(24,423)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 679.

OREGON & CALIFORNIA RAILROAD COMPANY ET AL.

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 879 9046

United States

Circuit Court of Appeals

For the Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, a Corporation, et al.,
Defendants and Appellants,

JOHN L. SNYDER, et al.,
Cross-complainants and Appellants,

WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the District of Oregon.

CERTIFIED TRANSCRIPT OF THE RECORD
ON CERTIFICATE FROM THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
TO THE
SUPREME COURT OF THE UNITED STATES.

VOLUME XIX.

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

At a Stated Term, to wit: the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Friday, the Twenty-ninth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:
Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 2400.

OREGON AND CALIFORNIA RAILROAD COMPANY, a Corporation, et al., Defendants and Appellants; John L. Snyder et al., Cross-complainants and Appellants; William F. Slaughter et al., Interveners and Appellants,

VS.

UNITED STATES OF AMERICA, Appellee.

Order on Hearing.

Ordered, appeals in the above-entitled cause argued by Mr. Peter F. Dunne, counsel for the defendants and appellants Oregon and California Railroad Company, a Corporation, et al., by Mr. A. W. Lafferty, counsel for the cross-complainants and appellants John L. Snyder et al., and by Mr. Charles E. Shepard, counsel for the interveners and appellants Frank Terrace et al., and continued to ten o'clock A. M. for further argument.

At a Stated Term, to wit: the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Saturday, the Thirtieth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:
Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 2400.

OREGON AND CALIFORNIA RAILROAD COMPANY, a Corporation, et al., Defendants and Appellants; John L. Snyder et al., Cross-complainants and Appellants; William F. Slaughter et al., Interveners and Appellants,

VS.

UNITED STATES OF AMERICA, Appellee.

Order on Hearing.

Ordered, appeals in the above-entitled cause further argued by Messrs. John C. Spooner and John M. Gearin, counsel for the de-

fendant and appellant Union Trust Company of New York, by Mr. Lewis C. Garrigus, counsel for the interveners and appellants and by Mr. Constantine J. Smyth, Special Assistant to the Attorney-General and counsel for the complainant and appellee The United States of America, and continued to ten o'clock A. M. Monday, the first proximo, for further argument.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2400.

OREGON AND CALIFORNIA RAILROAD COMPANY et al., Defendants and Appellants; John L. Snyder et al., Cross-complainants and Appellants; William F. Slaughter et al., Intervenors and Appellants,

VS.

UNITED STATES OF AMERICA, Appellee.

Petition of Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage.

To the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now come the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, defendants and appellants in the above entitled cause, and respectfully represent:

I.

That the above entitled cause is pending in this Court upon appeal from a final decree entered therein by the District Court of the United States for the District of Oregon.

II.

That these petitioners desire to present to the said District Court a petition praying for an order authorizing and directing the sale of certain timber standing on the lands involved which timber is liable to be destroyed by fire during the pendency of this suit.

III.

These petitioners are advised that by reason of the pendency of the appeal to this Court from the decree of the District Court, it is proper to secure the leave of this Court for the filing of such petition. A copy of the petition which these petitioners propose to file is hereunto annexed.

Wherefore, these petitioners pray that an order be entered herein permitting these petitioners to file such petition in said District

Court, and authorizing said District Court to make such order thereon as may be proper.

OREGON AND CALIFORNIA RAILROAD COMPANY AND
SOUTHERN PACIFIC COMPANY AND
STEPHEN T. GAGE,
By WM. F. HERRIN,
P. F. DUNNE, AND
WM. D. FENTON,
Its Solicitors.

In the District Court of the United States for the District of Oregon.

In Equity.

No. 3340.

UNITED STATES OF AMERICA, Complainant,
vs.
OREGON AND CALIFORNIA RAILROAD COMPANY et al., Defendants; John L. Snyder et al., Cross-complainants; William F. Slaughter et al., Intervenors.

Petition of Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage.

To the Judges of the United States District Court for the District of Oregon:

Come now the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, defendants and appellants in the above entitled cause, and respectfully show:

I.

That heretofore the United States of America, Complainant above named, filed its bill of complaint in equity in the United States Circuit Court, now District Court of the United States, for the District of Oregon, against these petitioners and other defendants named therein, which said suit so filed was so filed on September 4, 1908, and known as No. 3340, wherein on July 1, 1913, a decree of forfeiture of the lands described in said bill of complaint was entered in said Court.

II.

That the said defendants, cross complainants and intervenors thereafter duly appealed from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and duly perfected said appeal in said Court by filing the transcript therein and causing the same to be docketed in said Court and the said cause is now pending in said Circuit Court of Appeals as No. 2400, to which

record reference is here made by this petition as if the same were fully written herein.

III.

That included in the lands so described in said bill of complaint and in said decree were and are the following, to-wit: All of Sections 15, 23, 25, 27 and 35 in Township 4 North, Range 3 West of the Willamette Meridian.

That prior to the commencement of said suit No. 3340 the said defendants D. MacLafferty, George C. MacLafferty, Fred Witte, Edgar MacLafferty, Albert E. Thompson, Francis S. Wisner, Joseph A. Maxwell, Albert Arms and Paul Birkenfeld commenced certain suits in equity in the District Court of the United States for the District of Oregon against the defendants Oregon and California Railroad Company and Stephen T. Gage, and in and by their several bills of complaint in said suits the defendants last above mentioned alleged that in pursuance of the provisions of said Act of Congress of May 4, 1870, they had settled upon certain of the lands so granted by said Act of Congress, and as such settlers had tendered to the defendant Oregon and California Railroad Company the sum of $2.50 per acre for the lands so settled upon by them and had applied to purchase said lands from said defendant Railroad Company, and by their several bills of complaint sought to compel the said parties defendants to their several bills of complaint to sell and convey the tracts of land so severally claimed by them. And that said several persons last above mentioned are defendants herein. That the said individual defendants last above named by their said bills of complaint claimed to have settled upon and claimed the right to purchase lands as follows:

D. MacLafferty claimed the northeast quarter of Section 25, Township 4 North of Range 3 West of the Willamette Meridian;

George C. MacLafferty claimed the northwest quarter of Section 25, Township 4 North of Range 3 West of the Willamette Meridian;

Fred Witte claimed the southwest quarter of Section 25, Township 4 North of Range 3 West of the Willamette Meridian;

Edgar MacLafferty claimed the southeast quarter of Section 25, Township 4 North of Range 3 West of the Willamette Meridian;

Albert E. Thompson claimed the southeast quarter of Section 27, Township 4 North of Range 3 West of the Willamette Meridian;

Francis S. Wiser claimed the northwest quarter of Section 27, Township 4 North of Range 3 West of the Willamette Meridian;

Joseph A. Maxwell claimed the northeast quarter of Section 27, Township 4 North of Range 3 West of the Willamette Meridian;

Albert Arms claimed the northeast quarter of Section 35, Township 4 North of Range 3 West of the Willamette Meridian;

Paul Birkenfeld claimed the southeast quarter of Section 15, Township 4 North of Range 3 West of the Willamette Meridian.

That after the filing of said bill of complaint in said District Court and while said cause was so pending therein, the following named persons, defendants and known in this record as intervenors and appellants, applied to said District Court for leave and were

permitted to file bills in intervention in said cause, to-wit: J. N. Herbert, Walter S. Heminger, Sarah J. Reanier and Henry E. Reanier, and by their said bills in intervention, the said last named parties set forth that they, and each of them, had settled upon certain of said lands and had tendered to the Oregon and California Railroad Company the sum of $2.50 per acre for the land so alleged to have been settled upon by each of them, and they and each of them, alleged that they and each of them demanded of said Oregon and California Railroad Company that it sell and convey to each of them, respectively, the lands so claimed under the provisions of the Act of Congress of May 4, 1870.

That the said J. N. Herbert claimed the southeast quarter (S. E. ¼) of Section twenty-five (25), Township four (4) North of Range three (3) West of the Willamette Meridian; and the said Walter S. Heminger claimed the northwest quarter (N. W. ¼) of Section twenty-five (25), Township four (4) North, Range three (3) West of the Willamette Meridian; that the said Sarah J. Reanier claimed the northeast quarter (N. E. ¼) of Section twenty-five (25), Township four (4) North of Range three (3) West of the Willamette Meridian; and the said Henry E. Reanier claimed the northwest quarter (N. W. ¼) of Section twenty-five (25), Township four (4) North of Range three (3) West of the Willamette Meridian.

Thereupon and thereafter all of the persons and corporations named as defendants in said bill of complaint duly entered their several appearances and filed their amended answers to said bill of complaint, and said other co-defendants in said bill of complaint filed their cross-bills in said cause, and the said other persons, as intervenors, filed their bills in intervention and submitted their claims to the judgment and decree of said District Court, and thereupon proofs were duly taken in said Court upon the issues raised by the pleadings therein and upon consideration of the record made in said cause, a decree as aforesaid was entered in said cause on July 1, 1913.

IV.

That by said decree of July 1, 1913, it was ordered, adjudged and decreed that the title to all of the land described in the bill of complaint in said cause, and granted by the Act of Congress of May 4, 1870, including all of Sections 15, 23, 25, 27 and 35 in Township 4 North, Range 3 West of the Willamette Meridian, together with all the lands granted by the Act of Congress of July 25, 1866, by reason of alleged violation of the promises of the said representative grantees by the Oregon and California Railroad Company, was forfeited to the United States and by said decree it was adjudged that the United States was the owner in the fee simple of the title to all of said lands, free and clear from any and all lawful claim or claims of the defendants, cross complainants and intervenors in said cause, or any of them, in or to and of said lands, and that each of them were by this decree perpetually enjoined and restrained from interfering with the alleged possession of the United States in or to any of said lands, and from claiming any right, title or interest therein, from which said decree all said parties, and each of them,

have, and each of them has, duly appealed to said Circuit Court of Appeals, and such cause is now pending on appeal therein.

V.

That the lands particularly described above, namely Sections fifteen (15), twenty-three (23), twenty-five (25), twenty-seven (27) and thirty-five (35), Township four (4) North of Range three (3) West of the Willamette Meridian, carry a large body of standing timber which is solely valuable for saw logs from which timber can be manufactured; that the lands last above described are situate in a district wherein extensive logging operations have been carried on for many years by reason whereof substantially all of the timber standing on adjacent and surrounding lands held in private ownership has been cut and removed. That, as a result of such logging operations, large quantities of debris and inflam-able material have been left on such adjacent and surrounding lands, and thereby great risk of fire has been created and the destruction by fire of the timber standing on the lands last above particularly described is imminent and unless such timber shall be speedily cut, and removed, the owners thereof will suffer great financial loss. That the expense of protecting such timber against loss by fire during the summer months is very great by reason of the extent to which it is so exposed to fire hazard.

That the only market for logs which can be cut from said timber is on the Columbia River, which is about twenty-five (25) miles from said timber and the only practicable means of transporting logs from said lands to the Columbia River is by means of a logging railroad.

That there is now constructed and in operation a logging railroad extending from the Columbia River to a point near the said lands, and certain private logging spur tracks from said logging railroad to lands adjacent to the timber above described; that the Nehalem Timber and Logging Company owns the said spur tracks and has cut and removed substantially all of the timber held in private ownership which is tributary to said spur tracks, and unless further traffic can be secured intends to take up and remove the rails and ties with which such spur tracks are constructed, and that if such tracks shall be removed the value of said timber will be greatly lessened because of the lack of transportation facilities.

That your petitioners have had negotiations with the officers of the Nehalem Timber and Logging Company, and are informed and believe that the timber above described can be sold to the said Nehalem Timber and Logging Company for its fair present value and the proceeds thereof preserved for the benefit of these petitioners and of all other parties to this cause claiming any interest therein.

That your petitioners are advised that no sale of said timber may properly be made by any of the parties to this cause except under the order and direction of this Court or by an officer of the Court appointed for that purpose, and that any contract of sale with the said Nehalem Timber and Logging Company is dependent upon such order and direction.

That after such sale shall be made the proceeds thereof should be

deposited in some depositary within the jurisdiction of the District Court of the District of Oregon, and said proceeds of such sale deposited with such depositary at the best practicable rate of interest until the final disposition of this cause and the return of a mandate to the said District Court; that it is practicable to cause to be deposited the proceeds arising from such sale in certain banks and trust companies in the District of Oregon, subject to the jurisdiction of this Court, which banks and trust companies are in good standing financially and are proper depositaries for trust funds and are able and willing to pay a fair rate of interest not exceeding four per cent per annum, and not less than three per cent per annum if deposited with them; that the Portland Trust and Savings Bank, a corporation duly organized and existing under the laws of the State of Oregon and having its office and place of business at Portland in said State is financially responsible and would be a suitable depositary to accept and receive the proceeds of such sale as such depositary; that the Security Savings and Trust Company of Portland, Oregon, is likewise a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business at Portland in said State, and is financially responsible and would be a suitable depositary to accept the proceeds of such sale and to act as such depositary; that there are other financial institutions in the City of Portland likewise responsible that may be willing to act as such depositary; that either of said companies, appointed as such depositary, is likewise qualified to act as a special commissioner to execute any contract of sale that may be authorized by this Court in connection with the order of this Court directing the sale of said timber.

VI.

That preliminarily to filing this petition, your petitioners have had negotiations with the Assistant Attorney General of the United States representing the United States in this cause, and with said Nehalem Timber and Logging Company under which a cruise of the timber upon said lands has been made by the respective representatives of your petitioners and of the said Nehalem Timber and Logging Company and of the United States, but that the said cruise has not been fully completed; that it will be convenient and necessary that this petition be heard at an early date at Portland, Oregon, by or before a Judge of this Court within the next ten days, or as soon as the same can be heard.

Wherefore, your petitioners pray that an order to show cause why the prayer of this petition should not be granted be made herein, and that the said order be served upon the Union Trust Company, one of the defendants herein, and upon the said cross complainants and upon the said intervenors herein, so claiming said lands and upon the United States, complainant herein; that this petition and all matters in connection therewith be heard at Portland, Oregon, on or before June —, 1914, at the hour of 10 o'clock A. M. of said day, or at such further time as may be convenient to the Court; and that upon the final hearing of said petition an order be made herein appointing the

Portland Trust and Savings Bank of Portland, Oregon, or the Security Savings and Trust Company of Portland, Oregon, or both of them or any other responsible trust company or bank to act as commissioner to carry out the order of this Court that shall be made upon said petition directing the sale of the said timber as may be agreed upon between the parties to said cause, or as may appear necessary to the Court; and that the said corporation so appointed to make such sale as special commissioner herein, shall likewise be appointed a depositary to accept and receive the proceeds of such sale, and shall execute a good and sufficient certificate or certificates of deposit bearing such rate of interest as may be fixed by the order of the Court, and that such certificate or certificates of deposit shall be delivered to A. M. Cannon, Clerk of the District Court of the District of Oregon, to be held by him subject to the order of this Court, until the return of a mandate on the final decision of said cause, and to be held by said Clerk subject to the jurisdiction of this Court and to be paid over to whomsoever this Court shall direct in accordance with the mandate and decision of the Court; and for such other and further relief as may be proper.

Wherefore your petitioners pray that an order be entered herein returnable as aforesaid on June —, 1914, at the hour of 10 o'clock A. M., of said day, to be served upon the parties aforesaid, or their solicitors herein to show cause why the prayer of the petition should not be granted.

OREGON AND CALIFORNIA RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY, AND
STEPHEN T. GAGE,
By WM. F. HERRIN,
P. F. DUNNE AND
WM. D. FENTON,
Their Solicitors.

Received copy of the foregoing petition and service thereof upon us is hereby admitted, this 1st day of June, 1914.

(Signed) C. J. SMYTH,
F. C. RABB,
Special Assistants to the Attorney General, Attorneys for Appellee.
JNO. M. GEARIN,
F.,
Of Att'ys for Def't and Appellant Union Trust Co.
A. W. LAFFERTY,
Attorneys for Cross-complainants & Appellants.
LEWIS C. GARRIGUS,
Attorney for Interveners and Appellants.
JNO. MILLS DAY,
CHARLES E. SHEPARD,
Attorneys for Certain Interveners and Appellants.

[Endorsed:] Petition of Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage for Order Permitting Petitioners to file a Certain Petition in the Court Below for an Order Authorizing and Directing the Sale of Certain Timber, etc. Filed Jun- 1, 1914. F. D. Monckton, Clerk.

At a Stated Term, to wit: the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the First Day of June, in the Year of Our Lord One Thousand Nine Hundred and Fourteen:

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 2400.

OREGON AND CALIFORNIA RAILROAD COMPANY, a Corporation, et al., Defendants and Appellants; John L. Snyder et al., Cross-Complainants and Appellants; William F. Slaughter et al., Intervenors and Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Order Permitting Petitioners Oregon and California Railroad Company et al. to File in Court Below Petition for Entry of Order Authorizing and Directing the Sale of Certain Timber Standing on the Lands Herein Involved, etc.

The petition of Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, praying leave of this Court to file in the District Court of the United States for the District of Oregon in this cause their petition to said District Court praying for the entry of an order authorizing and directing the sale of certain timber standing on the lands involved herein, duly came on to be heard, all of the parties hereto appearing by their respective counsel, and the Court being advised:

It is ordered that said petitioners be and they are hereby permitted to file said proposed petition in this cause in the District Court of the United States for the District of Oregon, and leave is hereby granted for the entry by said District Court of such order as may be required to protect and preserve the rights of the parties in and to the subject matter of this suit.

At a Stated Term, to wit: the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the First Day of June, in the Year of Our Lord One Thousand Nine Hundred and Fourteen:

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

OREGON AND CALIFORNIA RAILROAD COMPANY, a Corporation, et al., Defendants and Appellants; John L. Snyder et al., Cross Complainants and Appellants; William F. Slaughter et al., Interveners and Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Order of Submission, etc.

Ordered appeals in the above-entitled cause further argued by Mr. Constantine J. Smyth, Special Assistant to the Attorney General and counsel for the complainant and appellee the United States of America; by Mr. John Mills Day, counsel for the interveners and appellants Elmer L. Hancock et al., and R. E. Cameron et al., by Mr. A. W. Lafferty, counsel for the cross-complainants and appellants John L. Snyder et al., and by Mr. William D. Fenton, counsel for the defendants and appellants Oregon and California Railroad Company, a Corporation et al., and submitted to the Court for consideration and decision.

Whereupon, the Court, speaking by the Honorable William B. Gilbert, Circuit Judge, Presiding, announced that the Court would certify the cause to the Supreme Court of the United States, and directed counsel for the respective parties thereto to agree upon and file with the clerk a statement accordingly on or before July 6, 1914.

At a Stated Term, to wit: the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the Fourteenth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Fourteen:

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 2400.

OREGON AND CALIFORNIA RAILROAD COMPANY, a Corporation, et al., Defendants and Appellants; John L. Snyder et al., Cross-Complainants and Appellants; William F. Slaughter et al., Interveners and Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Order Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States, etc.

It is ordered that the Certificate this day rendered by this Court certifying certain questions or propositions of law arising in the above-entitled cause to the Supreme Court of the United States under Section 239 of the Judicial Code (36 Stat. 1157) be forthwith filed by the clerk of this Court, and that said questions or propositions of law be, and hereby are certified to said Supreme Court accordingly.

It is further ordered that the clerk of this Court be, and he hereby is directed to forthwith transmit a certified copy of said certificate, together with a certified Transcript of the entire Record, including all of the original exhibits in said cause to the Clerk of the Supreme Court of the United States for filing in said Supreme Court.

9059

No. 2400

United States

Circuit Court of Appeals

For the Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, a Corporation, et al.,

Defendants and Appellants,

JOHN L. SNYDER, et al.,

Cross-complainants and Appellants,

WILLIAM F. SLAUGHTER, et al.,

Interveners and Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the District of Oregon.

Names and Addresses of Solicitors Upon This Appeal.

For Appellants OREGON AND CALIFORNIA R. R. CO., et al.:

WM. F. HERRIN, San Francisco, Cal.
P. F. DUNNE, San Francisco, Cal.
WM. D. FENTON, Portland, Oregon.

For Appellant UNION TRUST COMPANY:

DOLPH, MALLORY, SIMON & GEARIN, Portland, Oregon.
MILLER, KING, LANE & TRAFFORD, and JOHN C. SPOONER, New York.

For Appellants JOHN L. SNYDER, et al.:

A. W. LAFFERTY, Portland, Oregon.

For Appellants WILLIAM F. SLAUGHTER, et al.:

L. C. GARRIGUS, Portland, Oregon.
A. W. LAFFERTY, Portland, Oregon.
MOULTON & SCHWARTZ, Portland, Oregon.
DAY & BREWER, Seattle, Washington.
A. C. WOODCOCK, Eugene, Oregon.

For Appellee:

JAMES C. McREYNOLDS, Attorney General.
CLARENCE L. REAMES, U. S. District Attorney for Oregon.
CONSTANTINE J. SMYTH, B. D. TOWNSEND, F. C. RABB, Special Assistants to the Attorney General.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States Under Section 239 of the Judicial Code (36 Stat. 1157).

Whereas, the complainant in the above entitled cause, appellee herein, on September 4, 1908, filed its Bill of Complaint against the defendants and appellants, and cross-complainants, appellants herein, which said Bill of Complaint, with the exhibits made a part thereof, is set out in Volume I, pp. 1–540, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, thereafter, cross-complainants, on January 15, 1909, filed in said cause their cross-complaints, a typical one of which is the cross-complaint of John L. Snyder and others, which is set out in Volume II, pp. 640,676, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, on March 2, 1909, B. W. Nunally and others were allowed to file their petition in intervention, which is set out in Volume II, pp. 541–638, both inclusive, Record, to which reference is here made and which is made a part hereof; and which petition in intervention is typical of the petitions in intervention of all other interveners herein; and

Whereas, on December 7, 1908, the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, filed their joint

and several demurrer to the Bill of Complaint herein, which demurrer is set out in Volume II, pp. 677–681, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, on February 13, 1909, the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, filed their joint and several demurrer to the cross-complaint of John L. Snyder and others, which said demurrer is set out in Volume II, pp. 688 to 691, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, on April 7, 1909, filed their joint and several demurrer to the petition in intervention of B. W. Nunally and others, which said demurrer is set out in Volume II, pp. 685–687, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, on March 1, 1909, the Union Trust Company filed its demurrer to the cross-complaint of John L. Snyder and others, which said demurrer is set out in Volume II, pp. 682–684, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, the said demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, to the cross-complaint of John L. Snyder and

others is typical of the demurrer filed to each of the cross-complaints of all cross-complainants, appellants herein; and

Whereas, the demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, filed to the petition in intervention of B. W. Nunally and others is typical of the demurrer filed to each of the petitions in intervention of all other interveners herein; and

Whereas, the demurrer of the Union Trust Company to the cross-bill of John L. Snyder and others is typical of the demurrer filed by the Union Trust Company to the cross-complaints of all other cross-complainants, appellants herein; and

Whereas, said several demurrers were argued and submitted to the Court by the respective solicitors and counsel of the various parties herein on March 13, 1909, and thereafter on April 24, 1911, said Court made an order overruling the joint and several demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, to the Bill of Complaint herein, and sustained the demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, to the cross-complaint of John L. Snyder and others, and sustained a like demurrer to the cross-complaint of all other cross-complainants, appellants herein, and sustained the demurrer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage,

individually and as trustee, to the petition in intervention of B. W. Nunally and others, and sustained a like demurrer of the said Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, to each of the petitions in intervention of all other interveners herein, and sustained the demurrer of the Union Trust Company to the cross-bill of John L. Snyder and others, and sustained a like demurrer to the cross-bill of each of the other cross-complainants; and

Whereas, the Court at the time it so made the said order as to each of the said several demurrers, filed an opinion, which is set out in Volume II, pp. 696–855, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, within the time allowed by the Court, the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, on September 5, 1911, duly filed in said Court their joint and several answer, which, as amended September 8, 1911, and April 28, 1913, by leave of said Court, is set out in Volume II, pp. 859–1155, both inclusive, Record, to which reference is here made and which is made a part hereof; and

Whereas, the Union Trust Company on January 2, 1912, and within the time allowed by the Court, duly filed its amended answer as amended April 28, 1913, which said amended answer is set out in Volume III, pp. 1165–1280, both inclusive, Record, to which refer-

ence is here made and which is made a part hereof; and

Whereas, on November 1, 1911, the complainant filed its replication to the amended answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, which said replication is set out in Volume III, p. 1281, Record, to which reference is here made and which is made a part hereof; and on November 3, 1911, filed its replication to the amended answer of the Union Trust Company, which said replication is set out in Volume III, p. 1282, Record, to which reference is here made and which is made a part hereof; and

Whereas, thereafter, on February 8, 1912, said Court made an order appointing Margaret E. Fleming special examiner to take and report the testimony in said cause, and thereafter said testimony was duly taken and returned into Court within the time allowed by the order thereof, which said testimony has been preserved in the Transcript of Record in said cause in a "Statement of the Evidence" duly prepared and filed in and approved by said Court, which "Statement of the Evidence," with all the exhibits therein referred to, is set out commencing with Volume IV, p. 1551, and ending with Volume XV, p. 7920, Record; and

Whereas, said Court, on July 1, 1913, entered a decree in said cause in favor of the complainant and against the defendants, appellants herein, and against the cross-complainants, appellants herein, and interveners, appellants herein, whereby it was ordered, ad-

judged and decreed, among other things, as follows:

I.

"That all of those certain lands and estates in lands hereinafter described have become, and now are, forfeited to, and the title to all of said lands and estates in lands has reverted to, and now is revested in the United States of America, and all of said lands and estates in lands now are the absolute property of the United States of America, free from any and all claim or claims of right, title, interest or lien, in, to or upon the same or any part thereof, by or in favor of the defendants, cross-complainants and interveners herein or either or any of them, or any party or parties claiming under them or either or any of them.

II.

That the title of the United States of America to all of said lands and estates in lands be, and the same hereby is, quieted and confirmed, and particularly as to any and all claim or claims of right, title, interest or lien in, to or upon the same or any part thereof, by or in favor of the defendants, cross-complainants and interveners herein, and each and every of them, and each and every party or parties claiming under them or either or any of them.

III.

That each and all of the defendants, cross-complainants and interveners herein, and their respective officers and agents, be, and they and each of them hereby are, forever enjoined and restrained from in any manner claiming or asserting any right, title, interest or lien in, to or upon the aforesaid lands and

estates in lands, or any part thereof; and from in any manner selling, conveying, leasing or disposing of, any of said lands or estates in lands, or any interest therein; and from negotiating, executing or recording any document or instrument, and from doing any other act or thing, which shall in any manner affect or encumber the title to said lands or estates in lands, or any part thereof; and from going upon said lands or any part thereof; and from cutting, removing or in any manner using or injuring any of the timber or other natural products thereof; and from in any manner committing trespass upon said lands or any part thereof; and from in any manner using or interfering with said lands and estates in lands or any part thereof, or the title or possession thereof; and from contracting with, inviting, inducing or in any manner whatsoever permitting others to do any of the things aforesaid."

Which decree is set out in Volume III, pp. 1296–1550, both inclusive, Record; and

Whereas, on said date said Court likewise made an order dismissing the cross-complaint of John L. Snyder and others, and all cross-complaints herein, and a like order dismissing the petition in intervention of B. W. Nunally and others, and the petitions in intervention of all other interveners, appellants herein; and

Whereas, the said defendants, appellants herein, and the cross-complainants, appellants herein, and the interveners, appellants herein, on August 29, 1913, duly filed in said Court their joint and several petition for appeal, which is set out in Volume XV,

pp. 7923–8020, both inclusive, Record, which said petition was on August 29, 1913, duly served upon the complainant herein and its solicitors of record in said cause; and said petition for allowance of appeal was on said day granted and said appeal allowed; and the joint and several bond of the said appellants filed in and approved by said Court; and

Whereas, in connection therewith, the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee, defendants-appellants herein, and John L. Snyder and others, cross-complainants, appellants herein, and B. W. Nunally and others, interveners, appellants herein, duly and severally served and filed their separate and respective assignments of errors on said August 29, 1913, which said several assignments of errors are set out in Volume XV, pp. 8021–8076, both inclusive, pp. 8077–8137, both inclusive, pp. 8138–8198, both inclusive, pp. 8199–8221, both inclusive, pp. 8222–8282, both inclusive, pp. 8283–8391, both inclusive, Record; and

Whereas, citation on said joint and several appeal was duly issued out of said Court on August 29, 1913, and duly served upon the complainant and its solicitors on said date, which said citation with admission of service thereof is set out in Volume XVI, pp. 8425–8427, both inclusive, Record; and

Whereas, on November 11, 1913, the said John L. Snyder and others, defendants-cross-complainants-appellants herein, Wm. F. Slaughter and others, interveners-appellants herein, filed their petition for

a separate appeal, which is set out in Volume XVI, pp. 8428–8469, both inclusive, Record; which said petition for appeal was, after due service thereof on the complainant and upon the defendants-appellants herein, and upon their respective solicitors, duly granted and allowed by the Court; and

Whereas, on November 11, 1913, said cross-complainants and interveners filed their joint and several assignments of errors in connection with their said separate appeal, which are set out in Volume XVI, pp. 8470–8624, both inclusive, Record, together with due admission of service thereof upon the complainant and the defendant-appellants herein; and

Whereas, on March 14, 1914, a stipulation in writing was entered into between complainant and defendants, defendant-cross-complainants, and interveners, whereby, among other things, it was stipulated that the cross-appeal of the defendants-cross-complainants and interveners should be tried, heard and determined at the same time and upon the same record as in and upon the appeal of the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, and that said cross-appeal should be so tried, heard and determined upon said record, including any duly constituted, printed record of the said defendants-cross-complainants and interveners which may properly constitute the appeal papers upon the appeal; and whereby it was stipulated that:

"Any part of said record so to be printed on the

main appeal or upon the cross-appeal may be considered by the court, whether the same is printed as a part of the record on the main appeal or as part of the record on the cross-appeal. All questions raised by any joint Assignment of Error filed in the main appeal by the cross-complainants and the interveners therein shall be considered with and have like effect as though made and filed separately by each of the cross-complainants and interveners joining therein. In the separate or cross-appeal of the cross-complainants and interveners from the several orders of dismissal and from the judgment and decree entered herein, any questions raised by any joint Assignment of Error now filed herein by said cross-complainants and interveners, or either of them, shall be considered with and have like effect as though made and filed separately by each of the parties joining therein."

Whereas, an order was made pursuant to said stipulation on said date in accordance therewith, approving the same, which said stipulation and order are set out in Volume XVI, pp. 8652–8664, both inclusive, Record; and

Whereas, the time to file the record on appeal in said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to docket said cause therein, was from time to time duly enlarged up to and including April 4, 1914, and pursuant to said orders the record on appeal, was within the time allowed by the order of the Court below and of the Judge thereof, duly filed in said United States Circuit Court of Appeals and said cause

docketed in said last named Court, which said record, printed as required by the rules of this Court, was duly certified by the Clerk of the District Court to this Court, and said cause thereafter and on May 29, 1914, came on for hearing upon said appeal, and was argued and submitted to the Court by the respective counsel of all the parties, and said argument was concluded and said cause submitted on June 1, 1914; whereupon the Court, after hearing said arguments, and having taken said cause under advisement, now on this —— day of ————, 1914, has determined that there are questions in this cause which, under the law, should be certified to the Supreme Court of the United States, pursuant to the provisions of Section 239 of the Judicial Code, (36 Stat. 1157, Chapter 231; U. S. Comp. Stat. Supp. 1911, page 228).

Whereupon the Court, being duly advised, makes the following Statement of Facts in connection therewith.

[Statement of Facts.]

The Act of July 25, 1866, (14 Stat. 239), is as follows:

"An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the 'California and Oregon Railroad Company,' organized under an act of the State of California, to protect certain parties in and

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to a railroad survey, 'to connect Portland, in Oregon, with Marysville, in California,' approved April sixth, eighteen hundred and sixty-three, and such company organized under the laws of Oregon as the legislature of said State shall hereafter designate, be, and they are hereby, authorized and empowered to lay out, locate, construct, finish and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, in the manner following, to-wit: The said California and Oregon Railroad Company to construct that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said company) on the Central Pacific Railroad in the Sacramento Valley, in the State of California, and running thence northerly, through the Sacramento and Shasta valleys, to the northern boundary of the State of California; and the said Oregon company to construct that part of the said railroad and telegraph line within the State of Oregon; beginning at the City of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon, where the same shall connect with the part aforesaid to be made by the first-named company; Provided, That the company completing its respective part of the said railroad and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right, and the said company is hereby authorized, to continue in con-

structing the same beyond the line aforesaid, with the consent of the State in which the unfinished part may lie, upon the terms mentioned in this act, until the said parts shall meet and connect, and the whole line of said railroad and telegraph shall be completed.

Sec. 2. And be it further enacted, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands

herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold; Provided, that *bona fide* and actual settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation; And provided also, That settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

Sec. 3. And be it further enacted, That the right of way through the public lands be, and the same is hereby granted to said companies for the construction of said railroad and telelgraph line; and the right, power, and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine-shops, switches, side-

tracks, turn-tables, water stations, or any other structures, required in the construction and operating of said road.

Sec. 4. And be it further enacted, That whenever the said companies, or either of them, shall have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, the President of the United States shall appoint three commissioners, whose compensation shall be paid by said company, to examine the same, and if it shall appear that twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act, the said commissioners shall so report under oath to the President of the United States, and thereupon patents shall issue to said companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of said railroad and telegraph line as aforesaid; and from time to time, whenever twenty or more consecutive miles of the said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued.

Sec. 5. And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the

mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroads and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

Sec. 6. And be it further enacted, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the 'Central Pacific Railroad' of California, and be connected therewith.

Sec. 7. And be it further enacted, That the said companies named in this act are hereby required to operate and use the portions or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and com-

munication, so far as the government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any state, of competent jurisdiction.

Sec. 8. And be it further enacted, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

Sec. 9. And be it further enacted, That the said 'California and Oregon Railroad Company' and the said 'Oregon Company' shall be governed by the

provisions of the general railroad and telegraph laws of their respective States, as to the construction and management of the said railroad and telegraph line hereinbefore authorized, in all matters not provided for in this act. Wherever the word 'company' or 'companies' is used in this act it shall be construed to embrace the words 'their associates, successors, and assigns,' the same as if the words had been inserted, or thereto annexed.

Sec. 10. And be it further enacted, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber so much of the timber thereon as shall be required to construct said road over such mineral land is hereby granted to said companies; Provided, That the term 'mineral land' shall not include lands containing coal and iron.

Sec. 11. And be it further enacted, That the said companies named in this act shall obtain the consent of the legislatures of their respective States, and be governed by the statutory regulations thereof in all matters pertaining to the right of way, wherever the said road and telegraph line shall not pass over or through the public lands of the United States.

Sec. 12. And be it further enacted, That Congress may at any time, having due regard for the rights of said California and Oregon railroad companies, add to, alter, amend, or repeal this act.

Approved July 25, 1866."

The Act of June 25, 1868, (15 Stat. 80) is as follows:

"An Act to amend an Act entitled, 'An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon.'"

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That section six of an act entitled, 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' approved July twenty-fifth, eighteen hundred and sixty-six, be so amended as to provide that instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph shall be completed within eighteen months from the passage of this act, and at least twenty miles in each two years thereafter, and the whole on or before the first day of July, Anno Domini eighteen hundred and eighty.

Approved June 25, 1868."

The Act of April 10, 1869, (16 Stat. 47) is as follows:

"An Act to amend an Act entitled, 'An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an act entitled,

'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act; Provided, That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land: And provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.

Approved April 10, 1869."

The Act of May 4, 1870, (16 Stat. 94) is as follows:

"An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding in

the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

Sec. 2. And be it further enacted, That the commissioner of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as

often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: And provided also, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

Sec. 3. And be it further enacted, That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed sections.

Sec. 4. And be it further enacted, That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood

yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

Sec. 5. And be it further enacted, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the (rate) of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the State courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

Sec. 6. And be it further enacted, That the said company shall file with the Secretary of the Interior

its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date.

Approved May 4, 1870."

On January 3, 1913, the complainant and the defendants appellants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as Trustee, and Union Trust Company, individually and as trustee, made and filed in said cause, as a part of the evidence therein, a "Stipulation as to the Facts," in substance as follows:

On July 25, 1866, Congress passed an Act entitled, "An Act granting lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon," which act was approved and became operative on July 25, 1866, and that said act was amended by an Act of Congress approved June 25, 1868, hereinbefore set out, and that a copy of the Articles of Incorporation of the Oregon Central Railroad Company of Portland, Oregon, is as follows:

Know all Men by These Presents, That we, the undersigned citizens of the State of Oregon, do hereby associate ourselves together as a private incorporation, under and by virtue of the General Incorporation law of said State.

1st.

The corporation hereby created shall be known as

the "Oregon Central Railroad Company," and its duration unlimited.

2nd.

The object and business of the corporation shall be to construct and operate a railroad from the City of Portland, through the Willamette Valley to the southern boundary of the State; under the laws of Oregon, and the law of Congress recently passed granting land and aid for such purpose.

3rd.

The corporation shall have its principal office in the City of Portland.

4th.

The capital stock of said corporation shall be five million dollars, divided into general, and preferred interest-bearing stock, in such proportions as the incorporators, or board of directors, may deem proper.

5th.

The amount of each share of the capital stock shall be one hundred dollars.

The termini of the railroad proposed to be constructed by said company, shall be for the northern end, at the City of Portland, and for the southern end at some point on or near the southern boundary of the State, as may be hereafter determined by actual survey.

In Witness Whereof we have here set our hands and seals this —— day of September, A. D. 1866.

J. S. SMITH	Seal.
I. R. MOORES	Seal.
J. H. MITCHELL	Seal.
E. D. SHATTUCK	Seal.
JESSE APPLEGATE	Seal.
F. A. CHENOWETH	Seal.
JOEL PALMER	Seal.
H. W. CORBETT	Seal.
M. M. MELVIN	Seal.
GEO. L. WOODS	Seal.
R. R. THOMPSON	Seal.
J. C. AINSWORTH	Seal.
S. G. REED	Seal.
JOHN McCRACKEN	Seal.
C. H. LEWIS	Seal.
B. F. BROWN	Seal.
T. H. COX	Seal.
J. GASTON	Seal.

(Five cents in Revenue Stamps, canceled.)

State of Oregon, Marion County,—ss.

Be it known that the persons whose names are attached to the foregoing Articles of Incorporation, appeared before me, the undersigned, a Notary Public for and within said county and state, respectively, and at the time and places herein named, to-wit, J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. A. Chenoweth, Joel Palmer, and H. W. Corbett at Salem, in said State, on or about the 29th day of September, 1866, and M. M. Melvin, at Salem, on or about October 23rd, 1866, and George

L. Woods, at Salem, on or about November 10, 1866, and R. R. Thompson, J. C. Ainsworth, S. G. Reed, Jno. McCracken, and C. H. Lewis, at Portland, Oregon, on the 16th day of November, 1866; and they the said several subscribing persons to the aforesaid Articles of Incorporation did then and there, at the several times set forth in this certificate, sign and seal said articles before me and in my presence, and acknowledged the said signing and sealing to be their voluntary act and deed for the purposes set forth in said articles.

In Witness Whereof, I have here set my signature as said Notary Public and attached my official seal this 16th day of November, A. D. 1866.

(Official Seal) J. GASTON,
Notary Public.

(Five cents in Revenue Stamps, canceled.)

State of Oregon, County of Marion,—ss.

On this 20th day of November, A. D. 1866, before me, a Notary Public in and for said county, personally came the within named B. F. Brown, Thos H. Cox, and J. Gaston, who are personally known to me to be the identical persons whose names are subscribed to the within instrument, and acknowledged to me that they signed the same for the purposes therein set forth.

Witness my hand and seal of office this 20th day of November, A. D. 1866.

(Seal) SETH R. HAMMER,
Notary Public.

(Endorsed)

Filed in the office of the Secretary of State this 21st

day of November, A. D. 1866, at 10½ o'clock A. M.

SAMUEL E. MAY,
Secretary of State.

The original of said last mentioned document was presented to the Secretary of State on October 6, 1866, by Joseph Gaston, who requested the Secretary to file the same and permit him (Gaston) to immediately withdraw it for exhibition to the legislature or Oregon, then in session. Whereupon the Secretary of State wrote with a lead pencil, the date "October 6, 1866," on the back of said document, or on an envelope containing same, and Gaston immediately departed with said document and envelope in his (Gaston's) possession, and it was not returned to the Secretary of State's office until November 21, 1866. At the time said document was presented to said Secretary, no certificate or certificates of acknowledgment were appended thereto, and the only signatures thereon were those of J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. A. Chenoweth, Joel Palmer and H. W. Corbett. At the time said document was returned to the Secretary of State's office on November 21, 1866, it was in the form set forth above.

The said Oregon Central Railroad Company (of Portland) projected its railroad line from the City of Portland in a westerly direction to the village of Forest Grove, and thence southerly to and beyond the village of McMinnville, on the westerly side of the Willamette River, from which circumstances the said company became known as, and is hereinafter designated and referred to as the "West Side Company,"

and its railroad line became known as the "West Side Line."

On October 10, 1866, the legislature of the State of Oregon adopted, and the Governor of said state approved, Joint Resolution as follows:

"Whereas, The Congress of the United States, at its last session, passed an act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California, to Portland, Oregon, and made it the duty of the Legislative Assembly of the State of Oregon to designate the company, organized under the laws of Oregon, which shall receive that part of said land grant lying within the State of Oregon; therefore, be it

"Resolved by the House, the Senate Concurring, That the 'Oregon Central Railroad Company,' a company organized under the general incorporation laws of this State, be and the same is hereby designated as the company which shall be entitled to receive the land granted and all the benefits of an Act of Congress approved July 25, 1866, entitled, 'An Act granting land to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, Oregon,' so far as the said grant applies to the State of Oregon."

The West Side Company, assuming itself to have been lawfully designated thereby, on May 25, 1867, through its Board of Directors, adopted a resolution assenting to said Act of Congress approved July 25, 1866, and on July 6, 1867, filed a certified copy of said resolution in the office of the Secretary of the Interior, together with a certified copy of its Articles of Incorporation, and a certified copy of the said Joint

Resolution of the legislature of the State of Oregon, and on or about August 20, 1868, the West Side Company filed in the Department of the Interior a map of survey of its said projected line of railroad, a copy whereof, on a reduced scale, is referred to and made a part of the Stipulation, as Exhibit No. 2, and is set out in Volume IV, p. 1629, Record, to which reference is here made, and which is made a part hereof.

On April 22, 1867, the original Articles of Incorporation of the Oregon Central Railroad Company (of Salem) were filed in the office of the Secretary of State of the State of Oregon, a correct copy of which said Articles is as follows:

Know all Men by These Presents, That we, J. H. Moores, Geo. L. Woods, S. Ellsworth, by Geo. L. Woods, his Attorney, I. R. Moores, E. N. Cooke and J. S. Smith, by I. R. Moores, their Attorney, and Samuel A. Clarke, have this day incorporated ourselves under and in accordance with the laws of Oregon, and we adopt the following as our Articles of Incorporation.

ARTICLE FIRST.

This corporation shall be known as and do business under the name of the OREGON CENTRAL RAILROAD COMPANY.

ARTICLE SECOND.

The enterprise, occupation and business for which the company incorporates is to construct a railroad with all the necessary branches, fixtures, buildings and appurtenances from Portland, in Oregon, southerly about three hundred miles to the California line, to maintain the said road; in good condition and repair, and to employ the same in the transportation

of freight and passengers and freight.

ARTICLE THIRD.

The principal office for the transaction of the business of the Company shall be kept at the City of Salem, Marion County, Oregon.

ARTICLE FOURTH.

The capital stock of the OREGON CENTRAL RAILROAD COMPANY shall be fixed at Seven Million Two Hundred and Fifty Thousand Dollars ($7,250,000.00).

ARTICLE FIFTH.

The number of shares of the capital stock shall be Seventy-two Thousand Five Hundred (72,500) and the amount of each share of the stock shall be One Hundred Dollars ($100.00).

ARTICLE SIXTH.

The period of time during which the company shall remain in operation is not limited as to duration.

In testimony of our adoption of the foregoing Articles of Incorporation, witness our hands and seals this the twenty-second day of April, A. D. 1867.

JOHN H. MOORES. (Seal)
GEO. L. WOODS. (Seal)
S. ELLSWORTH.
By GEO. WOODS, Atty. (Seal)
I. R. MOORES. (Seal)
I. S. SMITH.
Per I. R. MOORES, Atty. (Seal)
E. N. COOKE.
Per I. R. MOORES, Atty. (Seal)
SAM'L A. CLARKE. (Seal)

(Fifteen cents in revenue stamps cancelled.)

State of Oregon, Marion County—ss.

BE IT REMEMBERED that on this the twenty-second day of April, A. D. 1867, personally came before me, a Notary Public in and for said County and State, the within named I. R. Moores, Geo. L. Woods, I. R. Moores, for himself and also as Attorney in Fact for each of the following named persons: J. S. Smith and E. N. Cooke and S. Ellsworth, by Geo. L. Woods, his Atty. and S. A. Clarke, who severally acknowledged that they signed the within and foregoing instrument; in person or as Attorney, for the uses and purposes therein named.

In Witness Whereof I have hereunto set my hand and Notarial Seal this the day and year above written.

(Notarial Seal) C. S. WOODWORTH,
Notary Public.

(Five cents in revenue stamps cancelled.)

(Endorsed)

Articles of Incorporation of Oregon Central R. R. Co. Filed in the office of the Secretary of State this 22nd day of April, A. D. 1867.

I. R. MOORES,
Acting Secy. of State.

On or about April 22, 1867, the persons whose names were subscribed to the said Articles of Incorporation, contending that the West Side Company was never lawfully incorporated or organized, and designing to secure the grants, franchises and other benefits of the said Act of Congress approved July 25, 1866, caused proceedings to be taken that were

intended to organize under the general incorporation laws of the State of Oregon, the Oregon Central Railroad Company (of Salem), named in the said Articles of Incorporation filed as aforesaid on April 22, 1867. The last mentioned Oregon Central Railroad Company (of Salem) projected its railroad line on the easterly side of the Willamette River, from which circumstance it became known as and is designated and referred to as the "East Side Company," and its railroad line became known as the "East Side Line."

The East Side Company, in furtherance of its aforesaid design, procured the legislature of the State of Oregon to adopt, and the Governor of said state to approve, on October 20, 1868, a Joint Resolution, correct copy of which is as follows:

"Whereas, The Congress of the United States, by an Act approved July 25, 1866, entitled, 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' did grant certain lands in the State of Oregon, and confer certain benefits and privileges upon such company organized under the laws of Oregon as the Legislature of said State should thereafter designate; and

"Whereas, The Legislative Assembly of Oregon, at its fourth regular session, did adopt a joint resolution known as 'House Joint Resolution No. 13,' designating in terms the Oregon Central Railroad Company as the company entitled to receive the land granted by, and all the benefits and privileges of, the said Act of Congress; and

"Whereas, At the time of the adoption of the said joint resolution as aforesaid, no such company as the Oregon Central Railroad Company was organized or in existence, and the said joint resolution was adopted under a misapprehension of facts as to the organization and existence of such company; and

"Whereas, The designation of the company to receive the lands in the State of Oregon granted, and the benefits and privileges conferred by, the said Act of Congress, yet remains to be made;

"Be it Resolved by the Senate, the House Concurring, That the Oregon Central Railroad Company, a corporation organized at Salem on the twenty-second (22nd) day of April, in the year one thousand eight hundred and sixty-seven (1867) under and pursuant to the laws of the State of Oregon, be and the same is hereby designated as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said Act of Congress."

A controversy arose between the West Side and the East Side companies, as to which of the said companies was entitled to the grants, franchises and other benefits of the said Act of Congress approved July 25, 1866, which continued until about January, 1870.

On April 10, 1869, Congress passed the Act of that date (16 Stat. 47), hereinbefore set out. On June 8, 1869, the East Side Company, through its Board of Directors, adopted a resolution, correct copy of which is as follows:

"Whereas, The Congress of the United States, on the 25th day of July, 1866, passed an Act entitled 'An

Act to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' and

"Whereas, Such Act provided that such company thereafter organized under the laws of Oregon, and designated by the Legislature of such State, should be entitled to receive and manage the said grant in Oregon, said Act further requiring that the company so organized and designated should, within one year from the date of its passage (to-wit: July 25, 1866), file its assent in the Department of the Interior, and

"Whereas, No company was designated by such Legislature within the year within which such an assent was required to be filed, and

"Whereas, The Legislature of the State of Oregon did, at its regular session in October, A. D. 1868, pass the following joint resolution, designating this company, to-wit, 'The Oregon Central Railroad Company' of Salem, Oregon, a company duly incorporated and organized under the laws of the State of Oregon, as the company to take and manage such grant, and receive all the benefits of the same, in the State of Oregon;

(Quoting in full said joint resolution, and which is hereinbefore set forth).

"And whereas, The Congress of the United States, in April, A. D. 1869, passed an Act amendatory of the said Act of July 25, 1866, extending the time in which the company designated might file its said assent, which Act was approved by the President of the United States, April 10, 1869, and is entitled, 'An Act to amend an Act entitled 'An Act granting

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lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' approved July 25th, 1866;

"Therefore, Resolved, That this company, the Oregon Central Railroad Company, of Salem, Oregon, incorporated at Salem, Oregon, April 22, 1867, do hereby accept all the provisions, rights, privileges and franchises of said Act of July 25, A. D. 1866, entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' and of all Acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto, and the Secretary of this company is hereby instructed to prepare a true copy of this resolution, certified to under the seal of the corporation, signed by himself as Secretary, and by the President of this company, and such certified copy transmit to and file the same with and in the office of the Secretary of the Interior at Washington City, D. C."

On June 30, 1869, the said company filed a certified copy of the said resolution in the Department of the Interior of the United States. On October 29, 1869, the East Side Company filed in the office of the Secretary of the Interior of the United States, a map of the survey and location of the first sixty miles of its projected line of railroad, extending southerly from Portland. On or about December 24, 1869, the East Side Company completed the construction of the first twenty miles of its said line of railroad, com-

mencing at Portland and extending southerly therefrom, and on December 31, 1869, the said twenty mile section of constructed railroad was approved by commissioners appointed pursuant to the provisions of Section four of the said Act of Congress of July 25, 1866, who had theretofore examined the same.

The original Articles of Incorporation of the Oregon and California Railroad Company were filed in the office of the Secretary of State of the State of Oregon, on March 17, 1870, a correct copy whereof is as follows:

"Know all Men by These Presents, That we, the undersigned corporators, Ben Holladay, of New York, and Cicero H. Lewis, I. R. Moores, J. C. Hawthorne, and Medorem Crawford, of the State of Oregon, do, by these presents, associate ourselves together as a corporation and body politic, under and by virtue of the general incorporation law of the State of Oregon, approved October 14, A. D. 1862, and amendments thereto, and for such purpose we do, jointly and severally, hereby agree to and with each other to the following articles:

ARTICLE I.

The name assumed by this corporation, and by which it shall be known, is the "Oregon and California Railroad Company."

ARTICLE II.

The duration of this corporation shall be ninety-nine (99) years.

ARTICLE III.

The enterprise, business, pursuit and occupation in which this corporation proposes to engage, is to con-

struct a railroad and telegraph line, with all the necessary branches, side tracks, fixtures, buildings, depots, stations and appurtenances, from Portland, in the State of Oregon, and running thence southerly through the Willamette, Umpqua and Rogue River Valleys to the California line on the southern boundary line of Oregon to connect with the railroad and telegraph line now being constructed northerly through the State of California by the California and Oregon Railroad Company toward the southern boundary of Oregon; and to purchase, own, construct, hold, equip, operate and use all necessary ferries on the line of such road over the Willamette and other rivers, and over any river or rivers on either side of the line of such railroad which may be necessary or proper in crossing freight and passengers to and from the said railroad; to maintain the said railroad and telegraph line in good order, condition and repair, and to operate the said railroad and employ the same and the said telegraph line in the business of transporting passengers and freight and the United States mails, and for the purposes aforesaid to purchase, take and receive of and from the "Oregon Central Railroad Company," of Salem, Oregon, incorporated April 22, A. D. 1867, that portion of its railroad and telegraph line now completed, together with all the property, real, personal and mixed, and the right of way of such last named corporation, of whatsoever name and nature, and all its right and franchises of every name and nature, both legal and equitable, which the said last named corporation now has or owned, or to which

it is any way or manner entitled, or hereafter may be entitled to—whether the same is absolute or contingent, and particularly and especially all the right, title, interest, franchise, claim and demand which the said Oregon Central Railroad Company, of Salem, Oregon, aforesaid, now has or is entitled to, and to which it may hereafter be entitled under and by virtue of an Act of Congress entitled, 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July 25, 1866, and of all amendments thereto. The purpose of this incorporation being to make such portion of the railroad and telegraph line of said "Oregon Central Railroad Company" which is now completed, a part of the line of railroad and telegraph which this corporation proposes to construct, as aforesaid, from Portland, Oregon, to the California line, and to construct and establish the whole thereof from Portland, in Oregon, to said California line in all respects in accordance with the Act of Congress hereinbefore referred to, and the amendments thereto, and for the purpose of receiving all the benefits of such Act of Congress and amendments thereto, and intended to be conferred thereby on the Oregon Company, and for the purpose of complying with all the provisions of such Act.

ARTICLE IV.

The principal office for the transaction of the business of this corporation shall be kept at the city of Portland, Multnomah County, State of Oregon.

ARTICLE V.

The amount of the capital stock of this corporation is hereby fixed at Twenty Million ($20,000,000) Dollars.

ARTICLE VI.

The amount of each share of such capital stock is hereby placed at One Hundred ($100) Dollars.

In Testimony Whereof, And of our adoption of the foregoing Articles of Incorporation we, the undersigned corporators, have hereunto set our hands and seals this 16th day of March, A. D. 1870, in triplicate.

BEN HOLLADAY.
CICERO H. LEWIS.
I. R. MOORES.
J. C. HAWTHORNE.
MEDOREM CRAWFORD.

(Corporate Seal)

State of Oregon, County of Multnomah, ss.

Be it Remembered, that on this 16th day of March, A. D. 1870, personally appeared before me, the undersigned, a Notary Public in and for the county aforesaid, the above named corporators, Ben Holladay, Cicero H. Lewis, I. R. Moores, J. C. Hawthorne and Medorem Crawford, all to me personally known as being the persons named in, and who, as corporators, made and subscribed the foregoing Articles of Incorporation and severally acknowledged to me that they, and each of them, executed the foregoing Articles of Incorporation freely and voluntarily, and for the uses and purposes therein specified.

Witness my hand and official seal the day and year in this certificate first above written.

(Seal) GEO. W. MURRAY,
Notary Public.

Said Articles of Incorporation of the Oregon and California Railroad Company were executed and filed in triplicate, one in the office of the Secretary of State of the State of Oregon, one in the office of the County Clerk of the County of Multnomah, Oregon (being the county in which the principal office of the said company was located), and one in the office of the Secretary of the said company, at the City of Portland, in the County of Multnomah. On March 29, 1870, the East Side Company executed and delivered to the Oregon and California Railroad Company an instrument in writing, a correct copy of which is attached to the bill of complaint, as Exhibit B, and which is set out in Volume I, pp. 93–125 Record, and which instrument was recorded in the office of the County Recorder of the several counties in which was situated any part of the lands intended to be granted by the said Act of Congress of July 25, 1866, which instrument, among other things, on its face recites that the Oregon Central Railroad Company (East Side Company) was on October 20, 1868, duly designated by the legislature of the State of Oregon, by Joint Resolution thereof, as the corporation to take, manage and receive the benefits of the Act of Congress approved July 25, 1866, and that the East Side Company did, afterwards, and in pursuance of said Act and all Acts amendatory thereof, and supplemental thereto, duly file its assent in writ-

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ing, to said Act of Congress, and all the provisions thereof, in the office of and with the Secretary of the Interior of the United States, and that said East Side Company was recognized by the Department of the Interior as the corporation in Oregon entitled to take and manage the Congressional grant referred to, and that the East Side Company did afterwards proceed to locate the line of said railroad, and did locate the same for a long distance, and did prepare and file its maps in the office of the Secretary of the Interior, in strict accordance with the requirements of said Act of Congress of July 25, 1866, and amendments thereto, making such grants of land, and did, prior to December 25, 1869, fully and in all respects as required by said Acts of Congress and acts amendatory thereof and supplemental thereto, complete the construction of twenty miles of its railroad, commencing at East Portland, in Multnomah County, in the State of Oregon, and running thence in a southerly direction twenty miles and over, and did stock and equip the same in all respects as required by said Act of Congress, and that on December 31, 1869, commissioners appointed by the President of the United States under said Act of Congress of July 25, 1866, examined and reported upon the railroad and telegraph line, aforesaid, being built by said East Side Company, and did examine the said twenty miles of railroad and telegraph line, and did make their report thereon to the Government of the United States, as required by said Act of Congress approved July 25, 1866 making such land grant, and the Acts amendatory thereof and supplemental thereto, which re-

port was favorable, and the same was received and accepted by the Government of the United States, and the said twenty miles of railroad and telegraph line so completed and equipped were accepted by the said Secretary of the Interior of the United States, and the lands granted by the Acts, aforesaid, and to which the East Side Company was entitled by virtue of the Acts of Congress aforesaid, and the completion and acceptance of twenty miles of its road, were, by an order of the Secretary of the Interior, withdrawn from sale and private entry, and for the benefit of said East Side Company, its successors and assigns, as in and by said Acts of Congress is provided, and that the East Side Company had done large amounts of work toward the construction of its said road, and in addition to said twenty miles so completed, in locating and grading the track of the same, and had acquired divers personal property, rights of way, franchises, privileges, and interests, real, personal and mixed, both legal and equitable, absolute and contingent, and that the Oregon and California Railroad Company was incorporated and organized solely with a view to becoming the assignee of the property, rights and franchises and privileges of the East Side Company (for reasons appearing in the subsequent recitals of the conveyance) and for the purpose of carrying out to successful completion the railroad and telegraph line commenced and partly completed, as aforesaid; that the Oregon and California Railroad Company was incorporated and organized in strict accordance with, and with special reference to a full and complete compliance with the

said Act of Congress approved July 25, 1866, and acts amendatory thereof and supplemental thereto, which Articles were filed on March 17, 1870, in the office of the Secretary of State, and there remained of record, (which acts are made a part of the conveyance) and that on March 28, 1870, the East Side Company, by its Board of Directors, unanimously adopted a resolution reciting an offer of the Oregon and California Railroad Company to purchase from the East Side Company the railroad then partly completed and in progress of construction, including the rolling stock and other property connected therewith, and including all of the property of the East Side Company, or to which it might be in any wise entitled, and including also all franchises of that company which it then owned or to which it was or might be entitled by virtue of any act or resolution of Congress, or of the legislature of the State of Oregon, and proposing that in consideration of the conveyance, transfer and delivery of all its property to the Oregon and California Railroad Company, the latter company should agree to and with the directors and stockholders of the East Side Company to assume, and should assume and agree to pay, all the debts and liabilities of the East Side Company, as the same should mature and become due and payable, of whatsoever name and nature, and would indemnify and forever save and keep harmless the East Side Company from any and all such payments, and from all liability whatever, of every name and nature, for which the East Side Company might be liable at the date of the acceptance of the proposition. The deed

further recites that the East Side Company was on that date indebted in the sum of not less than $800,000, nor more than $1,000,000, in gold coin of the United States, and that the former sum was equivalent in value, under existing circumstances, to that of all the property and franchises owned or possessed by the East Side Company, or to which it might be in any wise entitled, and that there had theretofore existed divers controversies in the courts, and there was one suit still pending of a similar nature, wherein the right of the East Side Company to use its corporate name, had been and was then questioned by another company, and by reason whereof the securities of the East Side Company had been weakened and rendered comparatively valueless, and which had prevented the East Side Company and its contractors from negotiating the same, and from proceeding with the construction of its railroad, and which had resulted in the East Side Company being driven to a cancellation of its contracts for the construction thereof, and whereby it was resolved that it was the judgment of the Board of Directors of the East Side Company, that it was to the best interests of that company and of its stockholders to accept the proposition of the Oregon and California Railroad Company, as stated, and thereupon a resolution was adopted accepting such proposition, subject to a majority vote of the stock of the corporation, and the President and Secretary of the East Side Company were authorized and directed to enter into an agreement with the Oregon and California Railroad Company for a sale of all of the property and franchises

of the East Side Company, upon the terms embodied in the proposition, such agreement to be subject to the approval or disapproval of a majority of the stock of the East Side Company at a stockholders' meeting to be thereafter held. That pursuant to such resolution, an agreement in writing between the East Side Company and the Oregon and California Railroad Company was executed on March 28, 1870, and thereafter, on that date, a meeting of the stockholders of the East Side Company was duly called and held, and the action of the Board of Directors of the East Side Company ratified by a vote of over two-thirds of the capital stock of such corporation, and a resolution adopted by such stockholders, authorizing the dissolution of the East Side Company, and that its business be settled up, and that it was deemed advisable to sell, dispose of, assign, transfer and convey to the Oregon and California Railroad Company, all the property, real, personal and mixed, and all the franchises, rights, credits, privileges, and emoluments of whatsoever name and nature, owned by or in any wise belonging to the East Side Company, in accordance with the agreement of March 28, 1870, and that the East Side Company should thereupon, and was thereby dissolved, "to take effect upon the settlement of its business and the sale, transfer and conveyance of its property and franchises." It is recited in this conveyance that the East Side Company "has, in and for the consideration of the written covenants and agreements upon the part of the Oregon and California Railroad Company, to pay all the debts, demands and liabilities of this company, of every name and na-

ture, as the same mature or become due, and in and for the further consideration of the covenants of such corporation to forever save, indemnify and keep harmless this company from all claims and demands whatsoever, bargained and sold to such "Oregon and California Railroad Company" all the property, real and personal, rights and franchises, credits and interests, legal and equitable, determined, absolute and contingent, of every name and nature, now owned by or belonging to this corporation." The conveyance makes a further recital as follows: "Whereas, the present indebtedness of this company exceeds the sum of Eight Hundred Thousand ($800,000) Dollars in U. S. gold coin, the whole of which amount said "Oregon and California Railroad Company" have assumed and agreed to pay, and to forever save, indemnify and keep harmless this company against all liability and damages by reason thereof, in consideration of this transfer and sale to said corporation, of all the property and corporate franchises of this corporation; and whereas it is the judgment of this meeting that the assumption of such indebtedness is a full, complete and adequate consideration for all the property and corporate rights and franchises of this company hereby directed to be transferred and conveyed, and that the best interests of all the stockholders herein are subserved by the cancellation of the said indebtedness." The formal part of this conveyance, so far as material, is as follows:

"Therefore, in consideration of the premises and of the assumption on the part of the "Oregon and California Railroad Company," party of the second

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part herein, of all the debts and liabilities of the "Oregon Central Railroad Company," party of the first part herein, of whatsoever name or nature, and of the covenant and agreement upon the part of such "Oregon and California Railroad Company," to pay all debts, liabilities, claims, damages and demands whatsoever, of every name and nature, for which the "Oregon Central Railroad Company," party of the first part herein, is now or at any time hereafter may be made liable; and the further covenant to forever save, indemnify and hold harmless the said "Oregon Central Railroad Company," party of the first part herein, and its directors and stockholders, against all loss, damages, costs, expenses and disbursements by reason of any such claim, liabilities or demands, all which agreements and covenants are, by the acceptance of this deed of conveyance by said "Oregon and California Railroad Company," party of the second part herein, by such corporation recognized and agreed, and in and for the further consideration of the mutual covenants and agreements of the parties hereto, as aforesaid; and of the further consideration of the sum of One Dollar in hand paid by the said "Oregon and California Railroad Company," party of the second part herein, to the said "Oregon Central Railroad Company," party of the first part herein, * * * has granted, bargained, sold, aliened, assigned, transferred, set over, enfeoffed, conveyed, delivered and confirmed, and by these presents it does hereby grant, bargain, sell, alien, assign, transfer, set over, enfeoff, convey, deliver and confirm to the "Oregon and California Railroad

Company," party of the second part herein, and to its successors and assigns, all and singular, the railroad and telegraph line of the said "Oregon Central Railroad Company," party of the first part herein, now constructed from a point in the town of East Portland, in Multnomah County, State of Oregon, opposite the city of Portland, a distance of over twenty miles, running southerly to a point in Clackamas County, State of Oregon, together with all and singular the extensions of such railroad of the said party of the first part now in progress of construction north and south from the termini of the said twenty miles completed, as aforesaid, to-wit: The whole line of the said railroad and right and franchises of the said party of the first part to construct a railroad and telegraph line from Portland, in Oregon, southerly through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon on the California line; together with all its lands, tenements and hereditaments acquired and appropriated, whether acquired by purchase, gift, by voluntary conveyance, or the judgment or decree of any court, or which shall hereafter be acquired or appropriated for the purpose of right of way for a single or double track railroad, and all the appurtenances thereunto belonging; and also all its lands acquired, or which hereafter shall be acquired, for depots, engine houses machine shops superstructures, erections and fixtures, and also all and singular the whole of the property of every name and nature, real, personal and mixed, now owned by the party of the first part herein, or to which it has any right,

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either legal or equitable, absolute or contingent; and also all and singular the franchises, rights and privileges now owned, possessed or acquired, or to which the said party of the first part has any right, title, either legal or equitable, absolute or contingent; and also all the rails, bridges, ways, piers, depots, engine houses, car houses, station houses, warehouse, machine shops, work shops, mills, machinery, engines, tackle, tools, erections, superstructures, fixtures, privileges, franchises and rights of said party of the first part, and all the lands, tenements, hereditaments and real estate wheresoever and whatsoever now owned by said party of the first part, or to which it has any right, legal or equitable, absolute or contingent, and all and singular the locomotives, passenger cars, freight cars, and all other cars, carriages, tools, machinery and equipments for said railroad, and now owned by said "Oregon Central Railroad Company," party of the first part herein; and also all goods and chattels, horses, mules, carts, drays, oxen, all live stock, and all implements of every name and nature, heretofore or now used in and about the construction of such railroad and telegraph line, and all rolling stock of every kind and description now owned by said party of the first part, together with all rents, issues, income, profits, money, rights, benefits and advantages derived or to be derived, had or received, therefrom by said party of the first part; also all donations and agreements to give, pay or transfer to the party of the first part, any moneys, lands, tenements or other property with full power and authority to enforce the collection and transfer

of the same. And also and especially all the lands, rights, title, franchise, interest, claim, property and demand whatsoever both legal and equitable, present and prospective, absolute and contingent, which the "Oregon Central Railroad Company," party of the first part herein, now has, owns or possesses, or to which it is now of right entitled legally or equitably, or to which it may at any time hereafter become entitled, in and to the franchise and grant of lands made by the Congress of the United States to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon, by an Act entitled, 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July 25, A. D. One Thousand Eight Hundred and Sixty-six (1866), and amendments thereto; and also all the lands included in such grant and all the right, title and interest which the party of the first part now has to the same, hereby giving, granting and assigning unto said party of the second part all the right, title interest and claim which the party of the first part now has in or to the lands, franchises, property, benefits and emoluments granted or intended to be granted by virtue of the Act of Congress aforesaid, and the acts amendatory thereof, or supplemental thereto; also all the right, title and franchise which the party of the first part has for any purpose whatever by virtue of any act or resolution of the Legislature of the State of Oregon, or the judgment or decree of any court, either state or federal.

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"TO HAVE AND TO HOLD the said premises, franchises and property, and every part thereof, unto the said "Oregon and California Railroad Company," party of the second part herein, its successors and assigns forever."

On April 4, 1870, the Oregon and California Railroad Company, through its Board of Directors, adopted the following resolution:

"Whereas, This company has purchased and taken an assignment from the Oregon Central Railroad Company, of Salem, Oregon, incorporated April 22, 1867, of all the railroad franchises and other property of such corporation, including all the right, title, interest and claim, both legal and equitable, absolute and contingent, of such corporation, of, in and to the lands and all other benefits granted to the Oregon Company by an Act of Congress entitled 'An Act to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July 25, 1866, and amendments thereto, therefore,

Resolved, That this company do accept the grant conferred by such Act of Congress, and all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified, and

Resolved, That the President and Secretary of this company be and they are hereby authorized and directed to file the assent of this company to such Act of Congress and amendments thereto, as aforesaid, in the office of the Secretary of the Interior, which shall be done by filing a copy of these resolutions in such office, certified to under seal of this com-

pany, and signed by the President and Secretary respectively.

Resolved Further, That a copy of the deed of assignment from said Oregon Central Railroad Company, certified to by the President and Secretary under the seal of this company, be also filed in such office of the Secretary of the Interior and accompanying these resolutions."

A certified copy of which said resolution was on April 28, 1870, together with a certified copy of said instrument in writing of date March 29, 1870 (a copy whereof is attached to the Bill of Complaint as "Exhibit B," which is set out in Volume I, at pages 93–125, both inclusive, Record), filed in the office of the Secretary of the Interior, and at all times since March 29, 1870, the Oregon and California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company in and to all the franchises, rights and property granted or intended to be granted by the said Acts of Congress.

By the words "Oregon Central Railroad Company" in said Act of May 4, 1870, set out above, Congress intended to and did refer to the West Side Company. On July 2, 1870, the West Side Company, through its Board of Directors, assented to and accepted all of the provisions of said Act of May 4, 1870, and on July 20, 1870, filed the said assent in the office of the Secretary of the Interior.

By the issuance and negotiation or pledge of mortgage bonds, approximately $8,000,000 was during the year 1870 procured by the Oregon and California Railroad Company, and approximately $1,000,000

was during the year 1871 procured by the West Side Company in the same way. With the funds thus procured the work of constructing the lines of railroad contemplated by said Acts of Congress of July 25, 1866, and May 4, 1870, respectively, was prosecuted continuously until about January, 1873.

The East Side Company completed the construction of the first twenty miles of its line of railroad commencing at Portland and extending southerly therefrom, and on or about March 29th, 1870, executed the instrument in writing, a copy of which is attached to the Bill of Complaint as "Exhibit B" (which Exhibit "B" is set out in Vol. I, pp. 93–125, both inclusive, Record). With the funds procured by it in 1870, as above mentioned, the Oregon and California Railroad Company during the years 1870, 1871 and 1872 completed the construction of the East Side Railroad from the point at which the East Side Company had quit the work to a point near Roseburg, a distance of approximately 197 miles. With the funds procured by it in 1871, as above set forth, the West Side Company completed construction of the railroad contemplated by the Act of Congress of May 4, 1870, from Portland to McMinnville by way of Forest Grove, a distance of approximately 47 miles.

About January, 1873, these funds became exhausted and because thereof further construction of said railroads was at that time discontinued and was not resumed by the Oregon and California Railroad Company until about June, 1881, and was never resumed by the West Side Company.

On or about July 24th, 1874, the direction and con-

trol of the financial affairs of the said two companies were assumed, and thereafter exercised, by the creditors thereof, organized under the name of "Bondholders' Committee," which on or about February 29th, 1876, acquired all the capital stock of both companies and thereafter, and until on or about June 1st, 1881, the affairs of the two companies were conducted by and under the control of the Bondholders Committee.

On October 6th, 1880, the West Side Company executed and delivered to the Oregon and California Railroad Company the instrument in writing, a correct copy whereof is attached to the Bill of Complaint as "Exhibit C" (which is set out in Vol. I, pp. 126–133, both inclusive, Record); a certified copy of this instrument was filed with the Secretary of the Interior of the United States on or about October 20th, 1880. This instrument recites that the West Side Company under and pursuant to and by virtue of the power and authority conferred upon and vested in it by the laws of the State of Oregon, and pursuant to and by authority of resolutions duly passed at a meeting of its stockholders, and a like resolution of its Board of Directors duly passed on October 6, 1880, among other things authorized the sale and conveyance of the property described, and that in consideration of the covenants and agreements of the Oregon and California Railroad Company and the further sum of Ten Dollars paid, the West Side Company "hath granted, bargained, sold, assigned, transferred, set over, enfeoffed, conveyed and confirmed, and doth hereby grant, bargain, sell,

assign, transfer, set over, enfeoff, convey and confirm" unto the Oregon and California Railroad Company, its successors and assigns forever, "all the railroad of the said party of the first part heretofore constructed, extending from Portland, Oregon, to St. Joseph, in Yamhill County, in the State of Oregon, a distance of forty-eight miles, together with all its lands, tenements, and hereditaments acquired and appropriated for the purpose of a right-of-way for its railroad and for stations, depots, turntables and other railroad purposes, and all the appurtenances thereunto belonging.

"And also all its lands not heretofore conveyed, by it acquired and which it shall hereafter acquire or to which it is entitled under and pursuant to the provisions of the Act of Congress of the United States of America entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May fourth, One Thousand Eight Hundred and Seventy" (and other property not material to be described).

"To Have and to Hold all and singular the premises, rights, franchises and property, real, personal, and mixed, hereby conveyed or intended to be conveyed, and every part and parcel thereof, with all the appurtenances unto the same belonging, or in any wise appertaining, unto the said party of the second part, its successors and assigns forever."

The deed contains a covenant of further assurance on the part of the West Side Company, and also contains the following covenants upon the part of the

Oregon and California Railroad Company:

"And this Indenture Further Witnesseth, That the said party of the second part, the said Oregon and California Railroad Company, in consideration of the grant and conveyance aforesaid, hereby covenants and agrees to and with said party of the first part, said Oregon Central Railroad Company, its successors and assigns, that it, said Oregon and California Railroad Company, and its successors and assigns, will and shall pay and discharge, or cause to be paid and discharged, all the lawful indebtedness of the said Oregon Central Railroad Company, and will forever indemnify and save and keep harmless said Oregon Central Railroad Company, its directors and stockholders against said indebtedness and from all costs, expenses and damages on account thereof."

At all times since October 6th, 1880, the Oregon and California Railroad Company has assumed and still assumes itself to be the successor of the West Side Company in and to all the franchises, rights and property granted or intended to be granted by the Act of Congress approved May 4, 1870.

On or about May 7th, 1881, the financial affairs of the Oregon and California Railroad Company were adjusted, substantially, as follows: All the capital stock of the company was, by action of its Board of Directors and stockholders, cancelled, and the amount of its capital stock was then established at, has ever since remained and still is of the total par value of $19,000,000, consisting of $12,000,000 preferred stock and $7,000,000 common stock, and in payment of its then existing indebtedness, with ac-

crued interest thereon, all of said new capital stock was then issued, and ever since has been and still is outstanding. By the issuance thereof and use of a part of the proceeds of the new bond issue hereinafter referred to, all of the then existing indebtedness of the Company was fully paid and discharged and the several mortgages and other instruments purporting to secure same were canceled and satisfied.

On June 2nd, 1881, the Oregon and California Railroad Company executed and delivered to Henry Villard, Robert Peebles and Charles Edward Bretherton, as Trustees for the owners and holders of the preferred stock, the Trust Deed a correct copy of which is attached to the Bill of Complaint as "Exhibit D" (which is set out in Vol. I, pp. 134–165, both inclusive, Record), and which purports to convey upon the trusts therein set out, all the railroad then owned by the Oregon and California Railroad Company between East Portland and Roseburg, between Portland and Corvallis, and Albany and Lebanon, together with all other property therein described and "also all lands granted by the United States in aid of the construction of the said railroads already completed between the termini aforesaid and not yet sold, estimated to be in amount about one million nine hundred thousand acres, and all other lands now or which may be hereafter granted to said company by the United States, and which lands are intended to be more particularly identified as the same are patented by the United States in manner hereinafter provided."

This Trust Deed recites the Act of Congress of July 25th, 1866, and particularly sections 2 and 3 thereof, and the Act of May 4th, 1870, and it also recites the execution by the Oregon and California Railroad Company of a mortgage of date April 15th, 1870, to Faxon D. Atherton and Milton S. Latham of all of its railroad and all its property except the Congressional land grant, and also recites another indenture of that date executed by the Oregon and California Railroad Company, by which that Company granted and conveyed to Milton S. Latham, Faxon D. Atherton and William Norris all the lands granted and to be granted by the United States to aid in the construction of the railroad, upon the trusts as therein provided for the sale of such granted lands, and for the creation with the proceeds of such sale of a sinking fund for the payment at maturity of said issue of Ten Millions Nine Hundred and Fifty Thousand Dollars in amount of the first mortgage bonds of the Company. It also recites that default had been made in the payment of interest upon these bonds and that there had been formed an association of holders thereof, having its office and legal domicile at Frankfort-on-the-Main, in Germany, and that such association had become the holder of all of such bonds. It further recited that a plan of reorganization of the Oregon and California Railroad Company had been adopted on May 5th, 1881 and ratified May 7th, 1881, and that in pursuance of the reorganization by deed of mortgage and trust of date June 1st, 1881, the Company had mortgaged all of its railroads, lands and other prop-

erty, present and future, to Henry Villard, Horace White and Charles Edward Bretherton to secure an immediate issue of 6,000 first mortgage bonds, for the aggregate amount of Six Million Dollars.

The instrument also recites the issuance of the preferred stock of Twelve Million Dollars, and that this stock was entitled to a preferential dividend out of the net earnings of the Company, and, after the first mortgage bonds had been paid off, out of the gross proceeds of the land grants.

On or about June 28th, 1881, this Trust Deed was recorded in the office of the County Recorder of Multnomah County, Oregon, page 179, Book 27 of Record of Mortgages of that County, and thereafter, about the same time, in the office of the County Recorder of the several counties in which was situated any part of the lands granted by either of said land grants.

Thereafter such proceedings were had and action taken thereunder, with the consent of the Oregon and California Railroad Company, that Stephen T. Gage became and now is the sole surviving Trustee thereunder, and that Stephen T. Gage as such Trustee, but not individually, and the Southern Pacific Company, as the present owner of all of said preferred stock, claim and assert a lien upon the said lands under and by virtue of this Trust Deed.

By the issuance and negotiation of two separate issues of its corporate bonds, bearing date June 1st, 1881, and May 26th, 1883, respectively, (known and designated as "First Mortgage Bonds" and "Second Mortgage Bonds" respectively), the Oregon and

California Railroad Company provided approximately $5,000,000 further construction funds; and on or about June 1st, 1881, the work of constructing the East Side railroad was resumed and thereafter continued until about January, 1884. During the last mentioned period of construction the East Side railroad was constructed and extended from Roseburg to a point about one and one-quarter miles southerly from Ashland, in the State of Oregon, a total distance of approximately 145 miles.

About January, 1884, the last-mentioned construction funds became exhausted and the work of further construction was discontinued until about April, 1887, when it was resumed.

About January 19th, 1885, the said First Mortgage Bonds and Second Mortgage Bonds being still outstanding, in a suit theretofore brought and then pending in the United States Circuit Court for the District of Oregon, wherein certain of the holders of said First Mortgage Bonds were plaintiffs, and the Oregon and California Railroad Company and others were defendants, the railroads and all other property of the Company were placed in the hands of a receiver then and in that suit appointed for that purpose.

On May 12, 1887, the status of said land grants was as follows: Under the East Side grant, during the years 1871 to 1877 inclusive, patents for 323,078.68 acres of land, (being lands contiguous to the first 125 miles of the said East Side railroad), were applied for by and issued to the Oregon and California Railroad Company. Excepting as aforesaid, no patents

under the East Side grant were issued until the year 1893, and no patents under the West Side grant were issued prior to the year 1895. The total length of the East Side railroad is approximately 367 miles. With the exception of the northerly 197 miles thereof, no part of the East Side railroad was constructed within the time prescribed therefor; and on May 12, 1887, the portion of the East Side railroad extending from Ashland to the southerly boundary line of the State of Oregon remained unconstructed. That part of the West Side railroad extending from Forest Grove to Astoria was never constructed, and because thereof the granted lands of the West Side grant contiguous to such unconstructed railroad were, by act of Congress, approved January 31, 1885, (23 Stat. 296), entitled "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," declared forfeited to and the ownership thereof resumed by the United States. Of the aforesaid granted lands, 163,430.28 acres were sold by the Oregon and California Railroad Company prior to May 12, 1887. Nearly all of the said sold lands were so sold to actual settlers, in small quantities, although in a few instances such sales were made in quantities exceeding 160 acres to one person, and for prices slightly in excess of $2.50 per acre.

The Southern Pacific Company was incorporated by an Act of the General Assembly of the State of Kentucky, entitled "An Act to incorporate the Southern Pacific Company," approved March 17, 1884; which Act was amended by an act of the Gen-

eral Assembly of the State of Kentucky, approved March 21, 1888, entitled "An Act to amend 'An Act to incorporate the Southern Pacific Company,' approved March 17th, 1884." A correct copy of said Act of March 17, 1884, and amendatory act of March 21, 1888, is "Exhibit No. 4 to Stipulation" (Vol. IV, pp. 1633–1639, Record).

Articles of Association, Amalgamation and Consolidation of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, were filed in the office of the Secretary of State of the State of California on June 23, 1870, amalgamating and consolidating the said companies into the Central Pacific Railroad Company, incorporated as such by the said articles—a correct copy of which is marked "Exhibit No. 5 to Stipulation" (Vol. IV., pp. 1640–1651, Record). Articles of Amalgamation and Consolidation between the Central Pacific Railroad Company, the California and Oregon Railroad Company, and the other Railroad Companies therein named, were filed in the office of the Secretary of State of the State of California August 22, 1870, a copy of which is "Exhibit No. 6 to Stipulation" (Vol. IV., pp. 1652–1662, Record).

On August 22, 1870, the Central Pacific Railroad Company was the owner of all unsold lands west of a point near Ogden, in Utah, coterminous with the Central Pacific Railroad from Ogden by way of Elko and Reno, in Nevada, Colfax, Auburn, Sacramento, Stockton, Miles and San Jose to San Francisco, in California, granted by Act of Congress approved July 1, 1862, entitled "An Act to aid in the construc-

tion of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes" (12 Stat. 489), as enlarged by the amendatory Act of Congress approved July 2, 1864, entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July first, eighteen hundred and sixty-two" (13 Stat. 356). At the time the said Articles of Amalgamation and Consolidation were filed on August 22, 1870, the said California and Oregon Railroad Company was the owner of all unsold lands in California granted by the Act of Congress approved July 25, 1866 (14 Stat. 239), entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon." From August 22, 1870, the date of filing the last mentioned Articles of Amalgamation and Consolidation, until July 29, 1899, the Central Pacific Railroad Company remained the owner of all lands of the three several land grants just mentioned which were unsold at the date of filing these articles, and were not thereafter, from time to time (prior to July 29, 1899) sold by the said Central Pacific Railroad Company. On July 29, 1899, the Central Pacific Railroad Company granted and conveyed unto the Central Pacific Railway Company all lands of the said land grants remaining unsold on July 29, 1899—a copy of which

conveyance is "Exhibit No. 7 to Stipulation" (Vol. IV., pp. 1663–1678, Record). The statements concerning the ownership and conveyance of the lands granted by said Acts of Congress are made subject to the terms and provisions of said Acts of Congress respectively, and all rights of the United States thereunder—the title to said lands not being an issue in this suit. A correct copy of the Articles of Association and Articles of Incorporation of the Central Pacific Railway Company referred to, is "Exhibit No. 8 to Stipulation" (Vol. IV., pp. 1678–1688, Record).

On February 17, 1885, the Central Pacific Railroad Company leased its railroad from Ogden to San Francisco and branch thereof from Roseville Junction to Delta, together with certain other railroads and property connected therewith as described in the instrument in writing of that date to the Southern Pacific Company; and pursuant thereto the Southern Pacific Company has held possession of the railroads and other property therein described, and operated the said railroads, as such lessee, continuously since the date of the said Agreement, and still continues to so operate the same—which Agreement is "Exhibit No. 2" to the amended Joint and Several Answer of the defendants Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, as follows:

"Exhibit No. 2.

This agreement, made and entered into this seventeenth (17) day of February, 1885, between the Southern Pacific Company, a corporation duly or-

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ganized and existing under the laws of the State of Kentucky, and now doing business in the State of California, and the Central Pacific Railroad Company, a corporation duly formed and existing under the laws of the State of California and the United States, witnesseth:

That, Whereas part of the through business heretofore done by the Central Pacific Railroad Company's line from Ogden to the waters of the Pacific has been diverted by the Northern Pacific, Atlantic and Pacific, and Atchison, Topeka and Santa Fe railroads:

And, whereas the Union Pacific Railroad Company has secured the control of the road known as the Oregon Short Line, and thereby secured an outlet to the Pacific, other than over the Central Pacific Railroad, and thus in that respect placed itself in opposition to the interests of the Central Pacific;

And, Whereas it now appears that the through business, hitherto done by the Central Pacific Railroad, will thereby be further diverted; and that it is not only to the best interests of, but absolutely necessary that the Central Pacific Railroad Company, in order to maintain itself against these diversions, should be operated in connection with a friendly through line to the waters of the Atlantic;

And, whereas the said Southern Pacific Company has a line of railroad under its control, for a period of ninety-nine years extending continuously from the Pacific Ocean to the Atlantic Ocean;

And, Whereas the lines of each company are doing a large local traffic, and it is important to both that

the same should be conducted in harmony;

And, Whereas the said Southern Pacific Company is willing to enter into an agreement with the Central Pacific Railroad Company where its line and the line of the said Southern Pacific Company shall be operated so as to secure their just rights to each without the one gaining any benefit or advantage at the expense of the other, and whereby the Central Pacific Railroad Company may for a long term of years be assured of protection against the diversion of its traffic and be relieved of the disadvantages flowing from lack of harmonious connections;

And, Whereas by reason of the facts before recited it is mutually advantageous to the Southern Pacific Company and the Central Pacific Railroad Company to make such agreement;

And, Whereas both companies contract in the knowledge that the future development of the country may change materially the relations of the companies to each other in respect to railroad traffic, and may in the future render any agreement now made, however fair in its terms in view of existing conditions, advantageous to one at the expense of the other, and thereby defeat the purposes which said companies desire and intend to accomplish by making this agreement;

And, Whereas it is intended that such shall never be the effect of this agreement, therefore all the premises and covenants herein shall be construed in the light of the conditions now existing, and the arbitrators hereinafter named, in adjusting the terms and provisions of this agreement to a changed state

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of affairs, if such change should ever take place, must keep in view the main purpose of the parties to this agreement, to-wit, that it is for the mutual advantage of both parties, and that neither is to be benefited at the expense of the other;

Now, Therefore, to accomplish the purposes aforesaid, in consideration of the premises and of the mutual promises herein, the said Central Pacific Railroad Company hereby leases to the said Southern Pacific Company for the term of ninety-nine years, from the first day of April, A. D. 1885, the whole of its railroad situated in the Territory of Utah and States of Nevada and California, and known and designated as the Central Pacific Railroad, together with all the branches thereof, together with all the rolling stock, telegraph lines, steamboats, wharves, piers, depots, workshops, and all other property, real and personal, now owned, held and possessed by the said Central Pacific Railroad Company and used upon, or in connection with, said railroad and telegraph lines, together with all the appurtenances thereunto belonging, with the right to possess, maintain, use, operate and enjoy the said property, and to receive the rents, issues and profits thereof.

And the said Central Pacific Railroad Company hereby assigns to the said Southern Pacific Company all the leases which it now holds of railroads and other property situated in said State of California, and lying and being north of the town of Goshen, in the County of Tulare, with the right to take, hold, operate, maintain and enjoy said railroads and other

property in the same manner as the said Central Pacific Railroad Company holds, operates, enjoys, and maintains the same under the said leases, and with the right to receive the rents, issues and profits thereof.

And the said Central Pacific Railroad Company hereby releases the Southern Pacific Railroad Company, a corporation formed and existing under the laws of the United States and of the State of California, and the Southern Pacific Railroad Company, a corporation formed and existing under the laws of the Territory of Arizona, and the Southern Pacific Railroad Company, a corporation formed and existing under the laws of the Territory of New Mexico, and each of them, from all and every obligation under or by virtue of any and every lease made by said three last-mentioned railroad companies, or either of them, to the said Central Pacific Railroad Company, and transfers and surrenders unto the said Southern Pacific Company, the possession of all the property in said leases, or any of them mentioned or described, with the right to receive the rents, issues and profits thereof free from all claim of the said Central Pacific Railroad Company to the same or any part thereof.

The said Southern Pacific Company agrees to and with the said Central Pacific Railroad Company that it will keep and maintain the property hereby leased in good order, condition, and repair; operate, maintain, add to, and better the same, at its own expense; pay all taxes legally assessed against or levied thereon, and will at the termination of this lease

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return the same to the said Central Pacific Railroad Company, or to its successors or assigns (with additions and betterments) in as good condition and repair as the same was at the date hereof.

And the said Southern Pacific Company hereby agrees to and with the said Central Pacific Railroad Company that it hereby assumes and will discharge all the liabilities and obligations of every kind (including its obligations on leases now held by it) of the said railroad company, except the obligation to pay the principal of said railroad company's indebtedness known as its "floating debt," and accept the obligation to pay the principal of the indebtedness of said railroad company known as its "bonded indebtedness," now outstanding and secured by mortgage or deed of trust, or which may be hereafter incurred under the provisions of any existing mortgage or deed of trust, or of any mortgage or deed of trust, hereafter made with the consent of the Southern Pacific Company; and except the principal of all indebtedness the payment of which has heretofore been guaranteed by the Central Pacific Railroad Company; and except the principal of the indebtedness of the said Central Pacific Railroad Company evidenced by bonds of the United States heretofore by the Government thereof loaned to the said Central Pacific Railroad Company. That as to such excepted indebtedness the said Southern Pacific Company will pay off and discharge at maturity the interest upon the same, except the interest upon the bonds of the United States loaned as aforesaid; and that, as to such bonds and the interest thereon, the said South-

ern Pacific Company will discharge the annual obligations imposed upon said Central Pacific Railroad Company by existing acts of Congress, and will during the continuance of this agreement, fully comply with the terms of, perform all the duties prescribed in, and discharge all the obligations imposed upon said Central Pacific Railroad Company by the act of Congress commonly known as the "Thurman Act."

And the said Southern Pacific Company hereby agrees to and with the said Central Pacific Railroad Company that it will well and truly perform all the duties and obligations of said railroad company to the United States and the Government thereof under existing acts of Congress relating to the maintenance and operation of its railroad, and to transportation for said Government over the same, as fully and faithfully as said railroad company is bound to do, except as otherwise hereinbefore provided.

And the said Southern Pacific Company agrees to and with the said Central Pacific Railroad Company that it will keep true and faithful accounts of all the earnings of the said Central Pacific Railroad, including the earnings of the railroads now held by said Central Pacific Railroad Company under leases and situated north of Goshen, together with true and faithful accounts of all expenditures, payments and disbursements of every kind made by the said Southern Pacific Company in operating, maintaining, adding to, and bettering the same, and of all expenditures, payments, and disbursements made by the said Southern Pacific Company for taxes, rentals,

interest, or in discharge of obligations incurred by said Southern Pacific Company under the provisions of this agreement hereinbefore contained; Provided, however, that any payments made by the said Southern Pacific Company to either of the said Southern Pacific railroads hereinbefore mentioned for rentals under the terms of existing leases in favor of the said Central Pacific Railroad Company, and now assigned to the Southern Pacific Company, shall never be included in or made part of any charge against the said Central Pacific Railroad Company or the earnings of its said railroads.

And the said Southern Pacific Company hereby agrees with the said Central Pacific Railroad Company that during the continuance of this lease it will annually, on the first Monday in May, pay to the said Central Pacific Railroad Company, as guaranteed rental for said Central Pacific Railroad and other leased property for the year ending on the thirty-first day of December next preceding that date, the sum of one million two hundred thousand dollars ($1,200,000).

And the said Southern Pacific Company hereby further in this behalf agrees with the said Central Pacific Railroad Company that if the earnings of the said Central Pacific Railroad, and of the railroads situated north of Goshen now held by the said Central Pacific Railroad Company, under leases, shall in any year during the continuance of this agreement exceed all expenditures, payments, and disbursements of every kind made by the said Southern Pacific Company for such year, in operating,

maintaining, adding to, and bettering the same, and of all expenditures, payments, and disbursements made by the said Southern Pacific Company for taxes, rentals, interest, and in discharge of any of the obligations by said Southern Pacific Company incurred under this agreement, as heretofore provided, including the said sum of one million two hundred thousand dollars, then such excess for any such year not exceeding the sum of two million four hundred thousand dollars shall, on the first Monday in May, as aforesaid, be paid to the said Central Pacific Railroad Company as additional rental for such year.

And it is further agreed between said Southern Pacific Company and the said Central Pacific Railroad Company that if at any time it appears that by the operation of this agreement either party is being benefited at the expense of the other, then this agreement shall be revised and changed, so that such will not be the operation thereof, and if the parties hereto cannot agree upon the changes necessary to that end, then each party shall appoint one arbitrator, disinterested, but skilled in relation to the subject matter, and the award and decision of such arbitrators, in writing, shall be binding upon the parties hereto, and this agreement shall be revised and changed in accordance with such award and decision, and, as revised and changed, shall be duly executed in writing by the parties hereto.

And it is further agreed that if the arbitrators so chosen cannot agree upon an award and decision, then that the two shall choose a third impartial and skilled arbitrator, and that the award or decision of

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two of said three arbitrators shall have the same force and effect between the parties hereto, and shall be executed in like manner as hereinbefore provided for the award and decision of the two arbitrators first chosen.

And it is further agreed between the said Southern Pacific Company and the said Central Pacific Railroad Company that if any legislation or governmental action hereafter be had which, in the opinion of the said Southern Pacific Company, is in hostility to the said Central Pacific Railroad Company, its rights, or the property hereby leased, the said Southern Pacific Company may, on notice to the said Central Pacific Railroad Company, terminate this agreement, or may submit to arbitrators, in the manner and with the effect hereinbefore provided for, changes and revisions.

And it is further agreed between the Southern Pacific Company and the Central Pacific Railroad Company that, upon the execution of this agreement, the said Southern Pacific Company may enter upon, take possession of, and hold during the continuance of this agreement all the property, real and personal, hereby leased by the said Central Pacific Railroad Company to the said Southern Pacific Company, and that duplicate lists of all the rolling stock and other personal and movable property so leased, showing its condition at the time of the execution of this agreement, shall be made and certified by the secretary of each of said companies, and that one of said lists shall be kept by each of said companies.

And it is further agreed between the Southern

Pacific Company and the Central Pacific Railroad Company that if at any time any of the rolling stock or other personal property hereby leased to the said Southern Pacific Company by said Central Pacific Railroad Company be used upon any roads other than the Central Pacific Railroad or the leased road north of Goshen, then the said Southern Pacific Company shall credit to the said Central Pacific Railroad Company the usual and customary sums paid by one railroad company to another for the use of the like property, and that the amounts so credited shall be deemed and taken to be a part of the earnings of said Central Pacific Railroad Company.

And it is further agreed that if, in the operation of said Central Pacific Railroad and leased roads north of Goshen, it becomes necessary to use any of the rolling stock or other personal property of the Southern Pacific Company, not leased from the Central Pacific Railroad Company, upon the said Central Pacific Railroad or leased roads north of Goshen, that the usual and customary sums paid by one railroad company to another for the use of like property, shall be allowed as, and constitute a charge against the receipts of the said Central Pacific Railroad and said leased lines, and be so considered in the accounting hereinbefore provided for.

In Testimony Whereof, the said Southern Pacific Company and the said Central Pacific Railroad Company have caused these presents to be signed by their respective presidents, countersigned by their secretaries, and their corporate seals to be hereunto affixed, pursuant to orders of their respective boards

of directors, the day and year first herein written. In duplicate.

(S. P. Co. Corporate Seal.)

W. E. BROWN,
President Southern Pacific Co.

H. C. NASH.
Secretary Southern Pacific Co.

LELAND STANFORD,
President Central Pacific Railroad Co.

(C. P. R. R. Co. Corporate Seal.)

E. H. MILLER, Jr.,
Secretary Central Pacific Railroad Co."

(Vol. II., pp. 957–967, Record.)

On July 1, 1887, the Oregon and California Railroad Company leased all its railroads in Oregon (including its East Side railroad and its West Side railroad) and other property used in connection therewith as described in the said agreement, to the Southern Pacific Company, pursuant to which the Southern Pacific Company held possession of and operated said railroads and property as such lessee, continuously from June 6, 1888, until August 1, 1893,—which instrument is "Exhibit "F" to the Bill of Complaint (Vol. I., pp. 185–188, Record). This instrument does not include any of the lands involved in suit, and does not affect any property other than the railroad with all its branches, together with rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever, in use upon or in connection with the said railroad.

On January 1, 1888, the Central Pacific Railroad Company leased its said railroad from Delta to the

north boundary line of the State of California, to the Southern Pacific Company; pursuant to which agreement the said Southern Pacific Company has operated said railroad as such lessee, continuously since the date thereof, and still continues to so operate the same, a copy of which instrument is "Exhibit No. 3" to said Joint and Several amended Answer. (Vol. II., pp. 968–970, Record.)

On August 1, 1893, the Oregon and California Railroad Company, by a new lease, leased all its railroads in Oregon (including the East Side railroad and West Side railroad) and other property used in connection therewith, described in said lease of July 1, 1887, to Southern Pacific Company; pursuant to which, said last named company has held possession of and operated the said railroads continuously from August 1, 1893, inclusive, to the present time, and still continues to so hold possession of and operate the same, which lease is "Exhibit G" to the Bill of Complaint (Vol. I,, pp. 189–196, Record).

On or about December, 1867, the principal stockholders of the Central Pacific Railroad Company of California became the principal stockholders of the California and Oregon Railroad Company; and on or about August 1, 1899, the Southern Pacific Company became, has ever since remained, and still is, the principal stockholder of the Central Pacific Railroad Company; and on or about August 1, 1899, the Southern Pacific Company became, has ever since remained, and still is, the principal stockholder of the Central Pacific Railway Company; and on or about April 9, 1901, the Southern Pacific Company

became, has ever since remained, and still, is the principal stockholder of the Oregon and California Railroad Company.

On July 31, 1885, the Oregon and California Railroad Company and the Central Pacific Railroad Company entered into an agreement in writing, a copy of which is "Exhibit No. 9 to Stipulation," as follows:

"This Agreement, made and entered into this thirty-first day of July, 1885, by and between the Oregon and California Railroad Company, of Oregon, hereinafter called the Selling Company of the one part, and the Central Pacific Railroad Company, of California, hereinafter called the Purchasing Company, of the other part,

Witnesseth, as follows:

First: The Selling Company hereby agrees to sell and transfer to the appointee of the Purchasing Company all its railway lines (the constructed portion of which lines extend from East Portland to a point about one and a half miles south of Ashland, and from Portland to Corvallis, and from Albany to Lebanon, and are about 451 miles in length) and the appurtenances and all its rolling stock, supplies and equipment, its lands remaining unsold at the date of this agreement, and its rights and interests in lands, and rights to acquire and earn lands, and all its rights, grants and franchises granted by the United States and also all its interests of every description in the Northern Pacific Terminal Company, at a price and upon the terms hereinafter specified.

Second: The transfer of the property sold shall be made as soon as possible, and in any case not later

than the first day of July, 1886, and in such manner as to give a good and clear title to the property sold to the appointee of the Purchasing Company, either by means of a sale under foreclosure of the deed of first mortgage of the Selling Company, or by such other means as the counsel of the Purchasing Company may approve.

Third: The property sold shall, when so transferred, be free from all debts, liabilities and encumbrances of every description, except such liabilities and duties as may be incident to the land grant and franchises granted by the United States to the Selling Company and agreed to be transferred to the appointee of the Purchasing Company and except any and all such liabilities for arrears of rent or otherwise, as may be incident to the interest of the Selling Company in the Northern Pacific Terminal Company. The value of the supplies transferred shall not be less than the value of those on hand at the date hereof and the Selling Company shall keep up the property to its present state of repairs until the transfer takes place. The whole amount of land sold at the date hereof does not exceed in aggregate 300,000 acres.

Fourth: For the purpose of adjusting the accounts and operating expenses, and dividing the earnings on the transfer of the property, an account shall be stated between the Purchasing and Selling companies as of the first day of July next; and all earnings of the railroads and other property sold, received after that date and the net proceeds and rentals of or from all lands sold or leased after the date hereof

shall go to the credit of the Purchasing Company or its appointee which shall undertake all expenses appertaining to the operation of the road as from the first day of July, 1886, and shall from such last mentioned date pay interest on the bonds to be issued in payment for the property purchased as hereinafter specified and shall pay or account for the dividends becoming due after said first day of July, 1886, on the shares in the Purchasing Company, to form part of the price as hereinafter mentioned. All net earnings of the existing railroads previous to the first day of July next, and the net price of all lands sold previous to the date hereof, shall belong to the Selling Company and no charge shall be made by the Purchasing Company or its appointee for receiving and paying over such amounts. The carriage of construction, labor and material over the existing lines shall be done at cost and without profit to the Selling Company, the certificate of the Chief Accounting Officer of the Central Pacific Railroad Company as to the amount of such cost being agreed to be final between the parties.

Fifth: The price of the property sold shall be $8,000,000 par value of the shares of the Purchasing Company, and carrying all dividends declared after July 1st, 1886, and $10,500,000 par value of bonds made or guaranteed by the Purchasing Company, to be secured on the property purchased as next hereinafter described, and carrying interest from July 1, 1886.

Sixth: The bonds to be issued or guaranteed by the Purchasing Company and delivered in payment as

last mentioned, shall be payable principal and interest in gold, forty years after date and bear interest from the first day of July next, at the rate of three per cent per annum for two years, and five per cent per annum thereafter, payable half yearly. Such bonds shall be either issued by or unconditionally guaranteed by, the Purchasing Company, as the Purchasing Company may decide, and shall be secured by a mortgage (to be made to the Farmers' Loan and Trust Company in case such Trust Company shall perform the duties of trustee at not exceeding fifty cents per bond, otherwise the Union Trust Company, or such company as shall be agreed upon by the parties) of all the property purchased hereunder, and of all extensions and of the future acquired property of the Purchasing Company in Oregon; and the deed of Mortgage shall be similar—except so far as otherwise stated in this agreement—to the existing deed of trust mortgage of the Selling Company. The net proceeds of the lands transferred and included in this mortgage shall form a sinking fund for the redemption of the bonds at par. The amount of the bonds to be issued under the mortgage shall be as follows: $30,000 per mile for every mile of standard gauge road, now or hereafter constructed or acquired and comprised in the mortgage and $10,000 for every mile of narrow gauge road now or at any time hereafter constructed or acquired and comprised in the mortgage. The mortgage deed shall provide for the issue and delivery to the Selling Company, upon the above mentioned transfer of the property to the ap-

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pointee of the Purchasing Company, of the $10,500,000 of bonds above specified and that the trustee of the mortgage shall further issue to the Purchasing Company or its appointee, for each mile of road constructed between Ashland and the California state line, $100,000 for such bonds, and for each ten miles of steel rails laid down on the present lines of the Selling Company and not now laid with steel rails, $50,000 of such bonds.

On the completion of the rail connection between the present lines of the Selling Company and the line of railway of the Purchasing Company any unissued bonds for which the mileage shall then be constructed, shall be transferred by the trustee to the Purchasing Company, or its appointee; Provided, however, that such aggregate issue to the Purchasing Company or its appointee shall not exceed, including the $10,500,000 to be issued to the Selling Company, the limit of $30,000 for each constructed mile. For any additional mileage constructed or acquired, either between Junction and Corvallis, or elsewhere in Oregon, the Purchasing Company, or its appointee, shall be entitled to receive from the Mortgage Trustee, the sum of $30,000 for each mile of standard gauge road and the sum of $10,000 for each mile of narrow gauge road. The Mortgage Trustee, however, not to be compelled to accept less than ten miles of road at one time, except in cases of terminal sections. Deliveries of bonds under such mortgage are to be made by the Trustee from time to time upon presentation to it of affidavits of the President and Chief Engineer of the Purchasing Company, or its appointee, to the facts authorizing delivery of such bonds under this article,

and without other evidence and proof thereof.

Seventh: Notwithstanding the provisions to be inserted in the mortgage deed restricting the future issue of bonds to a mileage rate as above specified, the mortgage deed, shall permit the Purchasing Company, or its appointee, to require the Trustee at one time, or from time to time, to issue and permit the sale of such amount or amounts of bonds as the Purchasing Company, or its appointee, may think fit; Provided, However, that the proceeds of such bonds shall be received by the Mortgage Trustee, and not by the Purchasing Company, or its appointee, and shall be disbursed by the Mortgage Trustee to the Purchasing Company, or its appointee only pro rata as and when the Purchasing Company, or its appointee, would have been entitled to receive such bonds thereunder under the foregoing articles hereof.

Eighth: The present holders of the First Mortgage Bonds of the Selling Company shall have the option, for 21 days after notice to that effect shall have been published in one daily paper in London and Frankfort respectively, of subscribing, in the ratio of one new bond for every three old bonds now held by them, respectively, to the new bonds to be issued in the manner above stated, at the price of eighty-six per cent of their par value, payable one-fifth on subscription and the residue in equal parts at the expiration of three, six, nine and twelve months from the date of such subscription.

Ninth: The Purchasing Company, or its appointee shall, within three years from the transfer of the property as above prescribed, complete the

railway between the present southern terminus of the railway lines of the Selling Company, at or near Ashland, in Oregon, and the present northern terminus of the Oregon division of the railway lines of the Purchasing Company, at or near Delta, so as to form a through line between Portland in Oregon, and San Francisco in California.

Tenth: The 80,000 shares of the capital stock of the Purchasing Company of the nominal value of $8,000,000 above mentioned, shall be delivered to the Selling Company upon the transfer of the property as above prescribed, and shall, in the first instance, be registered for the purpose of delivery in the joint names of George Henry Hopkinson, the President of the Selling Company, or of such other person as may be the President of the Selling Company, and C. E. Bretherton, Vice President of the Selling Company, or of such other person as may be the Vice President of such Company. But such shares shall carry dividends only from the 1st day of July, 1886, as above stipulated.

Eleventh: This agreement shall be void unless the stockholders of the Oregon and California Railroad Company shall, within two months from this date, ratify this agreement, and the two committees now formed respectively in London and Frankfort and representing the First Mortgage Bondholders of this Company, shall, within the same time, execute in due form a confirmation and acceptance of this agreement.

Twelfth: The Selling Company binds itself to execute to the Purchasing Company or its appointee,

on or before the first day of July, 1886, a proper deed transferring the property hereby agreed to be sold, free from all debts, liabilities and encumbrances, except as above specified, and to transfer the possession thereof and in case it shall fail to do so, the Purchasing Company may, at its option, declare this agreement to be void.

Thirteenth: No personal liability of any description shall attach to the officers of the two contracting companies, who execute this agreement on their respective behalf.

In Witness Whereof, the parties hereto have, by their respective Vice Presidents, thereunto duly authorized, executed these presents the thirty-first day of July, 1885.

THE OREGON AND CALIFORNIA RAILROAD COMPANY,
By C. E. BRETHERTON,
Vice President.

THE CENTRAL PACIFIC RAILROAD COMPANY,
By C. P. HUNTINGTON,
Vice President."

(Vol. IV., pp. 1689–1696, Record.)

On or about October 11, 1886, the Central Pacific Railroad Company, the Pacific Improvement Company (a corporation organized in 1878 under the laws of the State of California) and the Southern Pacific Company entered into an agreement in writing, a copy of which is "Exhibit No. 1" to the Joint and Several Answer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T.

Gage, individually and as trustee, and which is as follows:

"This Agreement, made and entered into on the eleventh day of October, 1886, between the Central Pacific Railroad Company, party of the first part, the Pacific Improvement Company, party of the second part, and the Southern Pacific Company, party of the third part, Witnesseth:

That Whereas: The Central Pacific Railroad Company is the successor in interest of the California and Oregon Railroad Company, mentioned in the act of Congress of July 25, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon"; and

Whereas, the said Central Pacific Railroad Company has constructed a portion of the line contemplated by said Act of Congress, to-wit, that portion between Roseville Junction on the Central Pacific Railroad, and the town of Delta; and

Whereas, about one hundred and four miles of the line between Roseville Junction and the southern boundary line of Oregon, as contemplated in said Act of Congress, has not been constructed; and

Whereas, the Oregon and California Railroad Company, charged by said Act of Congress with the construction of that portion of the said line of railroad between Portland, in Oregon, and the northern boundary line of California, has been in an embarrassed condition, and has been unable to complete its road to said boundary line; and

Whereas, until the whole of said line is completed

making a through connection between Portland, in Oregon, and the City of San Francisco, in California, no part of said line can be advantageously or profitably operated, nor the Act of Congress in relation thereto be carried into effect according to the spirit and intent thereof, to-wit, the construction and maintenance of a continuous railroad between the said cities, which the Government of the United States may use for the transportation of its property, troops and munitions of war when necessary, and to aid in the construction of which has granted quantities of the public lands; and

Whereas, the completion by the said Central Pacific Railroad Company of its own road to the southern boundary line of Oregon without assurance of the completion of that portion of the road from Portland to said boundary line would be a waste of money, the road having to be constructed through a rugged and mountainous country at great expense and without sustaining local traffic; and

Whereas, it is of the greatest importance to the Central Pacific Railroad Company that it should have an opening into Oregon both for local traffic and the through business of the two cities and also to furnish business for its entire line from Ogden. Now, therefore, for the purpose of completing its said road, and of securing the completion of the road between the California state line and Portland, Oregon, thus making a through line between said Cities of Portland and San Francisco, and a connection with the Union Pacific Railroad at Ogden, and in order to secure the business of the northern portion of the State of Cali-

fornia and as much as possible of the business of the State of Oregon and to bring such business to its line from Ogden, and for the purpose and with the intent of carrying into effect the provisions of said Act of Congress, the said Central Pacific Railroad Company, hereby covenants and agrees with the said Pacific Improvement Company;

First: That the said Pacific Improvement Company shall in a good workmanlike manner construct, finish, furnish and complete the railroad and telegraph line of the said Central Pacific Railroad Company, commencing at a point near the said town of Delta and running thence in a general northerly direction by the most practicable route to a point on the southern boundary line of Oregon, there to connect with the road of the said Oregon and California Company a distance of one hundred and four miles, as near as may be, together with the rolling stock, buildings, instruments and fixtures thereof; that is to say, to construct, finish and complete all the clearing, grading excavations, embankments, ditches, drains, masonry, culverts, bridges, trestling and necessary fencing, and furnish all the ties, timber, rails, all the chairs, fish-plates, spikes, frogs and switches, lay and complete all the main line of track and all side tracks, spur tracks and turnout necessary, usual and proper for a single track railroad; also all necessary and proper buildings and erections for stations, freight and passenger depots, water-tanks, turn-tables, engine houses, section houses, work and repair shops, with all the tools, furniture and implements necessary and proper therefor, also

to furnish and place on said railroad all necessary and proper rolling stock, instruments and equipments, including locomotives, passenger, box, freight, baggage, platform, dump and hand cars, for the proper and successful working and repairing of said railroad and telegraph line, said rolling stock to be furnished and delivered, as the same may be required by the said Central Pacific Railroad Company not to exceed the following quantity and proportion, namely: one locomotive for every eight miles of road constructed under the contract; one passenger car for every five miles of road, three box and flat cars for every mile of road; the proportion of each to be determined by the said Central Pacific Railroad Company; one hand car for every six miles of road; such number of dump cars as may be required for maintaining the line, said railroad to be constructed and complete to a point at or near Klamath River within twelve months from the date hereof, and to the southern boundary line of Oregon as soon as the said Oregon and California Railroad is completed to said line.

Second: That the said Pacific Improvement Company shall furnish and pay for all the engineer service necessary or requisite for the location and construction of said railroad and its appurtenances, such location and construction to be subject to the approval of the President or Chief Engineer of said Central Pacific Railroad Company, who may direct such changes to be made as they may deem proper; but the salary of the Chief Engineer shall be paid by the said Central Pacific Railroad Company.

Third: That the said Pacific Improvement Company will pay all the costs, damages and other expenses incurred in obtaining right of way for the construction of said road and to that end the Central Pacific Railroad Company agrees that it may use the name of the said Company in any legal steps found necessary to be taken in securing such right of way.

Fourth: That the said Pacific Improvement Company will within a reasonable time and as soon as it can be done to the best advantage, purchase, obtain possession and control of the said Oregon and California Railroad, or, that it will within a reasonable time purchase the whole of, or a majority of the shares of the capital stock of said Oregon and California Railroad Company, and in either event will within a reasonable time complete or cause to be completed, the said Oregon and California Railroad, to a connection with the Central Pacific Railroad at a point on the boundary line between California and Oregon, and as the case may be will enter into or will cause the said Oregon and California Railroad Company to enter into a contract perpetual with the said Central Pacific Railroad Company, its successors or assigns, that the said Oregon and California Railroad shall be operated in harmony with the said Central Pacific Railroad, prorating for services and covenanting therein never to give to any other railroad company any better terms for through traffic and for the interchange of business than it gives to the Central Pacific Railroad Company, its successors or assigns.

Fifth: That the said Pacific Improvement Company shall and will repay to the said Central Pacific Railroad Company within one hundred and twenty days from the date hereof all sums of money with interest thereon, at the rate of 6 per cent per annum, heretofore by the said railroad company expended upon that portion of its aforesaid line of railroad and telegraph line lying north of Delta, and that if said railroad company has not fully paid all the costs and expenses incurred as aforesaid, the said improvement company will assume the whole thereof and will upon demand pay off and discharge the same, or that if the said railroad company is compelled to pay the same or any part thereof the said Improvement Company will within one hundred and twenty days after notice thereof, repay to the said railroad company the full amount of any such payment or payments, with interest at the rate aforesaid; and

The said Southern Pacific Company, lessee of the said Central Pacific Railroad Company, hereby covenants and agrees with the other parties to this contract that in consideration of the advantages to be derived by it from the bringing of business to the main lines of the Central Pacific Railroad, it will, when said through line is completed, finished and ready for operation, enter into an agreement in writing with the said Central Pacific Railroad Company whereby it shall lease from said Company that portion of said line between Roseville Junction and the state line not now included within its lease, and will increase the consideration of twelve hundred thou-

sand dollars, guaranteed rental mentioned in the existing lease as much in proportion as eighty thousand shares of the capital stock of said Central Pacific road shall bear to the whole amount of capital of said company now issued, and will also increase the limit of the maximum rental of thirty-six hundred thousand dollars therein provided for in like proportion, and that it will transport and convey free of charge over the line operated by it in California north of San Francisco all agents, laborers and employes and all provisions, tools, iron and other materials and all other property employed or used, or to be employed or used in and about the construction of said railroad and telegraph line, and their appurtenances by or for said Pacific Improvement Company; and

The said Central Pacific Railroad Company hereby covenants and agrees to and with the said Pacific Improvement Company that in consideration of the premises and of the faithful performance of the covenants herein contained to be kept, observed and performed by said Pacific Improvement Company, it will upon the execution of this agreement issue and deliver to said company eighty thousand shares of its capital stock and in addition thereto it will pay to said Pacific Improvement Company four million five hundred thousand dollars, in mortgage bonds as follows: When one-half of the work on said road between Delta and the Oregon line is completed, it will pay and deliver to said Pacific Improvement Company all of its first mortgage bonds now unissued part of an issue by it heretofore provided for, to be

used toward the construction of its railroad between Roseville Junction and said Oregon line, and that it will pay to said Pacific Improvement Company the balance of said four million five hundred thousand dollars of bonds in its mortgage bonds, part of an issue by it provided for an indenture of mortgage by it made to William E. Brown, and Frank N. Douty, bearing date October first, 1886, and that it will make said last mentioned payment as the work on said road progresses, and sections of not less than ten miles between Delta and the Oregon state line are completed and in the proportion which the completed section shall bear to the whole length of the road between the points last aforesaid.

In Testimony Whereof, The parties hereto have caused these presents to be signed by the respective Presidents and Secretaries, and their corporate seals to be hereunto affixed. Done in triplicate the day and year first herein written."

Prior to the execution of either of said two last mentioned contracts, the stockholders of the Oregon and California Railroad Company became and were organized under the name "Stockholders' Committee"; certain of the owners of the mortgage bonds hereinbefore mentioned became and were organized under the name "Frankfort Bondholders' Committee"; and certain other of the owners of said bonds became and were organized under the name "London Bondholders' Committee"—said Bondholders' Committee representing the owners of substantially all of the aforesaid first mortgage bonds and second

mortgage bonds of said Oregon and California Railroad Company.

On March 28, 1887, the parties to the same made and entered into a written contract—a correct copy of which is "Exhibit E" to Bill of Complaint, and, omitting signatures, is as follows:

"This agreement made and entered into this 28th day of March, One Thousand Eight Hundred and Eighty-Seven, by and between George Henry Hopkinson, Robert Davie Peebles, Patrick Buchan and Charles Edward Bretherton, the Stockholders' Reconstruction Committee of the Oregon and California Railroad Company, and who are hereinafter called the Stockholders' Committee, of the first part; the Pacific Improvement Company, a corporation created, organized and existing under the laws of the State of California, of the second part; Lawrence Harrison, Andrew Haas, Henry Hopkinson, George Henry Kearton and Lawrence James Baker, a committee sitting in London, England, and representing the British holders of the First Mortgage Bonds of said Oregon and California Railroad Company, hereinafter called the London Bondholders' Committee, of the third part; Heinrich Hohenemser, Hermann Koehler, Karl Pollitz, Adolph Otto, Phillip Bonn, Heinrich Oswalt, Siegmund Lion and Emil Kalb, a committee sitting in Frankfort, Germany, and representing the German holders of the First Mortgage Bonds of said Company, hereinafter called the Frankfort Bondholders' Committee, of the fourth part; the Southern Pacific Company, a corporation created, organized and existing under

and by virtue of the laws of the State of Kentucky, of the fifth part, the said Oregon and California Railroad Company, of the sixth part, and the Union Trust Company of New York, a corporation created, organized and existing under and by virtue of the laws of the State of New York, party of the seventh part, witnesseth as follows:

First: The Stockholders' Committee agrees to sell to the Pacific Improvement Company, One Hundred and Seventeen Thousand, Two Hundred and Ninety (117,290) shares of the Preferred Capital Stock of the Oregon and California Railroad Company, out of the total issue of One Hundred and Twenty Thousand (120,000) shares thereof, and Sixty-Seven Thousand, Seven Hundred and Eighty-five (67,785) shares of the Common Capital Stock of said Oregon and California Railroad Company, out of the total issue of Seventy Thousand (70,000) shares thereof, and Second Mortgage Bonds of said Oregon and California Railroad Company, to the amount of their par value of Two Millions, Six Hundred and Ten Thousand Dollars ($2,610,000), being the total issue of such Second Mortgage Bonds, and will deliver the same to the said Pacific Improvement Company, in the City of New York, on or before the first day of April, One Thousand Eight Hundred and Eighty-Seven; and the said Pacific Improvement Company, in consideration thereof, and in payment therefor, will, simultaneously with such delivery and with the deposit with the Union Trust Company of New York, by the London and Frankfort Bondholders' committees, of bonds to the

amount of at least Eight Millions, Four Hundred Thousand Dollars ($8,400,000), par value, as hereinafter provided, deliver in the City of New York, to the Stockholders' Committee or its nominee in said city, one share of the Capital Stock of the Central Pacific Railroad Company (out of a total Capital Stock thereof not exceeding six hundred and eighty thousand (680,000) shares), against every two shares of Oregon and California Preferred Stock sold and delivered as aforesaid, and one share of Central Pacific Stock against every four shares of Oregon and California Common Stock sold and delivered as aforesaid, and will also pay the sum of Four Shillings sterling for every share of Oregon and California Preferred Stock, and of Three Shillings sterling for every share of Oregon and California Common Stock so sold and delivered. Such payments to be made by first class bankers' sight draft on London.

The Pacific Improvement Company also agrees to pay the cost of transportation and insurance of said stock and bonds to the City of New York, and of the stock of the Central Pacific Railroad to be received in payment therefor, from the City of New York to the City of London. It also agrees to pay to the nominee, in the City of New York, of the Stockholders' Committee, the sum of Two Thousand Five Hundred Dollars as a remuneration for such nominee's services in the premises, and that the Central Pacific Railroad Company, upon the surrender to it of the certificate or certificates representing the stock so to be delivered by the Pacific Improvement

Company, shall issue ten-share certificates for said stock in the name or names of such parties as may be designated by the Stockholders' Committee or its nominee in New York.

Second: In case the Stockholders' Committee shall on or before the first day of April, One Thousand Eight Hundred and Eighty-Seven, acquire the ownership or control of any additional amount of the Preferred or Common Stock of the Oregon and California Railroad Company, beyond and in excess of the amount mentioned and described in the foregoing article hereof, then and in that event the Stockholders' Committee agrees to sell and deliver the same to the Pacific Improvement Company, in the City of New York, on or before the said first day of April, One Thousand Eight Hundred and Eighty-Seven, and the Pacific Improvement Company shall pay for the same in cash and stock, at the respective rates and in the manner specified in the previous article.

Third: The Bondholders' Committees have agreed to sell to and exchange with the Southern Pacific Company, upon the terms hereinafter stated, and upon compliance with the same by the Southern Pacific Company and the Oregon and California Railroad Company or its successors, First Mortgage Bonds of said Oregon and California Railroad Company (out of the total amount outstanding of Eight Millions, Six Hundred and Six Thousand Dollars ($8,606,000) par value), issued under and secured by the mortgage of said Company to Henry Villard, Horace White and Charles Edward Bretherton, as

trustee, dated first day of June, One Thousand Eight Hundred and Eighty-One, but of which the Farmers' Loan and Trust Company of New York is now sole Trustee to the amount at their par value of Eight Million, Four Hundred Thousand Dollars ($8,400,000), bearing all unpaid coupons appertaining thereto. For that purpose they are to deposit the said Eight Million, Four Hundred Thousand Dollars ($8,400,000) bonds, within forty days after the execution of this agreement, with the Union Trust Company of New York. The Southern Pacific Company, in consideration thereof, and in payment and exchange therefor, is to deliver to the said Trust Company, to be delivered by it to the Bondholders' Committees, or their nominee in the City of New York, Nine Million, Two Hundred and Forty Thousand Dollars ($9,240,000) par value, of new bonds of the Oregon and California Railroad Company or its successors (being at the rate of One Hundred and Ten (110) per cent new bonds upon the amount of old bonds exchanged as aforesaid) carrying interest at the rate of five per centum per annum from the first day of July, One Thousand Eight Hundred and Eighty-Six (except so far as such interest may have been theretofore paid in cash as hereafter provided) and guaranteed, both principal and interest, by the Southern Pacific Company, and secured as hereinafter stated; and also to pay the sum in cash of Four Pounds (4) sterling for each now existing bond of One Thousand Dollars ($1,000) received in exchange as aforesaid; such new bonds so to be delivered by

the Southern Pacific Company in payment and exchange as aforesaid shall be payable, principal and interest, in gold, forty years after date, and bear interest at the rate of five per cent per annum, payable half-yearly, and shall be guaranteed, both as to principal and interest by the Southern Pacific Company, and shall be secured by a mortgage to be made by the said railroad company or its successors to the Union Trust Company of New York (or such other company as shall be agreed upon by the parties) upon all the property which, at the time of such deposit of existing bonds, shall be covered by the mortgage securing such First Mortgage Bonds of the Oregon and California Railroad Company, except the amounts due for lands sold previous to the date of such deposit, and except the cash in the hands of the mortgage Trustee, and upon all extensions thereof and future acquired property in Oregon of the company making such new bonds. The net proceeds of lands sold subsequent to the date of such deposit, and of the lands included in such mortgage securing such new bonds, shall be applied to the redemption and cancellation of the new bonds by annual drawings at par, unless purchasable at a lower price, as prescribed in the mortgage. Such new mortgage is to be equivalent, in point of lien and priority, to the aforesaid existing mortgage securing the said First Mortgage Bonds, except as to such of the latter as are not now or hereafter may not be deposited by the London and Frankfort Bondholders' Committee under this agreement. The amount of the bonds to be issued under such new mortgage shall be as fol-

lows: Thirty Thousand Dollars ($30,000) per mile for every mile of standard gauge road now or hereafter constructed or acquired and comprised in the mortgage, and Ten Thousand Dollars ($10,000) for every mile of narrow gauge road now or at any time hereafter constructed or acquired and comprised in the mortgage. The mortgage deed shall provide for the immediate issue and delivery by the mortgage Trustee to the Mortgagor Company of Ten Million, Five Hundred Thousand Dollars ($10,500,000) of the new bonds in nominal amount; and that thereafter the Trustee of the mortgage shall further issue One Hundred Thousand Dollars ($100,000) par value of such bonds for each mile of road constructed between the present terminus, near Ashland, and the California state line, and Fifty Thousand Dollars ($50,000) par value, of such bonds for each ten miles of steel rails laid down on the present lines of the Oregon and California Railroad Company, after such deposit of existing bonds, and on the completion of a rail connection between the present line of the Oregon and California Railroad Company and the line of the Central Pacific Railroad Company any unissued bonds for which the mileage shall then be constructed shall be delivered.

Provided, however, that such aggregate issue, including the amount to be delivered to the Bondholders' Committee hereunder, shall not exceed the limits of Thirty Thousand Dollars ($30,000) and Ten Thousand Dollars ($10,000) for each constructed mile of standard and narrow gauge line respectively, nor Twenty Million Dollars ($20,000,000) in all. For

any additional mileage constructed or acquired either between Junction and Corvallis or elsewhere in Oregon, the Mortgage Trustee shall deliver the sum of Thirty Thousand Dollars ($30,000) par value for each mile of standard gauge road, and the sum of Ten Thousand Dollars ($10,000) par value for each mile of narrow guage road; the mortgage Trustee, however, not to be compelled to accept less than ten miles of road at any one time, except in case of terminal sections. Deliveries of bonds under such mortgage are to be made by the Trustee from time to time upon presentation to it of affidavits, of the President and Chief Engineer of the Railway Company making such mortgage, to the facts authorizing delivery of such bonds under this article, and without other evidence or proof thereof. In no event, however, is the total issue of bonds secured by said new mortgage, to exceed for all the purposes in this article mentioned, the aggregate of the sum of Twenty Million Dollars ($20,000,000). The form of such new bond, which is to be of One Thousand Dollars ($1,000) denomination, and of the mortgage securing the same, and of the guaranty, are to be approved by the counsel of the Bondholders' Committees.

Fourth: Notwithstanding the provisions to be inserted in the mortgage deed restricting the future issue of bonds to the mileage rates above specified, the mortgage deed shall permit the Railway Company making the mortgage to require the Trustee, at any one time, or from time to time, to issue and permit the sale of such amount or amounts of bonds as the Railway Company may think fit; Provided,

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however, that the proceeds of such bonds shall be received by the mortgage Trustee and not by the Railway Company or its appointees, and shall be disbursed by the mortgage Trustee to the Railway Company or its appointees, only pro rata, as and when the Railway Company would have been entitled to receive such bonds thereunder, under the foregoing articles hereof.

Fifth: In case, on or before the first day of April, One Thousand Eight Hundred and Eighty-Seven, the Bondholders' Committee shall acquire the ownership or control of any additional amount of the said First Mortgage Bonds of the Oregon and California Railroad Company, beyond and in excess of those mentioned in the third article hereof, then and in that event said Bondholders' Committees agree to sell and exchange the same with the Southern Pacific Company, upon the like terms and in consideration thereof, and in payment and exchange therefor, the Southern Pacific Company shall deliver and pay to the Bondholders' Committees, Eleven Hundred Dollars of bonds guaranteed by the Southern Pacific Company, of the character hereinabove described, and the sum of Four Pounds (4) sterling in cash for every One Thousand Dollars of such additional now existing First Mortgage Bonds of the Oregon and California Railroad Company, above mentioned, with all unpaid coupons appertaining thereto, so delivered to it for exchange, due adjustment of fractions to be made by issue of fractional certificates therefor.

Sixth: Within three months from the deposit of the bonds now belonging to or controlled by the

Bondholders' committees, with the Union Trust Company, as hereinbefore provided, the Southern Pacific Company, by notice in writing to the Union Trust Company of New York, shall declare its election, either to cause to be created new bonds by act of the present Oregon and California Railroad Company, without foreclosure, or to require the Union Trust Company, as holders of the present mortgage bonds, to obtain a decree in the pending foreclosure suit or to foreclose the mortgage in some other suit caused to be brought by it, and to purchase the property or cause it to be purchased, by its nominee or nominees, at the foreclosure sale. In case said Southern Pacific Company shall give notice of its election to cause to be created new bonds of the present Oregon and California Railroad Company, then such new bonds, duly guaranteed by the said Southern Pacific Company, shall be delivered to the said Union Trust Company, of New York, within six months from the date of such notice, to be by said Trust Company forthwith delivered to the Bondholders' Committees or their nominees in New York. If within said period of three months from the deposit of the bonds by the Bondholders' Committees as aforesaid, the Southern Pacific Company shall fail to signify its election as aforesaid, or if within said period of six months from signifying an election to cause to be created new bonds of the present Oregon and California Railroad Company, it shall fail to deliver such new bonds, so guaranteed as aforesaid to the Union Trust Company of New York, then and in either of such events this agreement shall become

void and determined, and the said Trust Company shall forthwith return to the Bondholders' Committees or their nominees, the bonds deposited by them respectively, and all payments as aforesaid, made by the Southern Pacific Company to the Bondholders' Committees, shall be forfeited and be retained absolutely by the said Bondholders' Committees.

Seventh: Simultaneously with such deposit of bonds to the amount of at least Eight Million Four Hundred Thousand Dollars ($8,400,000) the Southern Pacific Company agrees to pay the Bondholders' Committees or their nominees in New York, by first class bankers' sight draft on London, the sum of Thirty-Three Thousand Six Hundred Pounds (33,600) sterling, being at the rate of Four Pounds (4) per bond in respect of the bonds so to be deposited. If the Southern Pacific Company shall not elect, as hereinbefore mentioned, to have the existing first mortgage foreclosed, then upon the delivery to the said Union Trust Company, of New York, of the new bonds of the character hereinbefore described, to the amount at their par or face value of Nine Million Two Hundred and Forty Thousand Dollars ($9,240,000), the Union Trust Company, of New York, shall deliver to the Trustee of the new mortgage the Eight Million Four Hundred Thousand Dollars ($8,400,000) par value of now existing First Mortgage Bonds so deposited with it, together with all coupons deposited therewith. In case the Southern Pacific Company shall elect to have such now existing first mortgage foreclosed, the Union Trust Company, of New York, shall under and pursuant

to the directions of the Southern Pacific Company, use such deposited bonds and coupons to bring about such foreclosure, and for the purchase of the property by the said Union Trust Company, of New York, or its nominee or nominees, at any sale or sales thereunder, and the said Union Trust Company, of New York, shall retain control of the property acquired therewith, until such new bonds to be delivered in exchange therefor under the third article hereof, shall be prepared by the corporation issuing the same, duly guaranteed by the Southern Pacific Company, and shall have been deposited with the said Union Trust Company of New York; and thereupon the property acquired shall be conveyed and turned over to the corporation issuing the new bonds, which corporation the Southern Pacific Company agrees to cause to be formed. In case of such foreclosure proceedings, the Southern Pacific Company is to cause a decree to be obtained, and a sale thereunder had and confirmed, within twelve months from the date of the execution and delivery of this instrument, or within such further time as may be fixed upon as reasonable by the counsel of the Bondholders' Committees, and of the Southern Pacific Company, or in case of their disagreement, by Benjamin H. Bristow, Esq., whose decision shall be final. In case the Southern Pacific Company fails to obtain a decree of foreclosure, and to purchase the said property within the times aforesaid, or, in case of such purchase, it fails within six months thereafter to deliver such new bonds by such new corporation, duly guaranteed by the Southern Pacific Company, to the said Union Trust Company,

of the City of New York, then, and in either of such events, the said Union Trust Company, of the City of New York, shall hold said property upon trust for the Bondholders' Committees without any claim thereupon or interest therein, by the Southern Pacific Company, under or by virtue of this agreement, or otherwise, and shall, when thereunto required by the Bondholders' Committees, convey such property to such persons or corporations as said Bondholders' Committees may in writing direct, and all payments by the Southern Pacific Company to the Bondholders' Committees, in pursuance of any of the articles of this agreement, shall be forfeited and retained absolutely by the said Bondholders' Committees. At any time after April first, One Thousand Eight Hundred and Eighty-Seven, any additional amounts of such First Mortgage Bonds acquired by the Bondholders' Committees, or either of them, shall be forthwith deposited by them in like manner with the said Union Trust Company of New York, subject to the like provisions in respect of their exchange and use in the meantime, as hereinbefore provided, in respect to the Eight Million Four Hundred Thousand Dollars ($8,400,000) bonds deposited as aforesaid, and simultaneously with each and every such additional deposit of any amount of bonds, the Southern Pacific Company will pay to the Bondholders' Committees making the deposit, the sum of Four Pounds (4) sterling in respect of each One Thousand Dollars ($1,000) of such additional bonds.

Eighth: On the deposit of such Eight Million Four Hundred Thousand Dollars ($8,400,000) of now ex-

isting First Mortgage Bonds, and on the first day of July, One Thousand Eight Hundred and Eighty-Seven, and each six months thereafter, until the delivery to said Union Trust Company, of the new bonds hereinbefore referred to, the said Southern Pacific Company shall pay in London to the said Bondholders' Committees, interest at the rate of Two and One-Half (2½) per cent upon an amount equal to One Hundred and Ten (110) per cent upon the now existing First Mortgage Bonds of the Oregon and California Railroad Company, which shall have been theretofore deposited (with all now unpaid coupons appertaining thereto) which the said Union Trust Company, under the terms of this agreement, and the new bonds to be delivered by the Southern Pacific Company, as hereinbefore prescribed, shall bear interest at the rate of Five (5) per cent per annum, only from the last date at which the Southern Pacific Company shall have made such payment.

Ninth: It is understood and agreed that there shall not at any time between the execution of this agreement and the delivery to the Pacific Improvement Company and the Southern Pacific Company respectively of the stocks and securities to be delivered to them as hereinabove provided, be any increase of the amount of the outstanding bonds or capital stock or indebtedness of the said Oregon and California Railroad Company, or any issue of Receivers' Certificates affecting its property, or increase of the Receivers' indebtedness, or dividend, or other distribution or diminution of assets, except so far as the same may necessarily result from the operation of the road

or maintenance of the offices of the corporation:

Tenth: The Pacific Improvement Company and the Southern Pacific Company will pay to the Stockholders' and Bondholders' Committees respectively, and as part of the consideration for the sales of shares and bonds hereinbefore specified, such stock of the Central Pacific Railroad Company and such sums in cash as may be necessary to pay and provide for the fees, remuneration and liabilities of said Committees, including counsel fees and office expenses incurred by said Committees, and the services of the employees of said committees, but not exceeding in the aggregate Two Thousand Five Hundred (2,500) shares of such stock and the sum of One Hundred and Fifty Thousand Dollars ($150,000) in cash. The audit of the London Bondholders' Committee of such accounts shall be necessary, and shall be final and conclusive as against the Southern Pacific Company and the Pacific Improvement Company. Such Twenty-Five Hundred shares are to be delivered to the Bondholders' Committees simultaneously with the deposit of bonds and the exchange of stock as hereinbefore provided, and the cash payment of One Hundred and Fifty Thousand Dollars ($150,000), or so much thereof as may be required as aforesaid, shall be made simultaneously with the declaration in writing by the Southern Pacific Company of its election or nonelection to cause the existing first mortgage to be foreclosed.

Eleventh: When this agreement shall have been fully performed by the Pacific Improvement Company and the Southern Pacific Company respectively,

then all sums of money and assets remaining in the hands of the said Committees, or any of them, out of the proceeds of assessments or derived from other sources, excepting from the aforesaid payment of Four Pounds (4) per bond and Four (4) Shillings and Three (3) Shillings in respect of preferred and common stock respectively, shall be paid over to the Pacific Improvement Company.

Twelfth: The Southern Pacific Company further agrees to and with the Bondholders' Committees to pay all Receivers' indebtedness, as well as all costs and counsel fees, in the now pending foreclosure suit or in any foreclosure suit which it may hereafter elect to or cause to be instituted. It also agrees to pay all the charges and expenses of every description of the Union Trust Company of New York, or of its nominee or nominees for any matter or service to be done or performed by it under and in pursuance of any or either of the articles of this contract.

Thirteenth: The Southern Pacific Company further agrees with the Bondholders' Committee to pay the cost of transportation and insurance on the aforementioned bonds both from London to New York and from New York to London, and in addition thereto, one-half of a commission of Fifteen Thousand Dollars ($15,000) which the Bondholders' Committees are to pay to their agents in New York for receiving and delivering the said bonds to the Union Trust Company of New York, and for receiving in return therefor from the said Trust Company the new bonds so to be issued as aforesaid.

Fourteenth: The Southern Pacific Company fur-

ther agrees to and with the Bondholders' Committees to cause to be stamped the certificates heretofore issued by either of such Committees, with a statement that the holder of such certificates is entitled to the benefit of this agreement, and has assented thereto. The Southern Pacific Company further agrees to designate a person in London and a person in Frankfort, who shall be authorized to so stamp such certificates, as and when they are presented by the holders thereof, without expense to such holders.

Fifteenth: The Southern Pacific Company agrees to execute a lease of the railroad of the Oregon and California Railroad Company or of its successors, for a period of at least forty years from the date of issue of the new bonds, and such railroad company agrees to execute such lease, and such lease is to form part of the consideration of the guaranty by the Southern Pacific Company of the new bonds as aforesaid. Any infirmity or invalidity of or in said lease shall not be deemed a breach of this agreement by the Southern Pacific Company or the Oregon and California Railroad Company or its successors, nor shall it in any wise affect the validity, legality or sufficiency of the guaranty of such new bonds by the Southern Pacific Company.

Sixteenth: The Pacific Improvement Company and the Southern Pacific Company further agree that, upon issue of the new bonds, hereinbefore provided, the Second Mortgage Bonds of the said Oregon and California Railroad Company, which shall have heretofore been delivered by the Stockholders' Committee to the Pacific Improvement Com-

pany, as hereinbefore prescribed, shall be cancelled, and thereupon, unless the counsel of the Southern Pacific Company and the Bondholders' Committees should otherwise determine, the First Mortgage Bonds, which shall have been deposited by the Bondholders' Committees hereunder, shall also be cancelled. Upon the cancellation of such Second Mortgage Bonds, the Pacific Improvement Company shall thereupon take all proper proceedings to have the mortgage securing the same, satisfied of record. As soon as all outstanding bonds not deposited by the Bondholders' Committees with the Union Trust Company, as hereinbefore provided, shall have been paid, or otherwise satisfied, all proper proceedings shall be taken to have the mortgage securing such now existing First Mortgage Bonds of said Oregon and California Railroad Company, satisfied of record, unless, in the joint judgment of the counsel for the Southern Pacific Company and the Bondholders' Committees, it should be deemed more expedient not then to have said mortgage so satisfied.

Seventeenth: The Union Trust Company, of New York, has executed this agreement as evidence of its acceptance of the trusts thereby assumed and undertaken by it, and the Oregon and California Railroad Company has executed this agreement as an evidence of its acquiescence and approval of the same, and of its obligation to assist in carrying out the provisions thereof.

In Witness Whereof, the parties of the first, third and fourth parts have hereunto set their hands and seals, and the parties of the second, fifth and sixth,

and seventh parts have caused their corporate names to be hereunto subscribed, and their corporate seals to be hereunto affixed by their Presidents or Vice Presidents respectively, the day and year first above written."

(Vol. I., pp. 166–184, Record.)

Pursuant to said contract of March 28, 1887, on or about May 12, 1887, all of the capital stock and all of said Second Mortgage Bonds of the Oregon and California Railroad Company were transferred, assigned and delivered to the Pacific Improvement Company, and all of said First Mortgage Bonds were transferred, assigned and delivered to the Southern Pacific Company. The Pacific Improvement Company held said capital stock until April 9, 1901, when it assigned and transferred the same to the Southern Pacific Company, which has ever since remained and still is the owner and holder thereof. It is agreed that the admission that the transfer of this stock was thus made shall not be taken as an admission on the part of the Government that the said capital stock was not held by said Pacific Improvement Company in trust for said Southern Pacific Company, as charged in the bill. The Pacific Improvement Company owned and held the controlling interest in the Southern Pacific Company from about March, 1887, until after April 9, 1901.

The Oregon and California Railroad Company executed to the Union Trust Company a trust mortgage of date July 1, 1887, a correct copy of which is "Exhibit H" to the bill. (Vol. I., pp. 197–223, Record.)

This instrument was not formally executed and acknowledged until January 3, 1888, and purports to be a trust mortgage to secure bonds of the par value of $20,000,000, and for that purpose to convey all the railways and railway lines of the Oregon and California Railroad Company, including all rights of way and other railroad property necessary to the operation thereof, and all the rolling stock, all the rents, issues and profits of the property, and all the property, real, personal and mixed, which on May 12, 1887, was covered by the mortgage securing the then existing First Mortgage Bonds of the Oregon and California Railroad Company, except the amounts due for lands sold previous to such date, and except the cash in the hands of the trustee under the mortgage last referred to, and was to include and cover also all extensions thereof and future acquired property in the State of Oregon. This mortgage is the one relied upon and pleaded by the Union Trust Company in its amended answer. A subdivision of this mortgage reads as follows:

> "And all the property, real, personal or mixed, which on the twelfth day of May, 1887, was covered by the mortgage securing the then existing First Mortgage Bonds of the Oregon and California Railroad Company."

and it is agreed that this referred to a certain deed of trust executed by the Oregon and California Railroad Company to Henry Villard, Horace White and Charles Edward Bretherton, as trustees, bearing date June 1, 1881, a correct copy of which is "Exhibit I" to the Bill of Complaint (Vol. I, pp. 224–260, Rec-

ord). The trust mortgage of July 1, 1887, was recorded on January 20, 1888, page 287, Book 63 of the Records of Mortgages in the office of the County Recorder of Multnomah County, Oregon, and about the same time recorded in the office of the County Recorder of each of the several counties in which was situated any of the lands granted by the Acts of Congress of July 25, 1866, or May 4, 1870.

The Oregon and California Railroad Company executed and delivered certain of the bonds provided for by the trust mortgage of July 1, 1887, of which $17,745,000 in amount are still outstanding. The payment of all these bonds, both as to principal and interest, was and is guaranteed by the Southern Pacific Company. These bonds were used, in large part, pursuant to the provisions of the contract of March 28, 1887, above set out, and were so used to retire the bonds secured by the earlier mortgages of June 1, 1881, and May 26, 1883, respectively, which had been sold abroad, and a large part of the balance of these bonds, secured by the mortgage to Union Trust Company of New York, also were negotiated abroad, and most of the bonds secured by said mortgage are now owned abroad, especially in Holland and Germany. By the issuance and negotiation of two separate issues of its corporate bonds bearing date June 1, 1881, and May 26, 1883, respectively, the Oregon and California Railroad Company provided funds aggregating approximately $5,000,000, which were used in the construction of its railroad; and the bonds secured by the mortgage of the Oregon and California Railroad Company to the Union

Trust Company of New York, dated July 1, 1887, were used to retire the bonds secured by the mortgages of 1881 and 1883, aforesaid, and to complete the construction of the said railroad. The total amount of bonds issued under and secured by this mortgage was $20,000,000, and from the proceeds of the sales of lands received by it, the Union Trust Company has paid off $2,255,000 of said bonds, leaving a balance outstanding of $17,745,000; and the Union Trust Company, as trustee for the owners and holders of said bonds, claims to have and hold a lieu upon the said granted lands under and by virtue of said trust mortgage of July 1, 1887. During the year 1887, the last section of the East Side railroad, extending from a point near Ashland to the southern boundary line of Oregon, and the section of railroad in California, extending from Delta to connection with the said East Side railroad at the southern boundary line of Oregon, were constructed by the Pacific Improvement Company.

On or about June 6, 1887, the Pacific Improvement Company and the Oregon and California Railroad Company entered into a contract, a copy of which is "Exhibit No. 10 to Stipulation," and is as follows:

"Agreement for Construction of the Oregon and California Railroad South of Ashland.

This Agreement, made this sixth day of June, 1887, between the Pacific Improvement Company, a corporation duly organized and existing under the laws of the State of California, party of the first part, and the Oregon and California Railroad Company,

a corporation duly organized and existing under the laws of the State of Oregon, and of the United States of America, party of the second part, Witnesseth:

That the party of the first part agrees to and with the party of the second part.

FIRST:

That it will construct and equip for the party of the second part that portion of the railroad and telegraph line of the party of the second part now uncompleted, commencing at a point near Ashland, in the State of Oregon, and extending southward to the northern boundary line of the State of California, to a connection, at said boundary line, with the railroad and telegraph line of the California and Oregon Railroad Company.

SECOND:

That it will construct and complete said portion of said railroad and telegraph line in a good and workmanlike manner to the satisfaction of the President and Chief Engineer of the party of the second part, and upon a line located and to be located by said Engineer; that when said railroad and telegraph line shall be completed they shall be in all respects equal to the railroad and telegraph line of the California and Oregon Railroad Company, and shall comprise all things necessary and proper for a first class single track railroad and a first class telegraph line and the operation thereof.

THIRD:

That it will equip said railroad with rolling stock (up to the standard of the California and Oregon Railroad) as follows:

1. One locomotive for every four miles in length of said road constructed by it.

2. Two passenger or mail or express cars for every five miles in length of said road so constructed.

3. Six box or flat cars for every mile of road so constructed; and

4. One hand car for every six miles of road so constructed.

The proportion of passenger, mail, express, box and flat cars to be furnished under the above specifications to be determined by the party of the second part, and all of said equipment to be furnished and delivered upon demand of said party.

FOURTH:

That it will construct and equip the said railroad and telegraph line between said Ashland and said boundary line within a reasonable time from the date hereof.

FIFTH:

That it will furnish and pay for all the engineering service (except the salary of the Chief Engineer), requisite for the location and construction of said railroad and telegraph line.

SIXTH:

That it will pay all costs, damages and other expenses henceforth incurred in procuring the right of way for said railroad and telegraph line.

SEVENTH:

That it will lay down upon the present completed line of said party of the second part first class steel rails of the same pattern and weight as those now laid upon the California and Oregon Railroad, to any

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extent which the party of the second part may, within two years from the date hereof request, and that it will lay said rails in a good and workmanlike manner and to the satisfaction of the President and Chief Engineer of the party of the second part.

And,

This Agreement further Witnesseth: That the party of the second part agrees to and with the party of the first part as follows:

FIRST:

That it will pay to the party of the first part for each and every mile of said railroad and telegraph line constructed and equipped by said party of the first part as aforesaid, One Hundred Thousand Dollars of its new Mortgage Bonds, with the coupons thereon, the issue of which is provided for in the third subdivision of an Agreement made and entered into in the year 1887, between George Henry Hopkinson, Robert Davie Peebles, Patrick Buchan and Charles Edward Bretherton, the Stockholders' Reconstruction Committee of the Oregon and California Railroad Company, the Pacific Improvement Company, a corporation organized and existing under the laws of the State of California; Lawrence Harrison, Andrew Haes, Henry Hopkinson, George Henry Kearton and Lawrence James Baker, a committee representing the British holders of the First Mortgage Bonds of the Oregon and California Railroad Company; Heinrich Hohenemser, Hermann Koehler, Carl Pollitz, Adolph Otto, Phillip P. Bonn, Siegmund Lion and Emil Kalb, a committee representing the German holders of the First Mortgage

Bonds of said Company; the Southern Pacific Company, a corporation organized and existing under the laws of the State of Kentucky and the laws of the United States of America, the Oregon and California Railroad Company, and the Union Trust Company, a corporation organized and existing under the laws of the State of New York; said payment to be made upon the construction, equipment and acceptance by the party of the second part of each section of ten miles or final fraction of such section of that part of said railroad and telegraph line the construction of which is hereinbefore provided for, said construction and acceptance to be established by the affidavits of the President and Chief Engineer of the party of the second part.

SECOND:

That it will pay to the party of the first part for every ten miles of steel rails laid by it under the provisions of this contract, upon the completed portion of the railroad of the party of the second part, Fifty Thousand Dollars in Bonds with the coupons thereon, of the issue referred to in the subdivision hereof next preceding, and will make said payment of Fifty Thousand Dollars in said Bonds for every ten miles of rails so laid when the fact of their having been laid in accordance with the terms of this contract has been established by the affidavits of the President and Chief Engineer of the party of the second part.

THIRD:

That the party of the first part may use its name in any proceeding necessary to obtain the right of

way for said railroad and telegraph line to be by it constructed.

And,

This Agreement Further Witnesseth: That should the party of the second part become dissatisfied with the manner of the prosecution of the work herein provided for, and the party of the first part should fail or refuse when requested to remove the cause of such dissatisfaction, or to prosecute said work as required by the party of the second part or to perform any of the conditions of this agreement on its part to be performed, then the party of the second part may take possession of all the work finished or unfinished, and of all equipment, and also of all the tools, horses, carts, wagons, provisions, material and other things used in the construction of said railroad and telegraph line, or purchased for that purpose, and may complete the said railroad and telegraph line and the equipment thereof, in the manner herein provided, at the expense of the party of the first part, the profit or loss as the case may be, to be received or sustained by the party of the first part.

In Testimony Whereof, the parties hereto have caused this Agreement to be signed by their respective Presidents and Secretaries, and their respective Corporate Seals to be hereto affixed."

(Vol. IV., pp. 1697–1702, Record.)

At the time of the execution of this contract, a large part of said work of construction had been performed by the Pacific Improvement Company, but it is not intended by the parties to the stipulation in the record to stipulate whether this prior work of

construction was performed pursuant to the contract of October 11, 1886, or some other contract, or otherwise.

On or about June 6, 1888, the receivership proceedings were dismissed, the receiver discharged, and all of the First Mortgage Bonds and Second Mortgage Bonds (not including the bonds issued under the Trust Mortgage of July 1, 1887), together with all mortgages and trust deeds securing the payment thereof, were cancelled and discharged; and thereupon and ever since the Southern Pacific Company has continued in possession of, pursuant to its leases from the Oregon and California Railroad Company of the railroads and all property in said leases described.

On February 7, 1891, the Board of Directors of the Oregon and California Railroad Company adopted a resolution, a copy of which is "Exhibit No. 11 to Stipulation" (Vol. IV., pp. 1702–1710, Record). On March 14, 1892, the Oregon and California Railroad Company, by its Board of Directors, adopted a resolution, a correct copy of which is "Exhibit No. 12 to Stipulation" (Vol. IV., pp. 1710–1713, Record); the forms of deeds therein set forth are the forms of deeds referred to in Subdivision 8, third paragraph of the Bill of Complaint (Vol. I., p. 52, Record.)

2,422,708 acres of the lands of the East Side grant were patented to the Oregon and California Railroad Company between 1893 and 1906, both years inclusive, and 128,618.13 acres of the lands of the West Side grant were patented to the Oregon and

California Railroad Company between the years 1895 and 1903, both years inclusive; which patents were issued from time to time between said dates, pursuant to applications made therefor by the Company from time to time between the years 1876 and 1906. No patent has issued to the Company under either of said land grants since the year 1906, except supplemental Patent No. 3, dated June 21, 1909, for 161.75 acres of land in the indemnity limits of the said East Side grant. A rapidly increasing demand for the lands of the Company, in large quantities and at increased prices, commenced about 1889 or 1890, and has continued ever since. From about 1894 to 1903, the Company sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person and at prices exceeding $2.50 per acre, and in several instances between said dates the Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one person, at prices ranging from $5.00 to $20.00 per acre, in one instance at $35.00 per acre, in one instance at $40.00 per acre, and in one instance a sale of 45,000 acres at $7.00 per acre was made by the said Company to a single purchaser. It has heretofore made approximately 5,306 sales of its land grant lands, aggregating 820,000 acres; approximately 4,930 of these sales were for quantities not exceeding 160 acres to one purchaser, aggregating about 296,000 acres, and approximately 376 of these sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. Substantially all of the said 524,000 acres were sold to persons other

than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of $2.50 per acre. Approximately 478,000 of these 524,000 acres were sold since the year 1897; approximately 370,000 acres of these 524,000 acres were sold to 38 purchasers, in quantities exceeding 2,000 acres to each purchaser. Approximately three-fourths in number of all sales made since the year 1897 were made by contracts providing for payment of purchase price in from five to ten equal annual payments, and execution of conveyance upon final payment. Many of these sales were still pending under such contracts on January 1, 1903, the conveyances under which were executed from time to time after January 1, 1903, and a considerable number of these contracts were still pending when this suit was brought. Of the total sales made, 4,508 had been fully executed and conveyances given aggregating 740,002.45 acres at the time the Joint and Several Answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, was first filed on September 5, 1911, and at that time 571 executory contracts were still pending, aggregating 81,684.31 acres. "Exhibit J" attached to the Bill of Complaint (Vol. I., pp. 260–272, Record), is substantially a correct statement of all conveyances of the granted lands made by the Oregon and California Railroad Company and of all contracts pending at the time it was compiled on July 1, 1908. The apparent discrepancies between said "Exhibit No. 4" and "Exhibit J" are explained by the fact that "Exhibit No. 4" is compiled with refer-

ence to the original date of sales, while "Exhibit J" is compiled with reference to the date of executed conveyances, except as to pending contracts; and the classification of sales (as to purchase price and quantity sold to each purchaser) in "Exhibit No. 4" differs from the classification used in "Exhibit J."

On or about September 5th, 1911, when the Joint and Several Answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage was filed, there remained unsold of these granted lands 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented to the Company under these land grants, and 284,876.36 acres thereof at that time remained unpatented; all of which are claimed by the Company under and by virtue of these land grants.

Approximately 1,800,000 acres of the unsold lands are situated southerly from Eugene, and constitute more than one-third, in alternate sections, of all lands lying within approximately twenty miles on each side of the East Side railroad from Eugene to the southern boundary line of Oregon; only a small portion of these granted lands in that part of the East Side grant has ever been sold.

Since January 1st, 1903, and principally since February 14th, 1907, persons exceeding four thousand in number have severally applied to the Company to purchase certain of these unsold lands in quantities not exceeding 160 acres to each person; said applicants claiming that they desired such lands to settle and establish a home upon, and in a few instances claiming that they had settled and established a

home upon the lands applied for by them; and at or about the time these applications were made, each applicant stated that he then was willing and able to tender payment at the rate of $2.50 per acre for the lands applied for by him, and in a few instances such tender was made.

On or about January 1st, 1903, the Company withdrew from sale all the unsold lands, and at all times refused and still refuses to approve or accept any of the applications to purchase just mentioned, claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose. The Company now assumes and asserts an absolute and unconditional estate in and to all of the said unsold lands.

"Exhibit K" to the Bill (Vol. I., pp. 273–519, Record), as corrected by "Exhibit No. 5" to the Answer (Vol. II., pp. 987–1002, Record), contains a correct list and description of all the unsold lands which have been heretofore patented.

"Exhibit No. 6" to the Answer (Vol. II., pp. 1002–1039, Record), contains a correct list and description of all unsold unpatented primary lands, and of all unsold selected but unpatented indemnity lands (claimed by the Company under the said land grants). The reasonable value of these unsold lands exceeds the sum of $30,000,000.

The Company has, in addition to the purchase price received from sales of the said granted lands, received and enjoyed the following other benefits on account of said granted lands, between April 1st, 1870, and April 30th, 1911, to wit:

A large number of contracts of sale had been forfeited because of defaults in payment of the annual installments due thereon, and installments previously paid, amounting in all to $88,205.06 have been retained by the Company; a portion of said lands has, from time to time, been leased for certain rentals therefor paid the Company, amounting in all to $5,532.07. The Company has cut and used large quantities of timber growing upon the land, receiving the benefit therefrom to the amount of $18,850.25, a reasonable stumpage value thereof at the times of such cutting. The Company has also received in addition thereto $10,687.92, collected from persons who, without its permission or consent, cut timber growing on the lands. These figures state, substantially, the correct value of all growing timber cut by or with the consent of the Company from the unsold lands, and the amount received by the Company for growing timber cut by others from these lands without its consent. The Company has not cut nor permitted others to cut timber growing on these lands since the commencement of this suit. All of these unsold lands now are and at all times since this suit was brought have been withdrawn from sale by the Company.

Until about the year 1890 or 1891 there was substantially no demand for these granted lands, except for the purpose of settlement or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding $2.50 per acre, and nearly all sales made prior to the year 1894 were of that character and to such persons.

During a large part of the time prior to the year 1894 the Company maintained an immigration bureau, engaged in inducing immigration and settlement upon said lands, and the greater part of the sales of lands to persons not settlers thereon, or in quantities exceeding 160 acres to one person, or for prices exceeding $2.50 per acre were made after the year 1894.

"Exhibit No. 17" to Stipulation (Vol. IV., pp. 1730–31, Record), is a correct statement of the facts therein set forth, and is made for the purpose of correcting "Exhibit No. 9 to the Answer (Vol. II., pp. 1143–1148, Record). From "Exhibit No. 9," as corrected by "Exhibit No. 17," it appears that certain deeds were made by the Oregon and California Railroad Company and expressly approved by the Interior Department of the United States, conveying more than 160 acres of land-grant Forest Reserve lands to a single purchaser, at prices exceeding $2.50 per acre; that such deeds were submitted by the direct or mesne grantee thereunder, as Lieu Bases for Lieu Selection of other lands, under the Act of Congress, approved June 4th, 1897, (30 Stat. 11–30). The deeds show on the faces thereof the true acreage and consideration price paid. All of these Lieu Base deeds and selections were approved by the Interior Department, excepting that some of these selections were pending in the Interior Department at the time the investigation of the subject matter of this suit was instituted, in the year 1907. Upon the recommendation of the Attorney General all of these selections pending at that time were suspended

and still remain under suspension. As to these selections thus under suspension, no action has been taken by the Interior Department and the title to the Base lands has not been approved. The selections under suspension are as follows:

To A. B. Hammond Co., under Contract No. 5392, for lands situated in Klamath County, Oregon, conveyed to the United States by deed of Marcus Daly (grantee of A. B. Hammond Co.) and wife, Sept. 14, 1899, as Lieu Base for Lieu Selection of land in Montana; 5,042.96 acres; consideration, $17,650.36.

All of 5,013.18 acres conveyed by the Company under Contract No. 5393, of date June 24, 1899, by deed June 26, 1899, to John Claflin, for $17,546.13, and conveyed by Marcus Daly (grantee of John Claflin) and wife on Sept. 14, 1899, as Lieu Base for Lieu Selection of land in Montana.

All of 6,214.34 acres (excepting 4014.34 acres) conveyed by the Company under its Contract No. 5394 of date June 24, 1899, by deed June 26, 1899, to Big Blackfoot Milling Company, for $21,750.18, and conveyed to the United States by Big Blackfoot Milling Company by deed of date August 30, 1899, as Lieu Base for Lieu Selections of land in Montana.

All of the 3,760 acres conveyed by the Company to Marcus Daly under its Contract No. 5395 of date June 24, 1899, and by its deed June 26, 1899 to Marcus Daly for $13,160.00, and conveyed to the United States by deed of Marcus Daly and wife, dated September 14, 1899.

All of the 9,044.35 acres (excepting 2787.72 acres) conveyed by the Company to R. S. Moore under its

Contract No. 5401, of date July 3, 1899, by its deed of July 5, 1899, and conveyed to United States by R. S. Moore and others as Lieu Bases for Lieu Selections in Minnesota, Oregon and Montana.

In addition to the foregoing Lieu Land Selections showing sales as stated, which are under suspension, the following Lieu base deeds, selections and sales have been approved by the Interior Department, to-wit:

Forty acres under Contract No. 5402 of date July 3, 1899, conveyed by the Company July 5, 1899, to Wm. Marlatt for $140.00, and conveyed by him to the United States July 7, 1899, as Lieu Base for Lieu Selection of land in Oregon; Lieu Base Deed and Lieu Selection approved by Interior Department July 31, 1903.

112.96 acres conveyed by the Company under its Contract No. 5405 of date July 5, 1899, by its deed of that date to H. A. Smith for the consideration of $395.36, and conveyed by John T. Murphy (assignee of H. A. Smith) by deed of September 1, 1899, to the United States as Lieu Bases for Lieu Selections in Montana and Idaho, and approved by the Interior Department February 9 and March 10, 1905.

522.00 acres for $1,827.00 conveyed by the Company under its Contract No. 5409 of date July 14, 1899, by its deed of that date to A. L. Mills, and conveyed by A. L. Mills to the United States by his deeds of October 27, 1899 and April 18, 1900, as Lieu Bases for Lieu Selections in Washington; approved by the Interior Department December 13, 1901 and July 9, 1902.

640 acres for $2,240.00, conveyed by the Company under Contract No. 5551 of date December 26, 1899, by its deed of that date to Frank D. Nash, and conveyed by him to the United States by his deed of date January 31, 1900, as Lieu Bases for Lieu Selection in Washington; approved by the Interior Department October 19, 1907.

2000 acres for $7,500.00, conveyed by the Company under Contract No. 5598 of date February 13, 1900, by its deed of that date to W. I. Vawter, and conveyed by Vawter and wife to the United States by deed of date March 3, 1900, as Lieu Bases for Lieu Selection in Oregon; approved by the Interior Department December 20, 1902.

59.90 acres for $209.65, conveyed by the Company under its Contract No. 5603 of date February 16, 1900, by its deed of that date, to W. I. Vawter, and by Vawter and wife conveyed to the United States by their deed of date March 8, 1900, as Lieu Bases for Lieu Selection in Oregon; approved by Interior Department March 28 and April 20, 1903.

40 acres for the consideration of $160.00, conveyed by the Company under its Contract No. 5606 of date February 16, 1900, by its deed of that date to C. A. Cogswell, and by Cogswell and wife conveyed to the United States March 8, 1900, as Lieu Bases for Lieu Selection in Oregon; approved by the Interior Department March 1, 1903.

8,579.13 acres for the consideration of $30,026.95, conveyed by the Company under its Contract No. 5626 of date March 2, 1900, by its deed of that date to Wm. G. Gosslin, and by W. W. Curtis (assignee

of Wm. G. Gosslin) conveyed to the United States as Lieu Bases for Lieu Selections in California, Oregon, Washington, Idaho and South Dakota, and approved by the Interior Department August 26, 1902, October 20, 1903, October 23, 1903, April 29, 1904, and December 18, 1906, respectively.

4014.34 acres conveyed by the Company under its Contract No. 5394 of date June 24, 1899, by its deed of date June 26, 1899, to Big Blackfoot Milling Company, and by that Company conveyed to the United States August 30, 1899, in connection with a conveyance of 6214.34 acres for which the Company received $21,750.18, and which Lieu Base Deed and Lieu Selections were approved by the Interior Department October 28, 1902, February 5, 1903, and July 12, 1907, respectively.

Also 2787.72 acres conveyed by the Company under its Contract No. 5401, in connection with its conveyance of 9,044.35 acres for the total consideration of $31,655.22, under its Contract No. 5401 of date July 3, 1899, and conveyed by it July 5, 1899, to R. S. Moore, and by him conveyed to the United States, and Lieu Base Deed and Lieu Selections approved by the Interior Department April 7, 22 and 27, 1903, January 9, 1904, and June 1, 1907.

On February 14, 1907, the Legislature of Oregon adopted a Memorial ("Exhibit L," Vol. I, pp. 520–21, Record), as follows:

"To his Excellency, the President, and Honorable Senate and House of Representatives of the United States of America:

Your memorialist, the legislative assembly of the

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State of Oregon, most respectfully represents:

That vast tracts of public lands within Oregon are claimed and held by the Oregon & California Railroad Company, as grantee in succession, under the acts of Congress of the United States of July 25, 1866, and April 10, 1869;

That said tracts are withdrawn from sale, whereby the development and material prosperity of the State is retarded;

That said railroad company, so claiming said lands, has not complied with the terms of said act of April 10, 1869, as to the terms of sale and the quantities of land to be sold;

That said conditions are claimed to inure only to the United States as grantor to the predecessor in alleged interest of said Oregon & California Railroad Company, and have not been complied with; therefore,

Your memorialist most respectfully asks that the Congress of the United States be and hereby is requested to enact such laws and take such steps by resolution, or otherwise, as may be necessary to compel said railroad company to comply with the conditions of said grant, and to enact and declare some sufficient penalty for noncompliance therewith by way of forfeiture of the grant, or otherwise, as in the wisdom of Congress may seem best.

That the Senators and Representatives in Congress from the State of Oregon and all other land grant states be and they hereby are requested to use their utmost endeavor to procure the needed legislation in the above matter.

That this memorial be forwarded to the President and to Oregon Senators and Representatives in Congress."

This memorial was communicated to Congress immediately after February 14, 1907, Congress adopted a Joint Resolution, approved April 30, 1908 (35 Stat. 571), pursuant to which this suit is brought.

Since the commencement of this suit, forty-five other and separate suits have been brought in the name of the United States, each against the defendants to the stipulation and another person or other persons asserting and praying for the enforcement of claimed rights and equitable remedies pertaining to certain of these granted lands subject to such suits, sold and conveyed by the Company to such other persons in alleged violation of alleged provisions or conditions of the said land grants.

Pursuant to the rules and regulations of the Department of the Interior, all of the patents to the Company were issued and based upon applications in writing therefor, from time to time filed in the appropriate land office of the United States by the Company as the "successor and assignee" of the said East Side Company and West Side Company, respectively; which applications contained description lists of the lands claimed and for which patents were so applied for; each of these applications was accompanied and supported by an affidavit signed and sworn to by the Land Agent of the Company duly authorized, alleging among other things that "the lands are vacant, unappropriated, and are not interdicted mineral, nor reserved lands, and are of the

character contemplated by the granting Act" under which patents were applied for, and issued as stated.

The contracts and deeds executed by the Company prior to about the year 1894, contained, substantially, the following reservation clause:

> "Reserving, however, a strip of land one hundred feet wide, to be used by the Oregon and California Railroad Company for right of way or other railroad purposes, when the railroad of said Oregon and California Railroad Company or any of its branches is or shall be located upon the premises, and the right to use all water needed for the operating and repair of said railroad, and also reserving all claim of the United States to the same as mineral lands."

The words "and also reserving all claim of the United States to the same as mineral lands" were stricken from this reservation clause in the contracts and deeds executed by the Company from about 1894 until about 1902; and in contracts and deeds executed by the Company during and at all times after about the year 1902, the words "and also reserving and excepting from said described premises so much thereof as may be mineral lands" were substituted for the said stricken-out words.

The Company claims to be the owner of all rights, lands and interest in lands at any time excepted or reserved by this clause.

The defendants, Southern Pacific Company, Stephen T. Gage and Union Trust Company, parties to the stipulation, with the Oregon and California Railroad Company, claim that the latter company is and

claims to be the owner of these granted lands, primary and indemnity, patented and unpatented, not heretofore sold and transferred by its deeds of conveyance, together with all right of way and other rights and property in Oregon described as granted by section 3 of the Act of July 25, 1866, and the first section of the Act of May 4, 1870, and all the rights and property reserved as stated for any and all railroad purposes, and the improvements upon all of these lands and property, and claim that all of the land and property is subject to the Trust Mortgage of July 1, 1887.

"Exhibit No. 13" to Stipulation (Vol. IV, pp. 1713–1717 Record), contains a correct statement of all maps of survey and location filed in the office of the Secretary of the Interior Department by the East Side Company and the Oregon and California Railroad Company, and the dates thereof, under and pursuant to the provisions of the East Side Grant; and a correct statement of the map filed in the same office by the West Side Company, under and pursuant to the West Side grant, with the date of such filing, from which it appears that a map of the first section, extending from East Portland to Jefferson, was filed October 29, 1869; and of the second and third sections from Jefferson south, March 26, 1870; of the fourth section January 7, 1871; of the fifth section April 6, 1882; of the sixth section April 6, 1882, both of which maps of the fifth and sixth sections were returned by the Commissioner of the General Land Office to the Secretary of the Interior with report, and received back by the Commissioner June

2, 1883, Map of the seventh section was filed August 24, 1882, returned to the Secretary with report and re-returned to the Commissioner of the General Land Office June 2, 1883. Map of the eighth section was filed June 6, 1883; of the ninth section July 3, 1883; of the tenth section September 4, 1883; of the eleventh section August 1, 1883; on the twelfth section, to the southern boundary of the State of Oregon, August 18, 1884.

The map of survey and location of first section of the West Side Company, extending from Portland via Forest Grove and McMinnville, thence southerly towards Corvallis was transmitted to the Interior Department and there received July 1, 1868, and returned July 6, 1868, for verification and other requirements, and a second map received by the Interior Department September 16, 1868; and a map of the first sixty miles was returned to the Interior Department and there received September 22, 1868. Subsequently there was forwarded to and received by the Secretary of the Interior on September 24, 1868, another map of the first sixty miles, and such map was sent by the Secretary of the Interior to the Commissioner of the General Land Office November 22, 1871; and a map of the section extending from Portland to McMinnville and from Forest Grove to Castor Creek was filed May 17, 1871; and a map of the remainder of the line from Castor Creek to Astoria was filed February 2, 1872.

"Exhibit No. 14 to the Stipulation" (Vol. IV, pp. 1717–1720, Record), contains a correct statement of the dates of construction, completion, approval and

acceptance of the several sections of the said East Side and West Side railroads, separately stated, and shows that construction of the first section of twenty miles of the East Side railroad was completed December 24, 1869, examined by commissioners and favorably reported upon December 31, 1869; such report submitted by the Secretary of the Interior January 26, 1870, to the President of the United States and its acceptance recommended, and such recommendations approved by the President January 29, 1870;

The second, third and fourth sections of the East Side road of twenty miles each, extending from Parrott's Creek to a point about one-half mile beyond the station of the City of Albany, 80 miles from the initial point, was completed during the year 1870, reports of Commissioners dated September 28, 1870, as to second and third sections, and December 10, 1870, as to fourth section, were transmitted by the Secretary of the Interior February 28, 1871, to the President of the United States, with recommendations that the road be accepted, and such recommendations were approved by the President February 28, 1871.

The fifth and sixth sections of twenty miles each were completed and reports of Commissioners on such completion dated respectively August 11, 1871, and January 13, 1872, were submitted March 7, 1872, by the Secretary of the Interior to the President of the United States with recommendations that the line be accepted, which recommendations were approved by the President March 11, 1872.

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The seventh, eighth and ninth sections, beginning at a point 2½ miles northwest of Eugene City and ending near Roseburg, a distance of 77.3668 miles, was completed in 1872 and had been in effective use for traffic since the summer of that year. The report of the Commissioners dated December 27, 1876, was submitted by the Secretary of the Interior to the President of the United States July 10, 1878, with recommendations that the railroad be accepted, and such recommendations were approved by the President July 11, 1878.

The tenth section of 45 miles, beginning a short distance south of the Roseburg depot, was wholly in operation from May, 1883, and 28 miles thereof, from Roseburg to Riddle had been in operation since November, 1882. The report of the Commissioners of date August 6, 1883, was submitted by the Secretary of the Interior to the President of the United States August 20, 1883, with recommendations that the line be accepted, and such recommendations were approved by the President August 29, 1883.

The eleventh section of 100 miles in length, extending from a point 45 miles south of Roseburg to a point about 1¼ miles south of Ashland was open for public use on the following dates: From the north end to Glendale, 20 miles, May 14, 1883; to Grants Pass, 55 miles, December 4, 1883, to Phoenix, 91 miles, February 25, 1884; to Ashland, 99 miles, May 5, 1884. The report of the Commissioners was submitted by the Secretary of the Interior to the President January 13, 1887, with recommendations that the section be accepted, Said recommendations were

approved by the President January 29, 1887.

The twelfth section, extending from the point 1½ miles south of Ashland to the boundary line between Oregon and California, a distance of 24.135 miles, was completed prior to June 20, 1888; the report of the Commissioners transmitted by the Secretary of the Interior to the President October 23, 1889, with recommendations that the railroad be accepted, and such recommendations were approved by the President November 8, 1889. At the date of each approval by the President, patents for the lands opposite to and coterminous with the completed sections of the road were directed to be issued.

The first section of 20 miles of the West Side railroad was completed and the report of the Commissioners of date January 6, 1872, was approved and the section accepted by the Secretary of the Interior February 16, 1872.

The second section, extending from the 20th mile post to the Yamhill River, a distance of 27½ miles, was reported on by Commissioners May 3, 1876, and the reports approved and the section accepted by the Secretary of the Interior June 23, 1876.

"Exhibit No. 11" (Vol. II, pp. 1152–54, Record) is a correct schedule showing the amount of land patented, compiled by years, separately stated as to the East Side and West Side grants, and also gives the dates of all Acts of Congress recited or referred to in such patents, and this Exhibit shows the following:

"EAST SIDE GRANT.

Year	Acts of Congress Recited	Acres
1871	July 25, 1866—June 25, 1868.....	152,764.67
1872	Act 1866 and 1868 and April 10 1869	69,061.63
1876	Acts 1866, 1868 and 1869.....	14,629.67
1877	Acts 1866, 1868 and 1869.....	86,622.71
1893	Acts 1866, 1868 and 1869.....	292,486.90
1894	Act 1866	382,352.95
1895	Act 1866	558,718.40
1896	Patent 31 recites Lieu Act of June 22nd, 1874, and Act of July 25th, 1866; all others recite Act of 1866	709,729.99
1897	Act of July 25th, 1866.....	37,231.90
1898	Act of July 25th, 1866.....	70,014.02
1899	Act of July 25th, 1866.....	151,064.30
1900	Act of July 25th, 1866.....	42,841.33
1901	Act of July 25th, 1866.....	60,466.60
1902	Patents 178 and 180, Lieu Act of June 22nd, 1874, and Act of July 25th, 1866; all other Acts of 1866	36,166.20
1903	Patent 189 recites Lieu Act of June 22, 1874, and Act of 1866; all others recite Act of July 25, 1866	36,438.08
1904	Act of July 25, 1866.....	39,339.08
1905	Act of July 25, 1866.....	25,838.67
1906	Act of July 25, 1866.....	20.
1909	Acts of 1866-1868 and 1869.....	161.75
	Total	2,765,948.85

"WEST SIDE GRANT.

Year	Acts of Congress Recited	Acres
1895	Act of May 4th, 1870.....	93,079.
1896	Act of May 4th, 1870.....	32,288.24
1897	Act of May 4th, 1870.....	2,388.
1898	Act of May 4th, 1870.....	72.75
1899	Act of May 4th, 1870.....	520.
1903	Act of May 4th, 1870.....	270.14
	Total	128,618.13
	Total acres, both grants.....	2,894,566.98

All of the West Side grant patents recited that they were issued to the Oregon and California Railroad Company "as successor to the Oregon Central Railroad Company," but no patent issued for lands of the East Side grant contains a recitation that it was issued to the Oregon and California Railroad Company "as successor to any Company."

"Exhibit P" to the Bill of Complaint (Vol I., pp. 529–537, Record), gives a correct list of suits, with lands specifically described, therein referred to, being the suits of thirty-eight so-called cross-complainants who claim to be actual settlers upon lands situated in the East Side grant, and twenty-eight cross-complainants who claim to be actual settlers upon lands within the limits of the West Side grant. These suits during the month of December, 1908, other than the one brought by Roy W. Minkler, were consolidated with this suit, and each of the complainants in the said several suits filed his cross-complaint, of which the cross-complaint of John L. Snyder and others is typical. On June 9, 1910, the suit brought

by Roy W. Minkler was dismissed by mutual consent of all parties thereto.

On June 19, 1878, Congress passed an Act (20 Stat. 169) entitled "An Act to create an Auditor of Railroad Accounts and for other purposes," a copy of which is marked "Exhibit 15 to Stipulation" (Vol. IV., pp. 1721–1724, Record).

Congress, by an Act entitled "An Act making appropriations for the legislative, executive and judicial expenses of the Government for the fiscal year ending June 30, 1882, and for other purposes," approved March 3, 1881 (21 Stat. pp. 385–413), among others, provided that the Auditor of Railroad Accounts should be thereafter styled "Commissioner of Railroads" and from time to time by various acts of Congress (31 Stat. 86; 31 Stat. 960–1009; 32 Stat. 419–481; 32 Stat. 1083–1147) made appropriations for the office of Commissioner of Railroads and extended the terms of office and continued him in the performance of his duties, and as provided by said Act of June 9, 1878, the Bureau of the Interior Department was organized and continuously administered as such under annual appropriations from Congress until the termination of said Bureau and the transfer of the duties, files and records thereof to the Secretary of the Interior in the year 1904, as required by the Act of March 3, 1903.

That pursuant to the requirements of the Act of June 9, 1878, the forms of reports to be made by the railroad companies contemplated by the Act, including the Oregon and California Railroad Company, were prepared and adopted by the Bureau of the

Interior Department and transmitted to the railroad companies, including the Oregon and California Railroad Company, by the said Bureau from 1879 to 1903, and the Oregon and California Railroad Company complied with the provisions of this Act and the demands of the Bureau as to the making of said reports upon such forms as prescribed continuously from 1879 to 1903, both years inclusive.

That beginning with the report for the half year ending December 31, 1879, and continuing down to and including the year 1903, reports were made of the transactions of the Land Department of the Oregon and California Railroad Company, upon these blanks formulated and furnished therefor by the said Bureau of the Interior Department, which are particularly set out in detail in Volume IV, pages 1595-1611, Transcript of Record (to which reference is here made and which is made a part hereof), from which reports there appears among other things, the following:

A statement of the average price per acre for all sales to date:

Average price per acre for all sales during half year;

Average price per acre for all purchases to date;

Maximum price per acre from sales;

Minimum price per acre from sales;

Maximum price per acre now asked;

Minimum price per acre now asked;

Average price per acre now asked;

and showing that for the half year ending December 31, 1879, the Company received a maximum price per

acre from sales of $15.00, and the maximum price per acre asked was $7.00, and for the half year ending June 30, 1880, the maximum price per acre from sales received was $5.00 and the maximum price per acre asked was $7.00, and thereafter for the period stated the maximum and average price received and the maximum price asked was as follows;

For the half year ending December 31, 1880:

Maximum price per acre from sales....$ 5.00
Maximum price per acre asked..... 5.00

For the half year ending June 30, 1881:

Maximum price per acre from sales....$10.00
Maximum price per acre asked..... 5.00

For the half year ending December 31, 1881:

Maximum price per acre from sales....$ 5.00
Maximum price per acre asked..... 10.00

For the half year ending June 30, 1882:

Maximum price per acre from sales....$ 3.50
Maximum price per acre asked..... 15.00

For the half year ending December 31, 1882:

Maximum price per acre from sales....$15.00
Maximum price per acre asked..... 7.00

For the half year ending June 30, 1883:

Maximum price per acre from sales....$15.00
Maximum price per acre asked..... 7.00

For the year ending June 30, 1884:

Average price per acre for all sales during year.....$ 2.7250
Maximum price per acre from sales.... 15.00
Maximum price per acre asked..... 7.00

For the year ending June 30, 1885:

Average price per acre for all sales during year.....$ 2.5608
Maximum price per acre from sales.... 15.00
Maximum price asked..... 7.00

For half year ending December 31, 1885:

Average price per year for all sales during half year.....$ 2.65
Maximum price per acre from sales.... 15.00
Maximum price asked..... 7.00

For the year ending December 31, 1885:

Average price per acre for all sales during year.....$ 2.70
Maximum price per acre from sales... 15.00
Maximum price per acre asked..... 7.00

For the half year ending June 30, 1886:

Average price per acre for all sales during half year.....$ 2.99
Maximum price per acre from sales.... 15.00
Maximum price per acre asked..... 7.00

For the half year ending December 31, 1886:

Average price per acre for all sales during half year.....$ 2.99
Maximum price per acre from sales... 15.00
Maximum price per acre asked..... 7.00

For the year ending December 31, 1886:

Average price per acre for all sales during year.....$ 2.99
Maximum price per acre from sales.... 15.00
Maximum price per acre asked..... 7.00

For the half year ending June 30, 1887:

Average price per acre for all sales during half year.....$ 3.19

Maximum price per acre from sales.. 15.00
Maximum price per acre asked..... 7.00

For the half year ending December 31, 1887:
Average price per acre for all sales during half year.....$ 3.40
Maximum price per acre from sales... 15.00
Maximum price per acre asked..... 7.00

For the year ending December 31, 1887:
Average price per acre for all sales during year.....$ 3.24
Maximum price per acre from sales.... 15.00
Maximum price per acre asked..... 7.00

For the year ending December 31, 1888:
Average price per acre for all sales during year.....$ 3.74
Maximum price per acre from sales.... 15.00
Maximum price per acre asked..... 10.00

For the year ending June 30, 1889:
Average price per acre for all sales during year.....$ 4.96
Maximum price per acre from sales.... 15.00
Maximum price per acre asked..... 15.00

For the year ending June 30, 1890:
Average price per acre for all sales during year.....$ 6.32
Maximum price per acre from sales.... 15.00
Maximum price per acre asked..... 15.00

For the year ending June 30, 1891:
Average price per acre for all sales during year.....$ 4.92
Maximum price per acre from sales.... 30.00
Maximum price per acre asked..... 25.00

For the year ending June 30, 1892:

Average price per acre for all sales during year	$ 5.61
Average price per acre for all sales to date	3.61
Maximum price per acre from sales	30.00
Maximum price per acre asked	25.00

For the year ending June 30, 1893:

Average price per acre for all sales to date	$ 3.66
Average price per acre for all sales during year	4.51
Maximum price per acre from sales	30.00
Maximum price per acre asked	25.00

For the year ending June 30, 1894:

Average price per acre for all sales to date	$ 3.63
Average price per acre for all sales during year	2.83
Maximum price per acre from sales	30.00
Maximum price per acre asked	25.00

For the year ending June 30, 1895:

Average price per acre for all sales to date	$ 3.40
Average price per acre for all sales during year	3.49
Maximum price per acre from sales	30.00
Maximum price per acre asked	15.00

For the year ending June 30, 1896:

Average price per acre for all sales to date	$ 3.40

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Average price per acre for all sales during year..... 3.57
Maximum price per acre from sales... 30.00
Maximum price per acre asked..... 15.00

For the year ending June 30, 1897:

Average price per acre for all sales to date..... .....$ 3.40
Average price per acre for all sales during year..... 3.35
Maximum price per acre from sales... 30.00
Maximum price per acre asked..... 15.00

For the year ending June 30, 1898:

Average price per acre for all sales to date..... .....$ 3.41
Average price per acre for all sales during year..... 3.95
Maximum price per acre from sales... 30.00
Maximum price per acre asked..... 15.00

For the year ending June 30, 1899:

Average price per acre for all sales to date..... .....$ 3.75
Average price per acre for all sales during year..... 2.62
Maximum price per acre from sales... 30.00
Maximum price per acre asked..... 15.00

For the year ending June 30, 1900:

Average price per acre for all sales to date ....$ 3.77
Average price per acre for all sales during year..... 5.02
Maximum price per acre from sales... 30.00
Maximum price per acre asked..... 15.00

For the year ending June 30, 1901:

Average price per acre for all sales to date	$ 4.076
Average price per acre for all sales during year	5.348
Maximum price per acre from sales	30.00
Maximum price per acre asked	15.00

For the year ending June 30, 1902:

Average price per acre for all sales to date	$ 5.00
Average price per acre for all sales during year	7.85
Maximum price per acre from sales	30.00
Maximum price per acre asked	20.00

For the year ending June 30, 1903:

Average price per acre for all sales to date	$ 4.73
Average price per acre for all sales during year	4.22
Maximum price per acre from sales	30.00

The Bureau of the Interior Department made annual reports to the Secretary of Interior as required by the said Act of June 19, 1878, from 1879 to the termination of said office. These reports were embodied in the annual reports of the Secretary of the Interior for the same years, transmitted by him to the President of the United States and by the latter to the two Houses of Congress, and the said Secretary's annual reports were there referred to appropriate committees and printed as Executive Documents (Vol. IV, Subdivision 21, Item 10, p. 1612, Record).

In the reports so made, embodied, transmitted, referred and printed, appear the following relating to the Oregon and California Railroad Company:

(1st)—For the year 1883, Executive Documents, 2nd Session, 47th Congress, 1882-83, No. 1, Part 5, Vol. 2, page 471:

"Oregon & California Railroad Company chartered March 17, 1870, and opened for business December 1st, 1872. The Company is now successor, by consolidation, of the Oregon Central Railroad Company, purchased September 1st, 1880, chartered July 25, 1866, and owns the land grant of said Company; the Western Oregon Railroad Company, purchased October 9, 1880; and the Albany & Lebanon Railroad Company, leased December 5, 1880, at a rental of $1 for each period of six months, this Company to pay taxes and keep up repairs. The several lines are operated in two Divisions, that is:

	Miles
EAST SIDE DIVISION:	
Main Line, Portland to Roseburg.....	198.
Lebanon Branch, Albany Junction to Lebanon	11.5
WEST SIDE DIVISION:	
Portland to Corvallis	97.
Total, exclusive of side-tracks.....	306.05

"The estimated grant of land to these combined companies amounts to 3,940,000 acres, of which 322,062.40 acres have been patented to June 30, 1882. Of this latter amount lands had been sold up to December 31, 1881—date of last report—for an amount aggregating $309,486.15, at an average price of $2.25

per acre. The minimum price now asked is 25 cents, the *maximum $10 per acre.*

(5th)—For the year 1889, House Executive Documents, 1st Session, 51st Congress, 1889–90, Vol. II, pages 512, 513:

"The Company has received by patent from the Government 323,068.88 acres of land, of which 269,-442.88 have been sold. It has received from sales of land $541,650.33, and there are outstanding on account of time sales $394,226.58, of which the sum of $98,992.42 is interest.

"The average price per acre for all sales to date was $2.64, while the average price for sales made during the year was $3.96."

(6th)—For the year 1890, House Executive Documents, 2nd Session, 51st Congress, 1890-91, Vol. 13, page 174:

"The Company reports that to June 30, 1890, there had been patented to it by the United States, 323,068.68 acres of land, and that 225,170.57 acres had been sold, the total cash receipts from all sales amounting to $626,520.03. There remained outstanding on account of time sales the sum of $516,287.66. *Average price per acre for all sales during the year was $6.32.*

(11th)—For the year 1895, House Document, 1st Session, 54th Congress, 1895–96, Vol. 16, page 156:

"The records of the General Land Office show that to June 30, 1895, there had been patented to the Company 1,162,067.28 acres.

The Company submitted the following report on

June 30, 1895, of the operations of its Land Department to date:

	Acres.
Acquired by United States patent.....	1,163,073.56
Disposed of for cash and on time contracts	381,402.78
Difference, unaccounted for.....	781,670.78

"The Company also reports that the total cash receipts from all sales to date had amounted to $946,952.81, and that there remained outstanding on account of time sales the sum of $700,064.64, principal and interest.

"The receipts during the year were $37,747.22, and the expenses $59,294.90.

"The average price per acre for all sales to date had been $3.40, and the average price now asked is $3.00."

(12th)—For the year 1896, House Documents 2nd Session, 54th Congress, 1896-97, Vol. 14, page 166:

"The records of the General Land Office show that to June 30, 1896, there had been patented to the Company 2,180,366.07 acres.

"The Company reports that to June 30, 1896, it had received by patent from the United States, 2,397,717.17 acres of land, and there had been disposed of for cash and on time contracts 387,119.43 acres, leaving the balance owned by the Company, 2,010,657.74 acres.

"The total cash receipts from all sales to date amounted to $986,605.69, and there remained outstanding on account of time sales, principal and interest, $875,146.35.

"The report of the operations of the Land Department during the year, shows a deficit of $81,770.68.

"Average price per acre received was $3.57.

"Average price per acre now asked, $3.00.

(13th)—For the year 1897, House Documents, 2nd Session, 55th Congress, 1897-98, Vol. 14, page 137:

"The records of the General Land Office show that to June 30, 1897, there had been patented to the Company 2,287,131.66 acres.

"The Company reports that to June 30, 1897, it had received by United States patents 2,503,754.59 acres of land, and had disposed of for cash and on time contracts (not including cancelled contracts), 382,443.44 acres.

"The total cash receipts from all sales to date amounted to $1,020,329.75, and there were outstanding on account of time sales $775,881.34.

"The receipts for the year were $33,724.06, and the expenses $60,012.11.

"The average price per acre now asked for land is $3.00."

(14th)—For the year 1898, House Documents, 3rd Session, 55th Congress, 1898-99, Vol. 16, page 152:

"The Company reports that to June 30, 1898, it had received by United States patent 2,561,685.30 acres of land, and had disposed of for cash and on time contracts (not including cancelled contracts), 504,606.53 acres.

"The total cash receipts from all sales to date amounted to $1,069,513.25, and there were outstanding on account of time sales $792,999.38.

"The receipts for the year were $49,183.50, and

the expenses $73,183.06.

"The average price per acre now asked for land is $3.00."

(15th)—For the year 1699, House Documents, 1st Session, 56th Congress, 1899–1900, Vol. 20, page 181:

"The Company reports that to June 30, 1899, it had received by United States Patent 2,659,300.56 acres of land.

"The total cash receipts from all sales to date amounted to $1,234,225.97, and there were outstanding on account of time sales $734,957.16.

"The receipts for the year were $164,712.72, and the expenses $77,138.22.

"The average price per acre now asked for land is $3.00."

(16th)—For the year 1900, House Documents, 2nd Session, 56th Congress, 1900–01, Vol. 29, page 185:

"The Company reports that to June 30, 1900, it had received by United States patent 2,787,363.55 acres of land.

"The total cash receipts from all sales to date amounted to $1,542,728.71, and there were outstanding on account of time sales, $1,189,918.71.

"The receipts for the year were $308,502.74, and the expenses $91,932.33.

"The average price per acre now asked for land is $3.00."

(17th)—For the year 1902, House Documents, 1st Session, 37th Congress, 1901, Vol. 25, page 218:

"The Company reports that to June 30, 1901, it had received by United States patent 2,795,567.64 acres of land.

"The total cash receipts from all sales to date amounted to $1,852,756.51, and there were outstanding on account of time sales, $1,808,935.66.

"The receipts for the year were $310,027.80, and the expenses $72,713.77.

"*The average price per acre now asked for land is $3.50.*"

(18th)—For the year 1903, House Documents, 2nd Session, 58th Congress, 1903–1904, Vol. 21, page 159:

"The Company reports that to June 30, 1903, it had received by United States patent 2,928,809.55 acres of land, and had disposed of, for cash and on time contracts, 1,032,591.47 acres.

"The total cash receipts from all sales to above date amounted to $2,735,532.88, and there were outstanding on account of time sales, principal and interest, $2,800,637.57.

"The receipts from this source for the year amounted to $437,471.63, and the expenses to $105,-936.96.

"*The average price per acre now asked for land is $4.73.*"

The original reports by the railroad companies to the Commissioner of Railroads and by the latter to the Secretary of the Interior, and by the latter to the President and by the President to Congress, for the years mentioned, are treated as having been offered and received in evidence subject to any objection of the parties that the same or any part thereof may be irrelevant and immaterial, and that for the purpose of showing the use made by Congress of these reports and for the further purpose of show-

ing whether the fact that lands were sold by the Company for prices in excess of $2.50 per acre was considered by Congress or any of the Committees thereof, and if so to what extent, it is stipulated that all parties may refer generally to the Reports of Congressional Committees, Congressional debates, and other proceedings shown by the Congressional Globe or Congressional Record, and other recognized official reports; subject to the right to object to all or any part of the same as incompetent, irrelevant and immaterial, but that no objection as to competency shall go to the identification of the same.

All Committee Reports and debates in Congress as appearing in the official printed copies of the Congressional Globe or Congressional Record, and all other proceedings in Congress which appear in any recognized official reports, relating to the enactments of the Acts of Congress approved July 25, 1866, June 25th, 1868, April 10th, 1869, May 4th, 1870, January 31st, 1885, and September 29th, 1890, referred to in the pleadings, are stipulated as having been offered and received in evidence subject to any objection for incompetency, irrelevancy and immateriality, but no objection as to competency shall go to the identification thereof.

"Exhibit 16 to Stipulation" (Vol. IV, pp. 1725–1729, Record) contains a correct statement of the stock quotations therein set forth, showing the quotations of Central Pacific Railroad Company stock and bonds, Eastern and Foreign markets.

All of the foregoing facts have, in substance, been stipulated by the parties—the United States, the

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and the Union Trust Company, individually and as trustee. (Vol. IV, pp. 1552–1731, both inclusive, Record.)

From the oral testimony and exhibits introduced upon behalf of the parties, the following facts, among others, appear:

The Act of June 25, 1868, was passed at the request of the West Side Company.

The Act of April 10, 1869, was introduced at the request of the East Side Company.

Two days after the approval of this act of April 10, 1869, John H. Mitchell, as attorney for the East Side Company, addressed a letter to the Secretary of the Interior reciting the terms of the Acts of July 25, 1866 and April 10, 1869, concerning the time for filing assent, in which he said:

> "This assent will be presented for filing as soon as I can return to Oregon and have a resolution for that purpose adopted by the company."

At a meeting of the stockholders and board of directors of the East Side Company held on March 28 and 29, 1870, that Company was dissolved.

In October, 1880, the stockholders of the Oregon Central Railroad Company (East Side Company) by resolution approved the conveyance to the Oregon & California Company, and passed the following resolution:

> "Resolved, that this company, the Oregon Central Railroad Company be, and the same is hereby, dissolved, to take effect on the transfer

of the property of this company and the settling of its business."

No lands were patented to the West Side Company under the Act of 1866.

All applications for patents filed with the Government by the Oregon & California Railroad Company requested that the patents be issued to it as the successor and assignee of the East and West Side Companies respectively.

The mortgage held by the Union Trust Company is guaranteed by the Southern Pacific Company. The amount due thereon is $17,745,000. In addition to the lands in controversy, the mortgage covers 660 miles of railroad lines, and other property of the Oregon & California Railroad Company. This road was worth, at the time the mortgage was given, $50,000 per mile, and is worth more now.

The West Side Company commenced construction on April 15, 1868, and the East Side Company the next day. (Vol. IV, p. 1760, Record.) During the year 1868 the West Side Company built the big bridges on the first five miles, and graded the first five miles of track. (Vol. IV, p. 1760, Record.)

The circular identified as Government's Exhibit No. 104, being an address to the people of Oregon by the East Side Company, was issued May 1, 1868 (Vol. IV, p. 1766; Vol. X, p. 5158, Record). It was sent to a great many people all over the Willamette Valley. This circular purports to be issued by the directors of the East Side Company and gives the capital stock of the company, the estimated actual cost of the road, the proposed issuance of first

mortgage bonds, and a history of the organization of the company, and the controversy with Joseph Gaston, and his action in attempting to procure the designation of the West Side Company by the legislature on October 10, 1866; also a history of the litigation between the two companies as to the use of the name, and replies to a circular issued from Portland, of date January 1, 1868, issued in the name of J. Gaston, President, and W. C. Whitson, Secretary, of the West Side Company, which it was claimed was unauthorized; also the recital that at that time two lawsuits were pending, one commenced by Gaston to invalidate the incorporation of the East Side Company, and the other commenced to test the legality of the West Side Company. This paragraph also appears therein:

"The charge has been extensively circulated that we are seeking to defraud the west side of the river of a valuable franchise—of State and Government aid—in answer to which we have only to say, that we recognize that the Act of Congress granting lands, and the Act of the last legislature of Oregon, are both inoperative, from the fact that the terms and stipulations of those Acts have not been, and cannot be, complied with. Any aid to be granted railroad enterprises in Oregon must be re-enacted by both the State and General Government, and we have no hesitation in affirming that we claim no grants, privileges or rights for our Company we do not desire also extended to the west side of the valley. Our Company has never entertained or expressed any hostility to the West Side road, or deemed its

progress an obstacle in our pathway, but on the contrary, we have often expressed to members of the West Side Company a desire to harmonize our interests, and work to mutual advantage." (Vol. X, pp. 5172-3, Record.)

Mr. Gaston testified (Vol. IV, p. 1777, Record), that when Mr. Reed came back from Washington and failed to get the legislation in shape, which he wanted, or "prevent the legislation of the East Side Company," the West Side Company abandoned the contract with S. G. Reed & Company, and it was apparent to Gaston then that they would not be able to build the road in time, that is, the first section of its railroad, in compliance with the Act of Congress. Subsequently they took steps to get another land grant. Gaston further testified (Vol. IV, p. 1795, Record) that the Board of Directors represented the West Side Company, and it was decided to apply for a new grant, without any reference to the old grant. It was simply concluded that the company never could earn the grant nor get it, and the thing to do was to get a new grant, if possible; also that he went to Washington in December, 1869, and at that time the conclusion was that the West Side Company was unable to comply with the Act of Congress, and from that they assumed that they had lost the grant. The West Side Company was unable to build its first twenty miles before December 24, 1869, within the time required by the Act of June 25, 1868, and he and his associates thought the grant was lost. (Vol. IV, p. 1812, Record.) It also appears from the testimony that the controversy be-

tween friends of the East Side Company and the West Side Company entered into the state election in June, 1868, and that there was a geographical division, the West Side counties as far south as Benton, favoring the West Side Company, and the East Side counties, as far south as Lane, favoring the East Side Company, and the Southern Oregon counties favoring the East Side Company, and the rest of the state more or less divided.

It was stipulated that the court should take judicial notice of the pleadings, records, files, and proceedings in each of the suits in equity referred to in Exhibit No. 10 of the Joint and Several Answer of the defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage. (Vol. IV, p. 1902, Record.)

On January 19, 1869, Geo. H. Williams, United States Senator from Oregon, addressed to Secretary of the Interior O. H. Browning, a letter of that date (Vol. IV, pp. 1910–11, Record), calling the attention of the Secretary to the Act of July 25, 1866, and enclosed with his letter a pamphlet entitled "Statement of Facts," which purported to set forth the rights and claims of the East Side Company, and also enclosed a paper signed by nine members of the Oregon Senate, protesting against the action of the legislature in October, 1868, in which the rights and claims of the West Side Company, designated in October, 1866, are fully stated. In the course of that letter Senator Williams says: "I have nothing to say as to the rights or claims of either company, but in view of the fact that the Articles

of Incorporation of the West Side Company were not filed in the office of the Secretary of State until after its designation by the legislature in 1866, and in view also of the fact that the East Side Company cannot file its assent as required by the Sixth Section of said Act, I am apprehensive that the benefits of said Act will be wholly lost to the State unless something is done to prevent it. Will you be good enough to advise me if there is anything in the action of your Department or the views you entertain of this matter making unnecessary the proposed legislation."

To this letter Secretary Browning, on January 20, 1869, replied (Vol. IV, pp. 1912–14, Record). In that letter Secretary Browning acknowledged receipt of the letter of Senator Williams, and copy of S. Bill 770, to amend "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon, approved July 25th, 1866," with other papers relating to the subject. After discussing the provisions of the Act of July 25, 1866, Secretary Browning says:

"By a resolution adopted by the Legislature, October 10, 1866, the Oregon Central Railroad Company was designated to locate and construct said road in Oregon. Two companies called the Oregon Central Railroad Company claimed to have been so designated. These it appears are locally called the East Side Company and the West Side Company. At the date of the adoption of said resolution by the legislature, neither company had been organized as

required by the laws of Oregon. The West Side Company, however, filed its assent with this Department within the year.

"By a resolution adopted by the legislature in October, 1868, the East Side Co. was designated. The purpose of the bill as understood, is to authorize this company to file its "assent" without prejudice to the rights or interests of the other company, and you ask for an expression of my views as to whether there is any necessity for the proposed legislation. In reply I have the honor to state, that as the matter now stands, the grant so far as the portion of the road in Oregon is concerned, has lapsed, while the grant for that portion of the road situate in California is still in force, and some legislation by Congress is necessary to revive the grant for the Oregon portion of the road. The proposed bill, if it becomes a law, will, in my opinion, accomplish that purpose.

"On the 13th instant, I declined to act upon maps filed by the West Side Company, 'in the absence of a judicial decision as to the rights of the claimants, or some action by Congress upon the subject.' "

It is admitted that by a letter dated January 20, 1869, Joseph Gaston transmitted to the Secretary of the Interior a copy of Government's Exhibit No. 106, entitled, "Inside History of the Oregon Central Railroad Company," which was filed in the office of the Secretary of the Interior on March 15, 1869. (Vol. IV, p. 1884, Record; Government's Exhibit No. 106, Vol. X, pp. 5228-5291, Record.) This document was so filed, and bears date January 9, 1869, and purports to be a document authorized by

the Board of Directors of the West Side Company at its meeting of December 28, 1868. It was prepared by Joseph Gaston, President of the West Side Company. After stating the reasons for its issuance, it contends that the West Side Company is legally and equitably entitled to the grant, and that the East Side Company has no legal or equitable rights thereto; that the East Side Company was not legally incorporated, and that it has been repudiated by the people of Oregon, and that its advocates have admitted the priority of the rights of the West Side Company. This document sets out a copy of the letter of Secretary Browning of date July 17, 1868, addressed to A. M. Loryea, which acknowledges the receipt of a letter from A. M. Loryea of July 16, 1868, enclosing a certified copy of a resolution purporting to be an acceptance by the East Side Company of the grant made by the Act of July 25, 1866, and that the Secretary refused to file the same because by law the company was required to file an "assent" to its terms and conditions within one year, and that time expired July 25, 1867.

On April 29, 1868 (Vol. X, p. 4996, Record) the East Side Company adopted the following resolution:

"Resolved, That the O. C. R. R. Company hereby accepts any grant of land which may have been made, or may be extended to said Company and our agent, A. M. Loryea, is hereby fully empowered to present a duly certified copy of this Resolution to the proper authorities as provided by Law to be filed."

On June 9, 1868, the East Side Company adopted

the following resolution:

"Resolved, That the O. C. R. R. Co. hereby accepts any grant of land which may have been made, or may be extended to said company by Congress. And the officers of this company are hereby directed to file a duly authenticated copy of this resolution with the Secretary of the Interior, Washington, D. C." (Vol. X, p. 5003, Record.)

On November 25, 1868. the East Side Company adopted the following resolution: (Vol. X, p. 5026, Record.)

"Whereas, the Legislature of the State of Oregon, at its late session in October, 1868, by Joint Resolution designated "The Oregon Central Railroad Company," of Salem, Oregon, Incorporated April 22nd, 1867, under the laws of Oregon, as the Company to take, manage and control the Land Grant given in aid of the construction of a railroad and telegraph line from Portland, Oregon, southerly through the Willamette, Umpqua and Rogue River Valleys, by Act of Congress of date July 25th, 1866;

"And Whereas, such legislature failed to designate any company until after the expiration of one year from the date of the passage of said Act of Congress,

"Therefore, Resolved that this company, The Oregon Central Railroad Company of Salem, Oregon,—organized April 22nd, 1867, does hereby accept such grant, and does assent thereto, upon the terms and conditions specified in said Act of Congress of July 25th, 1866, granting aid as aforesaid; and, resolved further,

"That the Secretary of this company be and he is hereby instructed to prepare a true and certified copy of this preamble and resolution, together with a certified copy of such Joint Resolution, being known as Senate Joint Resolution No. 16, under the seal of this company, and forward the same forthwith to the office of the Secretary of the Interior, and have the same filed in such office as the assent of this Company to the grant aforesaid."

And on the same day adopted the following resolution:

"Whereas, J. H. Mitchell, the attorney of this corporation, has proposed without charge or expense to this company to go East and represent this company before Congress and the Departments at Washington City, therefore

"Resolved, that J. H. Mitchell be and he is hereby authorized and empowered to represent this corporation and its interests as agent and attorney thereof, before the Congress of the United States, and the Departments at Washington, to the end that all necessary legislation by Congress and action by such Departments may be had in order to secure and promote its interests."

On July 16, 1868, A. M. Loryea wrote to Secretary Browning, enclosing therewith a certified copy of resolution of the East Side Company, as follows: (Vol. XIV, page 7454, Record.)

"Office of the
Oregon Central Railroad
Company.

Salem, April 30, 1868.

This is to certify that at a regular meeting of the Board of Directors of the Oregon Central Railroad Company, held at the office of the Company, Salem, April 29th, A. D. 1868, the following was passed as the unanimous action of said Board of Directors:

'Resolved, That the Oregon Central Railroad Company hereby accepts any grant of land which may have been made, or may be extended to said Company, and our Agent, A. M. Loryea, is hereby fully empowered to present a duly certified copy of this resolution to the proper authorities as provided by law to be filed.'

Witness my hand and the seal of said corporation this the day and year above written.

(Seal) S. A. CLARKE,
Secretary O. C. R. R. Co."

Secretary Browning replied, July 17, 1868, as follows: (Vol. XIV, page 7440, Record.)

"Department of the Interior
Washington, D. C., July 17, 1868.

Sir:

I have received your letter of the 16th instant and accompanying paper, purporting to be an acceptance by the Oregon Central Railroad Company of the grant made by the Act of July 25, 1868.

By law the Company was required to file an 'assent' to its terms and conditions, within one year. That time expired July 25, 1867, and this paper, if

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sufficient for that purpose, could not now be received.

I state for your information that J. Gaston, President of the Oregon Central Railroad Company, within the time prescribed in the act filed an assent which was received.

In compliance with your request I inclose a copy of my letter of the 8th instant to Mr. Gaston in regard to maps to be filed in this Department.

Very respectfully,

Your obt. servant,

A. M. Loryea, Esq., Present.

O. H. BROWNING, Secretary."

"It was stipulated by and between the parties that the Court may take judicial notice of the decisions of the Secretary of the Interior and the Commissioner of the General Land Office, and the rules and regulations of the Land Department, of the reports of either of these officers to Congress, and the reports of any committee of Congress and the action of Congress thereon; subject to the objection that may be made by either party to the same, or any thereof, as incompetent, immaterial, or irrelevant, or any other objection which might legally be interposed, it being intended to waive the actual production of these documents, to save expense, and the incumbering of the record." (Vol. V, page 2531, Record.)

Also:

It was stipulated between the parties that the Court in any stage of this case until and including a final hearing in the Supreme Court of the United States, if the case shall reach that court, shall take

judicial notice of all proceedings had in and final disposition of the forty-five suits against purchasers referred to in the "Stipulation as to the Facts," including issuance of patents to the lands therein described when issued, if any shall be issued, which stipulation, it was agreed, was subject to the objection on the part of complainant that the evidence is immaterial and irrelevant." (Vol. V, pages 2530–1, Record.)

Also:

"It was stipulated that the Central Pacific Railroad Company completed the construction and equipment of the California and Oregon Railroad from Chico to the south boundary line of Oregon in several sections, all on or before June 20, 1888; that the said entire constructed railroad was examined by commissioners appointed for the purpose and favorably reported on by them; that such report was submitted by the Secretary of the Interior with his favorable recommendations to the President, and such recommendations approved by the President, all on or before November 8, 1889." (Vol. V, pages 2630–1, Record.)

Also:

"It was further stipulated by and between the parties that the following documents were recorded, in the manner provided by law, in the Records of Deeds and Mortgages of Multnomah County, Oregon, at the dates hereinafter mentioned, and thereafter, and about the same time, in the Records of Deeds and Mortgages of the other counties of Oregon in which

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any part of the lands involved in this suit are situated, to-wit:

Oregon and California Railroad Company to Faxon D. Atherton and Milton S. Latham, of date April 15, 1870, recorded April 16, 1870, at page 745, Book C, of the Records of Mortgages of Multnomah County, Oregon;

The Oregon Central Railroad Company to Milton S. Latham and Faxon D. Atherton, Trustees, of date July 15, 1871, recorded at page 132, Book E, of the Records of Mortgages of Multnomah County, Oregon, October 14, 1871;

The Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, of date April 15, 1870, recorded at page 727, Book K, of the Records of Deeds of Multnomah County, Oregon, April 18, 1870;

Oregon and California Railroad Company, Richard Koehler, Heinrich Hohenemser and others, to Klaas Van Oterendorp and Philip N. Lilienthal, Trustees, of date January 1, 1881, recorded February 28, 1881, at page 346, Book X, of the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Henry Villard, Horace White and Charles Edward Bretherton, Trustees, of date June 1, 1881, recorded August 18, 1881, at page 1, Book 27, of the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, Trustees, of date June 2, 1881, Recorded September 13, 1881, at page 179, Book 27,

of the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company and Robert Davie Peebles, George H. Hopkinson and Patrick Buchan, to Farmers Loan and Trust Company, of date May 26, 1883, recorded at page 33, Book 41, on that date, in the Records of Mortgages of Multnomah County, Oregon;

Oregon and California Railroad Company to Union Trust Company of New York, of date July 1, 1887, recorded January 20, 1888, page 287, Book 63, of the Records of Mortgages of Multnomah County, Oregon;

Deed executed by Oregon Central Railroad Company to Oregon and California Railroad Company, of date March 29, 1870, recorded April 14, 1870, page 702, Book K, of the Records of Deeds of Multnomah County, Oregon;

Deed of Oregon and California Railroad Company, Milton S. Latham, Faxon D. Atherton and William Norris, to European and Oregon Land Company, of date March 28, 1871, recorded page 223, Book N, of Records of Deeds of Multnomah County, Oregon, April 4, 1871;

Deed from the European and Oregon Land Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, and others, of date July 25, 1874, recorded page 264, Book Z, of the Records of Deeds of Multnomah County Oregon, on January 4, 1875;

Deed from Oregon Central Railroad Company to Oregon and California Railroad Company, of date

October 6, 1880, recorded at page 555, Book 42, Records of Deeds of Multnomah County, Oregon, on October 6, 1880.

It is further stipulated and agreed that either party may at any time furnish a certified copy of either of said documents herein above set out, and the same shall be admitted in evidence subject to any objection that the same is incompetent, irrelevant or immaterial; and this stipulation is made subject to any objection that either party may desire to make to the same, or any part thereof, as incompetent, irrelevant or immaterial. These certified copies are in evidence.

It is further stipulated that, with respect to all of the conveyances, deeds of trust, mortgages and other documents above described, such proceedings were had that at the time of the filing of the bill of complaint, and at all times subsequent thereto, no parties had any right, title, or interest in or to, or lien upon, any of the lands involved in this suit, other than the defendants herein; the sole purpose of this portion of the stipulation being to avoid any question of defect of parties defendant.

It is further stipulated that the court may take judicial notice of the pleadings, proof and final decree in the cases of United States v. Oregon and California Railroad Company, John A. Hurlburt and Thomas L. Evans; and United States v. The Oregon and California Railroad Company and Oregon Central Railroad Company—the latter named case commonly known as the "Quadrant Case"; and both of which cases reached the Supreme Court of the United

States; and that either party, without being compelled to produce the records, may refer to any part of said record, including all pleadings, stipulations of fact, and other proceedings in each of said suits, subject to any objection that the same may be incompetent, irrelevant or immaterial, all parties reserving the right to introduce at any time to complete the record a certified copy of such pleadings, papers, stipulations, decrees or other proceedings in either of said cases, or any thereof, subject as aforesaid to any objection of either party that the same may be incompetent, irrelevant or immaterial.

It is further agreed between the parties hereto that the stipulations of fact signed by the parties in said causes were prepared by the attorneys for the defendants therein, and submitted to the Attorney General, who signed them." (Vol. V, pages 2531 to 2535, Record.)

"It was stipulated between counsel for the respective parties that Deed No. 2046, of date July 3, 1893, consideration $1,958.82, was executed pursuant to contract No. 1804, of date Feb. 16, 1883, executed to A. C. Cunningham; and that the deed of date March 14, 1892, executed by Oregon and California Railroad Company to the City of Portland for the Northwest quarter of the Southwest quarter and the Southwest quarter of the Southeast quarter of Section 23, Township 1 South, Range 4 East, W. M., and the North half of the Southwest quarter of Section 5, Township 2 South, Range 5 East, W. M., containing 160 acres, was executed pursuant to contract No. 3827, but date of contract is not given in deed and date is

unknown to counsel at this time.

It was further stipulated that at a meeting of the Water Board of the City of Portland of April 7, 1891, a committee was appointed to investigate these contracts and find out the amounts due, and the chairman, Henry Failing, reported that the amount necessary to pay off contracts was $8,532.84; whereupon warrants were drawn for this amount, but deeds were not delivered until two years later, on account of final payments required according to the following memorandum, which appears on an envelope in the handwriting of Superintendent Dodge of the Water Board of the City of Portland:

Amounts paid O. & C. R. R. Co. by City of Portland:

April 17, 1891.....	$5,958.69	
	2,574.15	$ 8,532.84
May 18, 1893.....	$ 522.05	
	490.00	
	102.80	1,114.85
	222.30	
	208.65	
	33.00	463.95
		$10,111.64"

(Vol. V, pages 2542–2543, Record.)

Up to April 27, 1914, decree of forfeiture had been entered as against the purchaser, grantee defendant, in twenty-eight of these forty-five so-called "innocent purchaser" suits, pursuant to the Act of August 20, 1912 (37 Stat. 320), and an order of dismissal entered against the defendants-appellants herein, in each of

these suits, the defendants, now the appellants herein, neither objecting to nor consenting to such orders of dismissal as shown thereby. Under these decrees thus entered, the different purchasers have paid to the United States, pursuant to the Act of August 20, 1912, $852,219.95, at the rate of $2.50 per acre, and patents have been, or will be, issued therefor. There remained on the 27th day of April 1914, seventeen suits awaiting like decree excepting that in suit No. 3464 involving 6463.72 acres, the Southern Pacific Company was the grantee purchaser of the lands involved therein, and in view of that fact, this suit stands upon demurrer to the Bill of Complaint, awaiting final determination of the appeal in the main case, although there is no express stipulation to that effect. The Southern Pacific Company paid for these lands $248,126.86 (Vol. XIII, p. 6699, Record).

Government's Exhibit 100–A (being all of Volume IX, Record) consists of the Minute Books of the West Side Company, beginning with the first meeting of the stockholders May 24, 1867, and ending with the last meeting of the Board of Directors May 23, 1895. The minutes show a communication from Ben Holladay, as President of the Willamette Valley Railway Company, of date August 15, 1870, proposing to purchase all the right, title and interest of the West Side Company in and to the lands granted by the Act of May 4, 1870, a resolution of the Board accepting this proposition (Vol. IX, pp. 4425–7, Record), the action of the directors April 17, 1871, accepting retransfer from Willamette Valley Railway

Company on that date to the West Side Company of the lands granted by the Act of May 4, 1870; a copy of deed of that date from the Willamette Valley Railway Company to the West Side Company (Vol. IX, p. 4457, Record); copy of mortgage of July 15, 1871, executed by the West Side Company to Milton S. Latham and Faxon D. Atherton (Vol. IX, p. 4477, Record). A statement is made in the minutes that a copy of the resolutions authorizing the sale and conveyance of the property of the West Side Company, including all lands granted under the act of May 4, 1870, was forwarded to the Secretary of the Department of the Interior at Washington, D. C.,—presumably mailed on or about August 15, 1870, (Vol. IX, p. 4430 Record); and that a like copy of the resolution accepting the transfer and conveyance made by the Willamette Valley Railway Company on April 17, 1871, to the West Side Company, was also forwarded to the Secretary of the Interior at Washington, D. C.—presumably about that date (Vol IX, p. 4456, Record).

This exhibit also shows that on October 6, 1880, the West Side Company accepted the proposition of the Oregon & California Railroad Company to purchase all of the property of the former company (Vol. II, pp. 4869–72, Record), and that a deed on that date, conveying all the property of the West Side Company to the Oregon & California Railroad Company, including the lands granted under the Act of May 4, 1870, was authorized, which deed it is stipulated (Vol. IV, p. 1561, Item 5, Record) was on that date executed by the West Side Company, and delivered to

the Oregon and California Railroad Company—a correct copy of which is Exhibit "C" to the Bill (Vol. I, pp. 126–131, Record), and a certified copy of which was filed with the Secretary of the Interior October 20, 1880.

Government's Exhibit 100–B (Vol. X, pp. 4893–5145, Record) consists of the minute books of the East Side Company, together with its stock book, and shows, among other things, the adoption of the resolution authorizing the construction contract of April 23, 1867, with Albert J. Cook (Vol. X, p. 4906, Record), under which A. J. Cook & Co. contracted to construct the first 150 miles of the East Side road. This exhibit also shows a communication from Ben Holladay & Company of date September 7, 1869 (Vol. X, pp. 5059–61, Record), as to purchase of the properties of the East Side Company; the action of the Board of Directors upon the proposition of Ben Holladay & Company of date March 28, 1870, as to settlement with the East Side Company; the offer of the Oregon and California Railroad Company of date March 28, 1870, to purchase the properties of the East Side Company, including its land grant. (Vol. X, p. 5083, Record); the agreement between the East Side Company and the Oregon and California Railroad Company of that date, and the resolution of that date authorizing the sale and transfer of the property of the East Side Company to the Oregon and California Railroad Company (Vol. X, p. 5107, Record). It appears also therefrom that on March 28, 1870 (Vol. X, pp. 5120–1, Record), the Board of Directors

of the East Side Company adopted the following resolution:

"Resolved, that the President and Secretary of this Company be and they are hereby instructed to communicate to the Secretary of the Interior, the fact that this Company has sold, assigned, transferred and conveyed to the "Oregon and California Railroad Company," of Portland, Oregon, all its right, title and interest, in and to the lands franchises and benefits granted to the "Oregon Company by the Act of Congress of July 25th, 1866, and amendments thereto, granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon."

The conveyance executed by the East Side Company of date March 29, 1870, to the Oregon and California Railroad Company, is referred to in the Bill of Complaint and made a part thereof, as "Exhibit B" (Vol. I, pp. 93–125, Record), and it is stipulated (Item 17, Vol. IV, p. 1558, Record), as hereinbefore set out, that this deed was on that date delivered to the Oregon and California Railroad Company, and recorded in the office of the County Recorder of the several counties in which was situated any part of the lands granted by the Act of Congress July 25, 1866; and that the Oregon and California Railroad Company, on April 4, 1870, adopted a resolution, reciting the purchase under this deed of all the property of the East Side Company, including the lands granted under the Act of July 25, 1866, and amendments thereto, accepting the grant conferred thereby, directing its President and Secretary to file the assent of

the company thereto in the office of the Secretary of the Interior by filing a copy of the resolutions certified under the seal of the company and signed by the President and Secretary respectively, and therewith a copy of the deed, and that on April 28, 1870, the Oregon and California Railroad Company filed in the office of the Secretary of the Interior an authenticated copy of this resolution and a certified copy of the deed of March 29, 1870 (Vol. I, pp. 26–28, Record).

On October 6, 1866, George L. Woods, Governor of Oregon, in his special message to the Legislative Assembly (Government's Exhibit No. 101, Vol. X, pp. 5146–5150, Record) says:

"With a railroad running through the Willamette Valley, and via Oakland, Roseburg, Jacksonville and Yreka, to and connecting with the Central Pacific Railroad in California—thus putting ourselves in direct and speedy communication with the City of San Francisco, and the demands of our sister State, in which we have a community of interest—we should reap a benefit which cannot well be estimated. * * * In his biennial message for the year 1864, my predecessor called the attention of the Legislature to the route first above named, and forcibly enumerated the advantages to be derived from such an enterprise; and, in accordance with the suggestions, an Act was passed, the effect of which was to aid in its construction. (Session Laws 1864, page 76.) But the amount provided for was so meager as to offer no inducement to capitalists for investment. * * * Your attention is called to an Act of Congress of July 25, 1866,

donating twenty sections of the public lands for each mile of Railroad and Telegraph to be constructed from the City of Portland, Oregon, to and connected with the Central Pacific Railroad, in California, which lands are to be selected within thirty miles on either side of said road. This grant, though quite liberal is wholly inadequate and will not, by itself, afford sufficient security to insure investment. Capital for the completion of this great work must come from abroad, and good policy requires that we should hold out inducements for investment. I am happy to be able to communicate to you that capitalists controlling ample means for the construction of the entire road proposed, are now ready, and have signified their willingness to invest in the great enterprise as soon as the legislation necessary for such an investment can be had. * * * Under the General Incorporation Act, a corporation is about to be organized to be known as "The Oregon Central Railroad Company," composed of some of the most responsible and energetic business men of the state, whose purpose it is, if they can meet with proper encouragement, to immediately begin this great work. And I take the liberty to suggest that it would be well to make provision, by immediate enactment, by which through the above named corporation the State shall be able to reap the benefits of the liberal domations by Congress, and also to make provision for the payment of the interest on the bonds of the Company, necessary to construct and put into operation, the first section of twenty miles of the road. * * * A railroad is a public necessity. The farmers need it;

the mechanics need it; the merchants need it; all classes need it."

On January 1, 1868 (Government's Exhibit No. 102, Vol. X, pp. 5151–2, Record), the West Side Company issued a circular in the name of its officers, among other things stating:

"1st. The Oregon Central Railroad Company was incorporated and organized at the session of the Legislature held in September 1866, and received valuable grants of U. S. land, and interest on bonds from the State of Oregon. Since that time it has duly filed its papers in the office of the Secretary of the Interior at Washington, D. C., and is now engaged in the location and construction of its railroad, having large subscriptions of home means."

On May 1, 1868 (Government's Exhibit No. 102, Vol. X, pp. 5153–7, Record), the directors of the West Side Company issued another circular which it is stated was sent everywhere, among other things stating the following:

"1st. The original "Oregon Central Railroad Company" was the only corporation in this state entitled to use this name, was incorporated under the General Incorporation Act of this state, at the session of our legislature for the year 1866; and at that time went before the legislature then in Salem, and procured the passage of House Joint Resolution No. 13, which designates this company to receive all the land, and all the benefits of an Act of Congress, entitled, "An Act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California, to Portland,

Oregon," so far as the land grant is located in Oregon. (This Act of Congress gives the Company about three million acres of land.) Our Company has filed the necessary papers in the Department of the Interior at Washington, and has been officially recognized by the Secretary of the Interior. The legislature of our state, at the same session named, passed an Act pledging the state to pay interest on one million dollars of our bonds for twenty years. After receiving three grants from the state, and the recognition of our rights to the land grant, by the Secretary of the Interior, we commenced surveying our line of road upon the west side of the Willamette River, and solicited subscriptions to the capital stock of the Company, and we now have subscriptions and donations of land, cash and other valuable property in aid of the road, amounting in value to near $300,000. In February last, the City Council of the City of Portland, upon the petition of nine-tenths of the voters of the City, passed an Ordinance, binding the City to pay interest on $250,000 of our bonds, for twenty years, all deliverable on the first twenty miles of road. In March last the County Commissioners of Washington County, upon the petition of four-fifths of the farmers, entered into a contract, obligating the County to pay interest on $50,000 of our bonds. On the 15th ult. we 'broke ground' in the commencement of our work, and a force is rapidly pushing the work. We submit that these facts, showing our standing at home, should give us a fair name abroad."

Government's Exhibit No. 105 (Vol. X, pp. 5176–5227, Record) purporting to be a "Statement of

Facts" relative to the incorporation and organization of the Oregon Central Railroad Company of Salem, Oregon, incorporated April 22, A. D. 1867, and reasons why such company is entitled to the benefit of the land grant given by Congress in aid of a railroad and telegraph line from Portland, Oregon, southerly through the Willamette, Umpqua and Rogue River Valleys, to the Central Pacific Road, in California, passed July 25th, 1866, and also why no other company has any legal or equitable right thereto, and printed at Portland, Oregon, by Carter & Himes, Book and Job Printers, 1868, concludes with the following statement:

"We do, therefore, feeling implicit confidence in the enterprise in which we are engaged, and in the justness of our claim to the Congressional land grant, most respectfully submit this statement of facts, and reasons why "the Oregon Central Railroad Company," of Salem, Oregon, is entitled to the grant referred to, to the exclusion of all others, to all persons, and to all officers and Departments of Government, that may be interested in relation to the same, in having justice and right prevail."

The West Side Company on January 9, 1869, pursuant to the authority of its Board of Directors taken December 28, 1868, replied to this "Statement of Facts," which reply is known in the record as Government's Exhibit No. 106 (Vol. X, pp. 5228–5291, Record). The "Statement of Facts" issued by the East Side Company and known in the record as Government's Exhibit No. 105, appears to have been issued on November 25, 1868, and was prepared

by John H. Mitchell as attorney for the East Side Company, and was undoubtedly prepared prior to the preparation of Government's Exhibit No. 106, purporting to give "the inside history of the Oregon Central Railroad Companies" which was authorized December 28, 1868, and written by Joseph Gaston, President of the West Side Company, who was authorized to prepare and publish a reply to the "recent pamphlet published by the East Side Company." (Vol. X, p. 5228, Record.)

It quotes the opinion of R. B. Boise, the Chief Justice of the Supreme Court, who heard the case brought by the West Side Company against the East Side Company, involving the use of the corporate name, wherein the court says:

"At the time the Act of Congress was passed, neither of the rival companies was in existence, and the objection made to the Resolution of the Legislature could be made with equal force to the Act of Congress; but I think the language of both the Act and the Resolution may as well refer to a company yet to be incorporated as to one already organized. * * * The plaintiff says in its bill that the defendant, through its agents and officers, has represented that it, and not the plaintiffs, is entitled to the benefit to be derived from a compliance with the Act of Congress, to the injury and depreciation of plaintiff's credit. The defendant must be required to answer whether these things be true." (Vol. X, p. 5240, Record.)

It also appears that S. G. Reed, representing the West Side Company, addressed a written remon-

strance to Congress against extending the time for filing assent (Government's Exhibit No. 107, Vol. X, pp. 5292–7, Record), and also submitted in connection therewith (Government's Exhibit No. 108, Vol. X, pp. 5298–5310, Record) objections to the passage of Senate Bill No. 94 to amend the Act entitled "An Act granting lands in aid of a Railroad and Telegraph Line from the Central Pacific Railroad in California to Portland in Oregon," approved July 25, 1866.

In this Remonstrance, (Government's Exhibit 107) Mr. Reed says:

"The Legislature designated the Oregon Central Railroad Company. The company filed its assent to the act, and located, and is now constructing, the road, having already expended about $100,000, and contracted for the completion of one hundred and fifty miles of road. * * * * They (East Side Company), have sought to file an assent to the act of Congress, but the Secretary of the Interior refuses to receive it, on the ground that the time has elapsed, and that the West Side Company had filed in time. They now ask to have the time extended; and against such extension the undersigned, on behalf of the West Side Company, which he represents, respectfully remonstrates. * * * * *

"The undersigned therefore prays that, instead of the pending bill, an act may be passed confirming what the first Legislature had the right to do, and tried to do, and supposed they had done."

The proposed substitute offered by Mr. Reed, which he asked Congress to pass, provided:

"That the joint resolution of the Legislative Assembly of the State of Oregon, of October 10, 1866, designating the Oregon Central Railroad Company to construct the railroad mentioned in the said act of July 25, 1866, was a lawful execution of the power vested in the said Assembly; and that the said company, by filing their assent to the said act on the 6th day of July, 1867, acquired the rights granted by the said act."

His formal objections to the passage of Senate Bill No. 94, known as Government's Exhibit 108, stated among other things, that the bill would infringe the rights of the West Side Company, and while it was not conceded that their rights could be destroyed by legislation, an act of Congress of the kind suggested would destroy the credit of the West Side Company and force the abandonment of the work of construction.

In the course of his objections, Mr. Reed says:

"The letter of Mr. Browning is the chief argument. It accords with the bill. It says the grant has lapsed, and the bill is necessary to revive it. It can only have lapsed because the West Side Company has not, in contemplation of law, been designated. * * * * * *

"The act declares that either the Oregon or California Company, on completing its part of the road and finding the other part incomplete, shall have the right to proceed, with the consent of the State, until the whole is completed. Oregon has already given that consent by its general incorporation law, the terms of which any corporation can easily comply

with. This likewise disposes of the report of the committee, which assigns no reason for the passage of the bill, but the groundless fear that the road will lose the land,

"The title of the company first designated depends on its being, in fact, the one intended by the Legislature, and on its having filed its assent within the time; both of which are conceded. It depends not at all, as has been supposed, on its having at that time performed each and every formal act necessary to acquire the legal quality of a corporation. * * *

"The objection of want of grantee goes to the act of Congress, which contains the grant. The resolution of the legislature only selected a grantee to take a previous grant. That previous grant was void from the beginning if a grantee in being was necessary to its validity. If the grant was good until the grantee was chosen, why not until he qualified himself to take? The objection goes not to length of time, but to any time. Is not an act of Congress which departs from the common law an alteration of the latter for that case and to that extent? And is not this likewise true of an act or resolution of the legislature? And do not such statute laws put aside, for the occasion, all common law obstructions, just so far and just so long as necessary to allow the act or resolution to effect its object? This has never before been questioned."

Senate Bill No. 94 referred to, was introduced by Mr. Williams in the Senate of the United States on March 10th, 1869, by unanimous consent was read twice on that day and referred to the Committee on

Public Lands, and ordered to be printed. As thus introduced, read and offered, omitting title and enacting clause, it read:

"That section 6 of an act entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act."

On March 22, 1869, Senator Williams, for the Committee on Public Lands, reported the bill, and in that report (Vol. X, pp. 5319–5321, Record), among other things, the Committee says:

"Congress ought not to decide between the two companies, because the questions involved are judicial in their nature, and the object of the accompanying bill is to provide so that both companies may have a standing in the courts of Oregon, and there have their legal rights and equities fully examined and adjudicated.

"To declare by act of Congress that the East Side Company shall have the grant would be unfair, for it may turn out upon investigation before the courts

that the West Side Company was legally designated in 1866, in which event that company, for aught that can now be seen, would be entitled to the land.

"To declare by act of Congress that the West Side Company shall have the grant would be equally unfair, for it appears that the East Side Company was organized and made large expenditures upon the ground that the other company was never legally designated, and it ought to have the benefits and advantages of the law in accordance with which it was organized and invested its money.

"It has been suggested that the proposed legislation is unfavorable to the West Side Company, but the bill has been framed so as to obviate that objection as far as practicable.

"If the West Side Company was legally designated in 1866, and it has since done what the act of Congress requires, it has a vested right to the grant, which the bill, if it becomes a law, will not and cannot disturb; but it is unreasonable to insist that because the company has failed to secure the grant, the State ought therefore to lose it.

"Both companies claim, and it may be that both have been designated by the Legislature, and if both are allowed to file their assent, as required by the sixth section of the act of Congress, it is made certain not only that one of the companies will get the grant, but that it will be used for railroad purposes, in which the State has more interest than in the fortunes of either company."

On January 13, 1869, Secretary Browning wrote to Senator Williams a letter, advising that he had

received his letter of January 11th asking that certain maps filed by J. Gaston might be accepted by the Department. Secretary Browning in reply thereto says:

"In reply, I have to state that, as there are two companies of the same name claiming, under the laws of the State of Oregon, the benefit of the grant made by said act of 1866, I must decline, in the absence of a judicial decision as to the rights of the claimants, or some action by Congress upon the subject, to comply with your request."

On June 27, 1872, Joseph S. Wilson, former Commissioner of the General Land Office, and then President of the European & Oregon Land Company, wrote a letter to Attorney-General Williams, formerly United States Senator from Oregon, calling his attention to the Act of July 25, 1866, and the amendatory act of April 10, 1869, and enclosed with this letter the opinion of S. M. Wilson of date November 11, 1871, addressed to Joseph S. Wilson as President of the European & Oregon Land Company (Government's Exhibit No. 109, Vol. X, pp. 5322–5363, Record). There was enclosed also therewith Document "A," which was a certified copy of the deed to be executed by Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, to the European & Oregon Land Company, to be joined in by the Oregon and California Railroad Company, purporting to convey to the European & Oregon Land Company the lands granted by the Act of July 25, 1866, subject to the terms and provisions of that certain trust deed executed by Oregon and California Rail-

road Company to Milton S. Latham, Faxon D. Atherton and William Norris as Trustees, recorded at pages 727 to 734, both inclusive, Book "K" of the records of Deeds of Multnomah County, Oregon, which trust deed was dated April 15th, 1870. This proposed conveyance was authorized by the Board of Trustees of the European & Oregon Land Company on March 27, 1871, and Document "A" is a copy of the minutes of the European & Oregon Land Company.

These documents were transmitted by Mr. Wilson in his letter of January 27, 1872, to Ben Holladay, and in that letter Mr. Wilson says:

"The Company have adopted the opinion (transcript herewith)—which has been given by the Counsel:—regarding the principles therein enunciated as just and proper, and as realizing the purposes of the grant. In order, however, that there may be a full understanding with the Executive Department of the Government, so that proceedings in disposal of the lands, may in all respects be harmonious and concurrent, it is requested that you will bring the matter to the attention of Attorney-General Williams, who is thoroughly conversant with the subject; to the end that he may request the Secretary of the Interior to dispatch an affirmation of the principles referred to, which the company would be gratified to have in the form suggested, by the draft of a letter, which I enclose herein, addressed to myself."

The Secretary of the Interior was asked to advise as follows:

"The Department has considered the papers you

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referred from the European and Oregon Land Company, in right of the Oregon and California Railroad Company, under the grant in Western Oregon, by Act of Congress approved 25th July, 1866, (Statutes Vol. 14, page 239)—and the Amendatory Act of 10th April, 1869, (Stat. 1869, page 47)—and is satisfied that the construction given by the said Company is just and proper, to the effect that all actual settlers on the odd sections from 25th July, 1866, the date of the Original Grant, and all those who went on the odd sections from that date to the passage of the Act of 10th April, 1869—and all others who are found on such odd sections when the line of the railroad is surveyed and established, are protected; and have the right to purchase, each one, not exceeding one hundred sixty acres, at two dollars and fifty cents per acre—but that in regard to all other persons, the Original Absolute Grant, by Act of July 25th, 1866, is in full force and effect, and authorizes the Company to sell on such terms as may be reasonable and just to all parties without any restriction."

Attorney General Williams, on April 20, 1872, transmitted these papers to the Commissioner of the General Land Office, who, under date of June 14, 1872, advised the Attorney General that the papers were submitted to the Secretary of the Interior, as advised in the letter of the Commissioner of date April 20, 1872, to the Attorney General, and the Commissioner enclosed with his letter of June 14th, a copy of the opinion of the Secretary of the Interior of date June 5, 1872, wherein Secretary Delano stated that he was of the opinion that

"the proviso means just what it says. 'That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.' The legislative intention was plainly to prevent the lands from being held for speculative prices and disposed of in larger quantities to other than actual settlers; and to limit the proviso's operation to those on the lands granted at or before the survey of the road would, in my judgment, utterly defeat such intention."

In the opinion of S. M. Wilson of date November 11, 1871, to Joseph S. Wilson, President, European and Oregon Land Company, there is a review of the Act of Congress of July 25, 1866, and of April 10, 1869, and a statement that on March 28, 1871, the Oregon and California Railroad Company sold its interest in the grant to the European and Oregon Land Company at the rate of $1.25 per acre for actual settlement, and he was asked his legal opinion in response to the following question:

"Are the rights of the European and Oregon Land Company in view of their purchase of the landed interests of the Oregon and California Railroad Company, so abridged by said Act of 10th April, 1869, as to restrict them in making sales, to $2.50 per acre, or have they a right, to sell to persons applying as settlers, at such rates as may be fair and reasonable, under the terms of the Original Grant, which contained no such restriction?"

After discussing the provisions of the various acts,

including the Act of Congress of July 1, 1862, (12 Stat., pp. 489–492), the opinion proceeds;

"We now come to the Act of April 10th, 1869, and must read it not only in view of the Act of 1866, but in the 'light of surrounding circumstances.' We must, therefore, remember that at the time of the passage of the Act of 1866, there was no Company in Oregon, selected by Congress, as the recipient of the powers and privileges conferred. That matter was referred to the sovereign State of Oregon. The Legislature of that State was left to designate a Company. No such designation was made until October 20th, 1868. The Legislature could hardly be charged with neglect. On the contrary, the delay must be attributed to a due regard to the public interests. The Company designated, could be guilty of no neglect, because it could not act until designated. Congress might withdraw its bounty, or change its policy, doubtless, but unless it very clearly indicated that intention, a waiver as to mere points of time, would be assumed, where a Company had acted with all due celerity after its designation. The Federal Government, consistently with comity and public policy, could not treat a Sovereign State with disrespect, and therefore would not inflict a penalty on the corporation, because of delay in the action of the State itself.

"The Act of 1869 gives the Company that had been designated by the Legislature of Oregon, the right to file its assent within one year after the Act of 1869, and gives to that filing the same force and effect, to all intents and purposes, as if such assent

had been filed within one year after the passage of said Act of 1866.

"There could have been no motive on the part of the Government, to put the Oregon Company in a less favorable position than the California Company, for the latter, on reaching the State line, could have gone on, under the Act of 1866, with the consent of the Oregon Legislature, and completed the line of road to Portland. The same inducements on the part of the Government to give its aid in 1866, still existed in 1869. The act of 1869, was, therefore, curative in its nature, and waived the literal performance of the acts called for by the Statute of 1866.

"Is it not then clear, that the Act of 1869 was not intended to create any radical change in the Act of 1866? Its primary, and it may be said, only object, was to give to the subsequent filing, of the assent of the Corporation, in the Department of the Interior, the 'same force and effect, to all intents and purposes, as if such assent had been filed within one year after the passage of said Act' of 1866." * *

"If it means that "actual settlers only" can become purchasers from the Company, and that all the lands, far and near, whether at stations, new towns, or important commercial points, are limited to two dollars and a half per acre, then it not only is directly contrary to the whole scope and bearing of the Act of 1866, but repeals by implication, a great part of that Act. All this is done, if at all, not by the plain language of the body of the enactment, but by

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the obscure words of a second proviso." * * * *

"The object is still 'to aid in the construction of the Railroad, etc.' The mandate still remains that 'the land hereby granted shall be applied to the building of said road,' etc. The word 'assigns' is still annexed to the word 'Company.' The great benefit the Government is to have, as secured by Sections 2 and 5, still remains intact. But if the last proviso to the Act of 1869 is to be read literally most of those provisions of the Act of 1866 would be repealed by implication. The Company could no longer sell to the highest bidder, any of its vast acres, could have no auction sale, could not speedily realize, but must await the slow and tedious progress of immigration to an agricultural State. At least a quarter of a century would pass away, yet short and positive is the time within which the road is to be completed and equipped.

"The Secretary of the Interior too, withdraws the Railroad lands from public sale and settlement, as provided in Section 2 of the Act of 1866, and thereafter no bona fide settlement could be made on these lands. The Company could not even mortgage the lands, because a mortgage always contemplates the possibility of a foreclosure, or other enforced payment, in the ordinary way of judicial sentence, with the right of purchase by the creditors. Yet if none could purchase but settlers, and they only to the extent of 160 acres, each, and that too at two dollars and fifty cents per acre, a mortgage is practically and in fact, absolutely prohibited. Such absurd re-

sults could never have been contemplated by Congress; certainly not as the effect of a mere proviso to an amendatory or supplemental Act. * * *

"Looking, then, at the Act of April 10th, 1869, and we find that although the Company designated by the Legislature of Oregon, is given one year after April 10th, 1869, within which to file its assent in the Department of the Interior, yet that Act relates back, and has the same effect as if filed before the 25th July, 1867. Being therefore retroactive, Congress was cautious to prevent a wrong being inflicted upon persons whose rights, had intervened during this time. The first proviso distinctly reserves the intervening rights of Railroad Companies under the Act of 1866, and provides (what was intended by the original Act) that only one Oregon Company should have a grant of lands under those Acts.

"The second proviso carries out the same principle. During the long lapse from July 25th, 1866, the date of the first Act, and April 10th, 1869, the passage of the last Act—settlers had gone in upon portions of these lands, and made their homes, though they had not yet purchased, or pre-empted, or complied with the homestead laws. They were, however, 'actual settlers,' and might have become, in the process of time (had not the Act of 1869 been passed), entitled to pre-emption or homestead rights. Up to April 10th, 1869 no Oregon Company had acquired any right under the Act of 1866; consequently the Secretary of the Interior had not withdrawn, under the Act, the land from market, or settlement. The Act of 1869 operating then retrospectively, these 'actual

settlers' were affected, and consequently were intended to be protected by the last proviso of that Act. Rejecting the single word 'only,' and that proviso becomes plain, viz: 'And provided, further, That the lands granted by the Act aforesaid shall be sold to actual settlers, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.' This would mean 'actual settlers,' at the date of the Act of 1869—or possibly up to the time of the location of the road, after the passage of the Act of 1869.

"The difficulty arises entirely from the use of the word 'only.' But the proviso may, by a slight transposition, give force even to that word; thus making it, that in the case of actual settlers, and in their cases 'only,' the Company would be compelled to let them have a quarter section each, at two dollars and a half per acre. This construction is rational and practical, retains all that is useful, in the original Act, aids the Railroad Company, and yet does justice to the 'actual settler,' who was on the land when the Act of 1869 was passed. * * * *

"In thus construing the Act of 1869, it is made to perform only a similar to that of the proviso in Section 2 of the Act of 1866. That Section after declaring that the 'land which shall remain in the United States, within the limits of the aforesaid grant, shall not be sold for less than double the minimum price of public land, when sold,' goes on to protect by the proviso 'bona fide and actual settlers' under the pre-emption laws of the United States, giving the right to purchase, at the price fixed at the

date of their settlements, and also to protect settlers under the homestead laws, to the extent of eighty acres of the land reserved to the United States.

"The manifest intention of the last proviso, to the Act of 1869 is likewise to protect the 'actual settler' who is deemed to have a claim on the equity and conscience of the Government.

"I am satisfied from the whole scope of both Acts of Congress, and by applying the recognized rules of construction, that the meaning of the proviso of the Act of 1869 is what I have given above, and that the power of the Company to sell is unlimited, as to persons and price, except that actual settlers on the lands on the 10th April, 1869, and possibly up to the time of the location of the line of the Railroad, have the right to purchase one quarter section each at two dollars and fifty cents per acre."

"Government's Exhibit No. 109–D" is a certified copy of the letter of Commissioner Drummond of July 16, 1872, addressed to Attorney General Williams in his official capacity (Vol. X, pp. 5370–5373, Record) in reply to a letter of June 27, 1872, written by Attorney General Williams to the Commissioner. This letter last mentioned is not in the record, and it appears that after diligent search had been made therefor, it could not be found. The contents of that letter can be inferred, however, from the statement made by Mr. Drummond, in his letter mentioned, wherein he says:

"It is stated in your letter that the papers contain no communication to me or to the Secretary of the Interior, asking any action or decision in reference

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to the subject which they discussed. That they were not filed with the view of eliciting any opinion, and that you did not suppose any would be given until some questions were presented which it would be necessary for the Department to decide, etc. You, therefore, ask that the papers may be filed until some question arises, or the parties bring them before me for consideration, or ask for opinion upon the question which they present, and that the opinion which the Secretary has given upon the subject may be withdrawn until some question is raised, making it necessary to pass upon the construction of the Act mentioned, or until the parties interested desire an opinion on the subject. * * * It was not understood that you desired the opinion, but the letter was addressed to you because I viewed you as the medium of communication adopted by the Company. Your request for a recall of the opinion expressed was presented to the Secretary who desires me to state that while he must respectfully decline to formally withdrawn his opinion, yet, in view of your letter, he will be willing at any time, on application, to reopen the case and to have all arguments the Company may desire to present upon the matter."

On May 7, 1870, the Secretary of the Interior J. D. Cox, wrote a letter to Jos. S. Wilson, Commissioner of the General Land Office, in which he says:

"Evidence has been filed in this Department by Geo. E. Cole, Esq., Secretary of the Oregon Central Railroad Company, of Salem, Oregon, that said company have sold and transferred all their rights, interests, etc., to the California and Oregon (mean-

ing Oregon and California) Railroad Company, of Portland, Oregon."

On May 23, 1870, Jos. S. Wilson, Commissioner of the General Land Office, wrote a letter to Hon. Geo. H. Williams, United States Senate, as follows:

"Pursuant to your oral request of this morning, I have the honor to state, that evidence is on file to the effect that the 'Oregon Central Railroad Company,' of Salem, Oregon, have sold and transferred all their rights, interests, etc., to the California and Oregon (meaning Oregon and California) Railroad Company of Portland, Oregon, and we have this day dispatched such information to the Register and Receiver at Oregon City, Oregon, and to be governed accordingly in relation to the matter."

On May 23, 1870, Jos. S. Wilson, as Commissioner of the General Land Office, wrote a letter to the Register and Receiver, Oregon City, Oregon, in which he says:

"I have been advised by the Secretary of the Interior to the effect that the Oregon Central Railroad Company of Salem, Oregon, have sold and transferred all the rights, interests, etc., to the California and Oregon (meaning Oregon and California) Railroad Company of Portland, Oregon, and you will be pleased to govern yourself accordingly in relation to the matter."

On May 20, 1872, Willis Drummond, Commissioner of the General Land Office, wrote a letter to Hon. C. Delano, Secretary of the Interior, in which he said:

"I have the honor to lay before you certain papers

filed in this office by the Hon. Geo. H. Williams, Attorney General for the purpose of obtaining a construction by the Department of the proviso of the Act of Congress approved April 10th, 1869, Stat. 16, p. 47—amendatory to the Act of July 25th, 1866, Stat. Vol. 14, p. 239—granting lands to aid in the construction of a Railroad and Telegraph Line from the Central Pacific Railroad in California to Portland in Oregon, which reads as follows: 'That the lands granted by the Act aforesaid shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.'

"As the Company requests an expression of opinion by the Department, the papers are hereby submitted."

("Defendants' Exhibit 373," Vol. XIV, pp. 7371–7375, Record.)

From "Defendants' Exhibit 374 (Vol. XIV, pp. 7376–7383, Record), it appears that form of deeds to be executed by the European and Oregon Land Company and Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, under the Trust Deed of April 15, 1870, executed by the Oregon and California Railroad Company to them, which form of deed recites this trust deed, and also recites that the Trustees had on March 28th, 1871, executed to the European & Oregon Land Company a certain Indenture (to which that Company and Oregon and California Railroad Company were parties, accepting and ratifying the same) which was recorded in the offices of the County Clerks of Multnomah,

Clackamas, Marion, Linn and Douglas Counties, in the State of Oregon, and whereby for the uses and purposes in said Indenture set forth, the said Trustees conveyed to the said Land Company, among others, the lands described—was sent to the Department of the Interior by I. R. Moores, Land Agent, of the Oregon and California Railroad Company, about January 23, 1874, or prior thereto, and therewith Mr. Moore, as Land Agent of the Oregon and California Railroad Company transmitted a letter to Commissioner Drummond on January 23, 1874, which reads:

"Your letter of the 13th ult., addressed to Mr. Holladay, Prest. O. and C. R. R. Co. with Copy of letter enclosed, relating to certain tracts of land for which Patents had been issued to the Company and which were subsequently ascertained to be embraced in valid claims, and requesting Mr. Holladay to execute a quit claim Deed to the rightful owners of such lands, has been referred to me with instructions to inform you, that all the lands enuring to the Company by the terms of the Act of July 25, 1866, have been disposed of to the European and Oregon Land Company, a corporation organized under the Laws of California, with its principal office in San Francisco, subject to a mortgage to three Trustees to secure the payment of the bonded debt of the Board. To give clear title to the lands and free it from the mortgage lien, it is necessary to obtain title from the E. and O. Land Co. in which conveyance the Trustees join. One of the Trustees is now in Europe, but will return within the next sixty days,

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when the deeds will be duly executed as requested. The claimants here have been notified of the condition of facts as stated above. I enclose one of our blanks which will fully explain the situation."

On March 13, 1874, Commissioner Drummond wrote a letter to I. R. Moores, Land Agent of the Oregon and California Railroad Company, in which he said:

"The Register and Receiver at Oregon City, have recently filed James Waldrup's Donation Certificate No. 4325, covering lots 2 and 3 of Section 13, Tp. 3 S., R. 3 E., 42.21/100 acres, settlement March 15th, 1854.

"It is shown that the above lots were selected under the Act of July 25, 1866, and inadvertently patented May 9th, 1871, to the 'Oregon and California' Railroad Company.

"I therefore respectfully request a relinquishment of said lots on the part of said Railroad Company, in order that Mr. Waldrup's certificate may pass for patenting.

"The receipt of your letter of 23d January last is acknowledged, stating that as soon as the return of one of the Trustees of your Company from Europe, the Company would execute 'quit claim' deeds for the tract requested by my letter of 22d April last.

"I have also to add that the printed form of 'quit claim' deed in use by the European and Oregon Land Company, and which accompanied your letter of 23d January, will be satisfactory to this office."

It also appears from "Defendants' Exhibit 375" (Vol. XIV, pp. 7383–7439) that P. Schulze, Land

Agent of the Oregon and California Railroad Company, in his letter of June 20, 1876, addressed to the Commissioner of the General Land Office, in reply to the letter of the latter of June 3rd, advised the Commissioner that "delay in execution of relinquish-"ment is caused by severe illness of one of our trus-"tees, who has thus far been unable to sign deed. "Hope to get the deed next week."

On July 14, 1876, Commissioner J. A. Williamson wrote P. Schulze, Land Agent of the Oregon and California Railroad Company, as follows:

"I have to acknowledge the receipt of your letter of 28th ultimo, and seven accompanying 'quit claim' deeds executed the 22nd ultimo, by the Oregon & California Railroad Company in compliance with our letter of April 22d, 1873, for the following described tract, inadvertently patented May 29th, 1872, to said Company (Descriptions follow)."

On June 28th, 1876, P. Schulze, Land Agent, Oregon and California Railroad Company, wrote to the Commissioner of the General Land Office as follows:

"I have the honor, herewith, to transmit to you quit claim deeds, numbered 146, 147, 148, 149, 150, 151 and 153, for certain tracts which were inadvertently patented to this company.

"I do not send a deed for Lots 2 and 3, Sec. 13, T. 3 S. R. 3 East, as requested in your letter of March 13th, 1874, because we have sold one of said tracts, not knowing that they were covered by a Donation Entry. It will take some time before this matter can be straightened up,

"Please acknowledge receipt of the above deed.

The deeds therewith enclosed recited that the lands therein described were theretofore patented by the United States to the Oregon and California Railroad Company, and were embraced in a certain Trust Deed of that Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, of date April 15, 1870, and purported to be signed by Milton S. Latham, Faxon D. Atherton and William Norris, and by no other person.

On July 9, 1877, P. Schulze wrote having thereon above the date, the words "Land Department, Oregon and California R. R. Co." to the Commissioner of the General Land Office, as follows:

"Referring to your letter of June 19th I beg to state that this company is going to furnish a quit claim deed for the tracts described in the said letter.

"There will, however, be some delay in the execution of the deed, owing to the protracted illness of one of the mortgage trustees who have to execute the deed."

One June 19, 1877, Commissioner of the General Land Office Williamson, wrote a letter to P. Schulze, Land Agent, Oregon and California Railroad Company, requesting the Company to furnish a full relinquishment to the United States of certain lands described in patent No. 1, issued May 9, 1871, to the Oregon and California Railroad Company.

On April 27, 1877, Commissioner of the General Land Office Williamson, wrote a letter to P. Schulze, Land Agent, Oregon and California Railroad Company, requesting his Company to furnish relinquishment of a certain tract of land described in Patent

No. 2, issued July 12, 1871, to the Oregon and California Railroad Company.

On April 30, 1877, Commissioner of the General Land Office J. A. Williamson, wrote a letter to P. Schulze, Land Agent, Oregon and California Railroad Company, requesting the Company to furnish a relinquishment of certain premises described in Patent No. 2, issued July 10th (12th), 1871, to the Oregon and California Railroad Company.

On August 10th, 1877, P. Schulze, Land Agent, Oregon & California R. R. Co., wrote to the Commissioner of the General Land Office as follows:

"Your letters of April 27th and April 30th were mislaid and therefore left unanswered, having just found them, I beg to state that quit claim deed to the United States for the tracts described in the said letters will be issued as soon as a mortgage trustee will have been appointed by the Court in place of F. D. Atherton, deceased."

On August 10, 1877, P. Schulze, Land Agent, wrote a letter to the Commissioner of the General Land Office as follows:

"I have the honor to enclose herewith as quit claim deed for Lots 2 and 3 of Sec. 13, T. 3 S. R. 3 E. containing 40.21 acres, to James Waldrup, the receipt of which please acknowledge."

On Sept. 5, 1877, Commissioner of the General Land Office Williamson, wrote to P. Schulze, Land Agent, Oregon and California R. R. Co., as follows:

"I have to acknowledge receipt of your letter of 10th ulto., and accompany quit claim deed for Lots No. 2 and 3 of Sec. 13, Tp. 3 S. R. 3 E., 42.21/100

acres, made by the Oregon and California Railroad Company, June 22d, 1876, in accordance with our letter of March 13, 1873."

This deed therein referred to, was executed by Milton S. Latham, Faxon D. Atherton and Wm. Norris, and recites that the lands described had been theretofore patented by the United States to the Oregon and California Railroad Company, and were embraced in a certain Trust Deed of said Company to Milton S. Latham, Faxon D. Atherton and William Norris of date April 15, 1870.

On Sept. 6, 1877, Commissioner of the General Land Office Williamson, wrote a letter to the Register and Receiver, Oregon City, Oregon, as follows:

"The selection of Lots 2 and 3 of Sec. 13, Tp. 3 S. R. 3 E., 42.21 acres, by the Oregon and California Railroad Company, under the Acts of July 25, 1866, and June 25, 1868, and same patented May 9, 1871, I have now to state were duly relinquished by said Company, June 22d, 1876, upon the showing that said selection was in direct conflict with the donation claim of James Waldrup, Certificate No. 4325, issued Jany. 28, 1874.

"Please note on your records said relinquishment and refer to this as letter F."

On January 28, 1878, P. Schulze, Land Agent, O. & C. R. R. Co., wrote a letter to the Commissioner of the General Land Office, as follows:

"Referring to your letters 'F' dated April 27th, April 30th and June 19th, 1877, respectively I beg to enclose herewith our relinquishment to the following described land, to-wit:

"S. W. 4 Sec. 7 T. 1 S. R. 4 E.; Lot No. 5 of Sec. 29 T. 9 S. R. 3 W.; Lots 1 2 3 and 4 Sec. 31 T. 6 S. R. 5 W.; and S 2 of N. W. 4 of N. W. 4 Sec. 3 T. 6 S. R. 1 W.

"Please acknowledge receipt."

On February 16, 1878, Commissioner of the General Land Office J. A. Williamson, wrote a letter to P. Schulze, Land Agent, Oregon & California R. R. Co., as follows:

"I have to acknowledge the receipt of your letter of 28th ultimo, and accompanying relinquishment of the Oregon and California Railroad Company, made the 19th ulto., in accordance with my letters of April 27 and 30th and Jun 19, 1877, for the following described tracts:

"S. W. ¼ Sec. 7, Tp. 1 S. R.—4 E, 160.20 acres.

"S. ½ of N. W. ¼ of N. W. ¼ Sec 3, Tp. 6, S. R. 1 W., 19.45 acres.

Lots 1, 2, 3 and 4, Sec. 31, Tp. 6, S. R. 5 W., 68.44 acres.

"Lot 5, Sec. 29, Tp. 9, S. R. 3 W., 5080 acres."

The relinquishment enclosed in the letter of Mr. Schulze to the Commissioner on January 28, 1878, is in the form of a deed, signed by Milton S. Latham and Wm. Norris, duly executed and acknowledged, which recites that the lands described therein were patented by the United States to the Oregon and California Railroad Company under the Act of Congress of July 25, 1866, and were parts of the land conveyed by that Company to Milton S. Latham, Faxon D. Atherton and William Norris, Trustees, by a certain Trust Deed of date April 15, 1870, and that

Milton S. Latham and William Norris were the only surviving and acting Trustees thereunder, and that Faxon D. Atherton had died July 18, 1877, and the deed purports to release and forever quitclaim to the United States the premises described.

On August 4, 1881, Commissioner of the General Land Office N. C. M'Farland, wrote a letter to P. Schulze, Atty., Oregon and California R. R. Co., requesting the Railroad Company to reconvey title to certain lands to the United States which had been patented on May 29, 1872, List No. 3.

On August 25, 1881, Paul Schulze, Land Agent, Oregon and California Railroad Company, replied to the letter of the Commisioner of the General Land Office of August 4, 1881, as follows:

"Referring to your letter 'F' of 4th inst., I have the honor to advise you that this company will comply with your request to give a quitclaim deed to the United States for the N. W. 4 of the N. W. 4 of Section 33, Township 18 South Range 4 West.

"There will be, however, some delay in the issuance of such deed as it will require some time to obtain the signatures of the mortgage trustees of this company."

On June 11, 1887, Geo. H. Andrews, upon a letter having these words "Oregon & California Railroad Company, R. Koehler, Receiver," wrote to the Commissioner of the General Land Office, enclosing therewith a deed of the Company to certain tracts of land, the two first pieces of which were included in patent dated May 29, 1872, and the last in patent dated July 12, 1871, to which on July 2, 1887, Comis-

sioner of the General Land Office Wm. A. J. Sparks, replied to Geo. H. Andrews acknowledging the receipt of his letter of June 11, 1887, and the accompanying deed, which deed recites that patents had been erroneously issued for the premises described, by the United States to the Oregon and California Railroad Company, under the Act of Congress of July 25, 1866, granting lands to said Company to aid in the construction of its railroad and telegraph line therein mentioned, and further recites that "the said Oregon and California Railroad Company doth hereby grant and convey, and the Farmers Loan and Trust Company, a corporation created and existing under the laws of the State of New York, being the Trustee or Mortgagee of said lands, so granted to said Railroad Company by said Act of Congress, doth hereby remise and release unto the United States, etc." This deed was executed May 9, 1887, by the Oregon and California Railroad Company by Geo. H. Andrews, Second Vice-President, by W. W. Bretherton, Secretary, by the Farmers Loan and Trust Company by R. G. Rolston, President, and by Wm. H. Leupp, Secretary, duly witnessed, acknowledged and certified, and contains endorsed thereon the following:

"Pursuant to an order of the Circuit Court of the United States for the District of Oregon, bearing date February 9th, 1885, in the case of Lawrence Harrison et al vs. the Oregon and California Railroad Company et al, of record in said Court and cause; I do hereby approve the execution of the

within deed as and upon the considerations and terms therein expressed.

Witness my hand and seal this 8th day of June, A. D. 1887.

"R. KOEHLER,
Receiver."

On October 21, 1887, A. C. Jones, Receiver, of the United States Land Office at Roseburg, Oregon, wrote a letter to the Hon. Commissioner of the General Land Office, Washington, D. C., as follows:

"Referring to your letter 'F' dated July 2, 1887, I herewith return to you the deed therein referred to, the same having been recorded in all the counties in which the land is situated (Linn and Lane), and being returned to this office by the Register and Receiver of Oregon City Land Office."

The deed therewith returned is a certified copy of the deed just mentioned, certified by the Commissioner of the General Land Office Wm. A. J. Sparks, as follows:

"Department of the Interior,
General Land Office,
Washington, D. C., June —, 1887.

"I, Wm. A. J. Sparks, Commissioner of the General Land Office, hereby certify that the annexed copy of a deed executed by the Oregon and California Railroad Company, and the Farmer's Loan and Trust Company, a corporation existing under the laws of the State of New York, on the 9th day of May, 1887, and reconveying to the United States, the N. W. ¼ Sec. 33, Tp. 18 S. 1, Range 4 W. 1, and the N. W. ¼ S. E. ¼ and N. E. ¼, S. W. ¼ Sec. 29,

Town. 14 S. Range 1 E., Roseburg district; and the S. E. ¼, N. W. ¼ Section Town. 11 S. Range 1 E., Oregon City district, all in the State of Oregon, is a true and literal exemplification from the files of this office.

"In witness whereof I have hereunto subscribed my name, and caused the Seal of this office to be affixed, at the City of Washington, on the day and year above written.

WM. A. J. SPARKS,
Commissioner of General Land Office."

On October 19, 1905, D. A. Chambers, Attorney, Oregon and California Railroad Company, wrote a letter to the Commissioner of the General Land Office as follows:

"Referring to your letter (1904–222494) to me of February 6, 1905, I now enclose herewith Deed No. 88-B, dated August 1, 1905, executed by the Oregon and California R. R. Co., by J. P. O'Brien, Vice-President, and W. W. Cotton, Secretary, and by the Union Trust Company of New York, by A. W. Kelley, Vice-President, and E. R. Merritt, Assistant Secretary, relinquishing and reconveying the tracts named in the caption to the United States.

"Please acknowledge receipt of this deed."

On May 9, 1871 (Vol. XIV, pp. 7455–7457, Record), the Attorney General replied to Secretary Delano that he concurred in the opinion of Assistant Attorney General Smith that the transfer of the rights of the East Side Company to the Oregon and California Railroad Company was valid, as evi-

denced by the deed filed in the Department April 28, 1870, and that patents for the lands opposite to and coterminous with the three sections of twenty miles each of constructed road should be issued to the Oregon and California Railroad Company.

On April 20, 1871, (Defendants' Exhibit 378, Vol. XIV, pp. 7463–7502, Record) Jos. S. Wilson, President, European & Oregon Land Company, wrote a letter to the Commissioner of the General Land Office, enclosing therewith a letter of that date from I. R. Moores, Land Agent of the Oregon & California Railroad Company, referring to Lists Nos. 1 and 2 on file in the Department embracing 33,308.97/100 acres, selected as inuring to the Oregon and California Railroad Company under the Act of July 25, 1866, and earnestly asking for the early issuance of the patents.

In the letter of I. R. Moores it is stated that on July 28, 1870, as Agent of the Company, he made selections of lands for the first completed section of twenty miles of road embraced in the lists mentioned, covering the area mentioned, but that no patent had been received and in consequence thereof the Company could not sell the lands.

On May 9, 1871, Acting Commissioner W. W. Curtis replied to the letter of April 20th, 1871, advising that he had that day transmitted to I. R. Moores, Land Agent, Patent No. 1 of lands inuring to the Company under the Act of Congress of July 25, 1866, embracing in the aggregate 32,517.21 acres.

On March 25, 1871, Jos. S. Wilson wrote to the Commissioner of the General Land Office calling his

attention to section 2 of the Act of July 25, 1866, and requesting a sketch map showing the first sixty continuous miles according to the map of survey which had been filed, and also asking for certain other information.

On March 21, 1871, Mr. Jos. S. Wilson again wrote to the Commissioner of the General Land Office requesting certain information and early action upon the matters requested.

On April 7, 1871, Willis Drummond, Commissioner of the General Land Office, acknowledged receipt of these letters and advised that he would furnish the requested data touching the Oregon and California Railroad Company at an early date.

On April 19, 1871, Willis Drummond, Commissioner of the General Land Office, wrote to Jos. S. Wilson President of the Oregon and California Land Company (meaning, no doubt, the European and Oregon Land Company) in reply to the letters of Mr. Wilson of March 21st and 23rd, and furnished certain data requested respecting "the grant by Congress of 25th July, 1866, for the Oregon and California Railroad Company of Oregon."

On April 3, 1871, Jos. S. Wilson wrote to the Commissioner of the General Land Office requesting certain information and therewith called special attention to certain matters affecting the grant.

On April 21, 1871, Commissioner Drummond wrote a letter to Jos. S. Wilson, President Oregon and California Land Company (meaning European and Oregon Land Company, no doubt), acknowledging receipt of the letter of April 3rd transmitting certain

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circulars requested, and advising that requisite data would be ascertained and given in further communications.

On May 17, 1871, Jos. S. Wilson wired to the Commissioner of the General Land Office requesting that he telegraph when railroad patent mentioned in the letter of the Commissioner of April 19th could be expected, and also as to Lists 3, 4, 5, 6, 7, to which Acting Commissioner W. W. Curtis replied by wire May 18, 1871, addressed to Jos. S. Wilson, 320 California Street, San Francisco, Cal., advising that Railroad Patent No. 1 was transmitted May ninth to I. R. Moores, Salem, Oregon, and that Lists three to seven inclusive, were just received.

On May 12, 1871, Jos. S. Wilson wrote to the Commissioner of the General Land Office, advising that these lists had been sent, that Lists Nos. 1 and 2 had been approved, and requesting that these five lists be examined and carried to patent at an early period.

On June 1, 1871, Commissioner Drummond wrote to Mr. Wilson acknowledging the receipt of his letter of May 12th and advising that Lists Nos. 3, 4, 5, 6 and 7 of the Oregon and California Railroad selections in the Oregon City District under the Act of July 25, 1866, and embracing in the aggregate 141,-537.76 acres, had been received and that they would be designated upon the records, examined and listed for approval at the earliest practicable period.

On July 18, 1871, Joseph S. Wilson wired the Commissioner of the General Land Office, inquiring when Oregon and California patent No. 2 might be expected, to which Commissioner Drummond replied

July 19, 1871, by wire that the patent would be ready for transmission on July 22nd. On September 29, 1871, Joseph S. Wilson wrote to the Commissioner of the General Land Office, upon stationery carrying the words "Office of European & Oregon Land Company," referring to patent No. 2 in favor of the Oregon and California Railroad Company, transmitted to I. R. Moores July 22, 1871, from the General Land Office, calling attention to certain lands therein described and making further inquiry in reference to same. On November 18, 1871, Joseph S. Wilson wired Commissioner of the General Land Office, requesting that he suspend action on large list of Oregon selections or railroad lands from Roseburg to California line, receipt of which was acknowledged by Commissioner Drummond on November 21, 1871. Joseph S. Wilson, on November 18, 1871, wrote Commissioner of General Land Office, advising that on that date he had received a letter from I. R. Moores, of the Oregon and California Railroad land department, dated November 13, 1871, referring to the fact that a preliminary survey had been made more than a year ago for a short distance south from Roseburg, and enclosing therewith a map believed to be approximately correct. Mr. Wilson presented his objections to this and requested an acknowledgment of the receipt of his letter; to which, on January 4, 1872, Commissioner Drummond replied, acknowledging receipt thereof, and advising that official action would be suspended as requested. On January 9, 1872, Joseph S. Wilson, as President, on stationery having the words "Office European and

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Oregon Land Company," wrote the Commissioner of the General Land Office, advising that he had received a letter dated December 26, 1871, from I. R. Moores, agent of the Oregon and California Railroad Company, advising that a map in good shape had been transmitted to the department, showing the definite location of the railroad from Township 30 south to the California line, and Mr. Wilson requested that immediate orders might be given for the withdrawal of the lands affected, copies thereof forwarded to him, and that a copy of the sketch map be sent to the Register and Receiver as the guide and basis of withdrawal. He requested prompt acknowledgment and compliance with his request. On October 26, 1871, a like letter, upon like stationery, signed as President, was written by Joseph S. Wilson to Commissioner of the General Land Office, advising that on October 21, 1871, he had received from I. R. Moores lists of selections of lands in the Roseburg district, inuring to the Oregon and California Railroad Company under the Act of Congress approved July 25, 1866, which had been transmitted about October 1, 1871, by the Register of the Land Office at Roseburg to the General Land Office, which lists embraced 262,030.8 acres. Mr. Wilson advised that these lists were accurately prepared, and requested early action of the Land Department "in view of the enormous outlays required in constructing this railway to span Western Oregon from north to south." On January 25, 1872, Commissioner Drummond wrote Joseph S. Wilson, acknowledging receipt of the "Oregon and California Railroad lists

of selections in Oregon," referred to in the letters of Mr. Wilson on October 26 and December 30, 1871, and advising that these lists were duly received October 7, 1871, and had been designated upon the tract books of his office. The Commissioner further stated that lists 1 and 2 embraced 262,038.8 acres, and were lands lying south and beyond the constructed fourth section of twenty miles of road, and would have to await the filing of advanced constructed sections of road before any steps could be taken toward the patenting thereof. On December 30, 1871, Joseph S. Wilson, as President, upon like stationery, wrote to the Commissioner of the General Land Office, advising that he had on October 26, 1871, written to the Commissioner referring to certain lists of selections, and advising that great care had been observed in preparing same and requesting prompt official action and reply to his letter. A like letter was written by Joseph S. Wilson, as president, on like stationery, January 17, 1872, acknowledging receipt of letter from the Commissioner January 4, 1872, which acknowledged receipt of his letter of November 13, 1871, relative to preliminary map of the route of the Company from near Roseburg to the California line. This letter makes further explanation of this map and of the correspondence between the parties, and requests compliance both as to the issue of the order of withdrawal and cancellation of the invalid, interfering sections. On February 20, 1872, Joseph S. Wilson, as president of the European & Oregon Land Company, wired Commissioner Drummond, inquiring if Oregon and Califor-

nia Railroad map had been received and withdrawal order made; to which Commissioner Drummond, on February 24, 1872, replied by wire, advising that map had been received and was under consideration. On February 24, 1872, Joseph S. Wilson, president of the European & Oregon Land Company, as such wrote the Commissioner of the General Land Office, acknowledging receipt of his letter of January 25, 1872, which acknowledged receipt of letter of October 17, 1871, with reference to selection lists Roseburg land office, the subject of previous correspondence. In this letter Mr. Wilson says:

"What is now wanted, however, and to which there is no legal interdict, is that the Lists shall be taken up, examined and tested and where the selections are found perfectly regular, and correct, and free from interference, that the usual List of approval may be furnished. At the same time it would be gratification to the Company to have transcript of the approved List, so as to be certain as to the particular lands inuring under the Grant, on which they can rely as a land fund, and for which ultimate title as stipulated in said 4th section is to be given by patent, upon meeting the statutory requirements aforesaid."

This correspondence hereinabove set out, is all contained in Defendants' Exhibit 378 (Vol. XIV, pages 7463–7502, Record).

In his letter of May 12, 1871, from Jos. S. Wilson, President of the European & Oregon Land Company to the Commissioner of the General Land Office, the following appears:

"The heavy expenses incurred in realizing the purpose of Congress in regard to the construction of the railway and telegraph at so distant a point made it a serious concern to the grantees to have the patents so as to make the means available that are allowed by the statute which can only be done after the issuing of the patents." (Vol. XIV, p. 7483.)

In his letter of December 30, 1871, Mr. Wilson wrote the Commissioner of the General Land Office as follows:

"As I have received no intimation as to what has been done, nor acknowledgment, and as the early approval of the lists is a matter of grave and most pressing importance to the Company in view of very heavy outlays, and the necessity for making immediately available the lands which have been granted, I am constrained again to trouble the Commissioner by asking that the work be pressed to completion, and the requisite list of approval forwarded at the earliest period possible, thereby rendering legitimate service to the Company, and obliging the undersigned." (Vol. XIV, p. 7497, Record.)

It appears that patents to the Oregon and California Railroad Company issued under the Act of July 25, 1866, and amendments thereof, and the Act of May 4, 1870, are listed in the Record (Vol. XIV, p. 7514–7564), beginning with Patent No. 1, issued May 9, 1871, for 32,517.21 acres, reciting in the patent the Acts of July 25, 1866, and June 25, 1868, and issuance of Patent No. 2, July 12, 1871, for 72,417.65 acres within place limits and 47,829.80 acres within indemnity limits, the patent reciting issuance of same

under the Acts of July 25, 1866, and June 25, 1868, showing a total acreage included in these patents issued under these two acts of Congress, of 152,764.67 acres, and with no mention of the Act of April 10, 1869. Patents Nos. 3, 4, 5, 6, 7 and 8, dated from May 29, 1872, down to and including March 3, 1893, conveying 462,800.91 acres, conveyed under the Acts of July 25, 1866, June 25, 1868, and April 10, 1869. Patents Nos. 9 to 211, from June 11, 1894, down to December 7, 1906, were issued, reciting that each was issued under the Act of July 25, 1866, only, and conveying lands therein described within primary limits, amounting to 1,559,120.28 acres, and within indemnity limits 590,419.50 acres, or a total of 2,149,539.78 acres, and a grand total of 2,765,948.85 acres patented. Patents issued under the Act of May 4, 1870, were begun to be issued October 9, 1895, and extended to March 20, 1903, covering a total acreage of 128,-618.13 acres.

It appears from "Defendants' Exhibit 383" (Vol. XIV, p. 7564, Record) and "Exhibit 14 to Stipulation" (Vol. IV, pp. 1717–1720) that construction of the first section of the East Side railroad was completed December 24, 1869, examined by Commissioners appointed therefor favorably reported December 31, 1869; such reports submitted by the Secretary of the Interior January 26, 1870, to the President of the United States, and its acceptance recommended, and such recommendations approved by the President January 29, 1870, and thereafter the construction of each subsequent section of road was completed, including the twelfth section, reports of Commissioners

transmitted to the Secretary of the Interior, and by him to the President of the United States, with recommendations that each section of road be accepted, and approval of such recommendations by the President, down to November 8, 1889; and that the first section of the West Side railroad was completed, and the report of the Commissioner, of date January 6, 1872, approved, and the section accepted by the Secretary of the Interior February 16, 1872, and the second section reported on by Commissioners on May 3, 1876, and the report approved and the section accepted by the Secretary of the Interior June 3, 1876; and that pursuant to the official action of these various officers, the lands were approved to be patented, and patents were issued in recognition that the companies, respectively, had earned the lands opposite to and coterminous with the constructed sections of road.

It further appears from "Defendants' Exhibit 384" (Vol. XIV, p. 7564) by the affidavit of H. Villard, of date January 8, 1883, that he was President of the Oregon and California Railroad Company, which had succeeded to and become invested with and was at that time possessed of and entitled to all the grants, rights, franchises and privileges conferred by the Act of July 25, 1866, and the Act of May 4, 1870; that there has been already accepted and approved by the United States, as duly constructed under the provisions of these acts, those parts of the Oregon and California Railroad between East Portland and Roseburg, 198 miles in length, and between Portland and St. Joseph and McMinnville, about 50 miles in length, and that in the summer of 1881, and

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fully one year before December 1, 1882, the work of duly constructing, completing and equipping the remaining parts of said railroad, as defined in these acts, has been prosecuted by the company continuously, actively and in perfect good faith, at an actual expenditure of large sums of money (several millions of dollars in amount) and in conformity with the will and desire of Congress, as expressed in these acts, that said lines of railroad should be speedily and thoroughly completed; and that, within the time above mentioned substantial progress has been made towards the completion of these lines, inasmuch as at least 45 miles of new road have, within that time, been constructed, completed and equipped in a thorough and first-class manner, and said new mileage was at that time in full operation as part of the railroad system of the company; and at least 20 miles additional to the above were then partially constructed, and further construction was continuing; that by reason of the mountainous nature of the country through which said lines were being constructed, and on account of other natural obstructions, only overcome with the greatest difficulty and labor and at enormous expense, this mileage was all that could be completed, with the utmost diligence, within the time mentioned; that at that time the company was vigorously continuing said construction, in entire good faith; and that it would continue the same without unnecessary delay until its lines were fully completed in the manner specified in the acts above recited.

This affidavit appears to have been filed in the General Land Office on the 15th day of January, 1883.

At the time it was so filed the company had not complied with the Act of July 25, 1866, or of June 25, 1868, as to construction of road within time, and as shown by the reports made by the company under the Act of June 19, 1878, (20 Stat. 169) had made its official reports to Congress showing sales of these lands from June 30, 1879, for the half year ending June 30, 1883, Vol. IV, p. 1590-1598) in which reports the United States was advised that the company, in selling these lands, was in some instances selling them for more than $2.50 per acre, and that the Secretary of the Interior recommended approval of the lands for patent and the President of the United States caused patents to be issued for the lands opposite to and coterminous with the constructed portions of road, and the company has continuously asserted title to these lands under these patents, has sold and conveyed the same, has mortgaged the same, as shown by the record, without any action being taken by Congress looking to an attempt to forfeit the grant for alleged breach of the so-called condition subsequent claimed to be created by the proviso of April 10, 1869, and the words of Section 4 of the Act of May 4, 1870, until the passage of the Joint Resolution of April 30, 1908, under which this suit is being prosecuted by the United States.

On January 1, 1886, the Oregon road was constructed and in operation from Portland, as hereinbefore shown (Vol. IV., pp. 1717–1720), and there remained only the unconstructed portion of the road from a point one and one-half miles south of Ashland to the boundary line between Oregon and California,

a distance of 24.125 miles.

As we have seen, it appears from the stipulation of the parties, as shown by Exhibit No. 10 to the Joint and Several Answer Vol. II., pp. 1149–1151, Record), that certain suits had been brought by the United States against the Oregon and California Railroad Company in the United States Circuit Court for the District of Oregon, to quiet title to, and cancel patents for, lands of the said company's East Side land grant, in which the pleadings and proofs showed sales in quantities exceeding 160 acres to single purchasers, and at prices exceeding $2.50 per acre, without objection made by the United States to any such sales because of quantity of land sold to one purchaser, or sale price. The first of these suits referred to was begun February 3, 1892, and the last February 27, 1901. The first suit involved 240 acres of land sold to John A. Hurlburt for $720, and the issues were finally determined by the Supreme Court of the United States in United States vs. Oregon and California Railroad Company et al., in 176 U. S. 28.

It appears from the testimony, in addition to what has been stipulated, that about 10,000 applications to purchase quarter sections of timber lands belonging to the company at $2.50 per acre, have been made to the company and refused since the commencement of the first Lafferty suit about that time up to July 30, 1912, and that these applications are made usually in this way: Some person comes into the office of the company with a bunch of applications, anywhere from 5 to 10 up to 50 or 100, and presents one application and tenders the sum of $400 with it,

and that being rejected, this person follows by presenting another application and tendering the same $400, and that being rejected the process is gone through with the entire bunch that the party brings in. This party is attorney or agent for the applicant, or at least claims so to be, and in nearly all cases the blanks used by these so-called applicants are printed forms. It appears from the testimony that there were 7,991 applications in the hands of the Land Commissioner of the Company on March 1, 1909, covering 6,168 quarter sections, or in some cases less, and occasionally an 80 acres. When these applications were tabulated on March 1, 1909, there were 4,749 tracts of land, each covered by one application; there were 1,079 tracts, each covered by two applications; 256 tracts, each covered by three applications; 54 tracts, each covered by four applications; 8 tracts, each covered by five applications, and 4 tracts, each covered by six applications. (Vol. IV., pp. 1958–1960, Record.)

The form of patent issued under contract No. 5394, being the third item of Exhibit No. 9 of the Answer, omitting descriptions, is as follows:

"The United States of America.

"To all to whom these presents shall come, Greeting:

"Whereas, by the Acts of Congress approved July 25, 1866, June 25, 1868, and April 10, 1869, to aid in the construction of a railroad and telegraph line from Portland in Oregon, thence southerly through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon. Authority is given to the Oregon and California Railroad Company of

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Oregon, a corporation existing under the laws of the state to construct a railroad and telegraph line, under certain conditions and stipulations as expressed in said Acts and provision is made for granting to the said company every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile on each side of the said railroad on the line thereof and within the limits of twenty miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time, the line of said road is definitely fixed.

And Whereas, it is further enacted in said section that when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands designated as aforesaid shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid nearest to, and not more than ten miles beyond the limits of said first named alternate sections.

And Whereas, official statements from the Secretary of the Interior have been filed in the General Land Office, that Commissioners appointed by the President under the provisions of the fourth section of said Act of July 25, 1866, have reported to him that the said Oregon and California Railroad and Telegraph Line commencing at a point in East Portland, in the County of Multnomah, State of Oregon,

and ending at a point on the boundary between the States of Oregon and California, where it joined the California and Oregon Railroad a distance of three hundred and sixty miles has been constructed and fully completed and equipped in the manner prescribed by said Act.

And Whereas, that portion of said road lying between the City of Portland, Oregon, and the town of Roseburg, in Township 27 South, Range 5 West, a distance of one hundred and ninety-seven miles was completed within the time prescribed by the law, and the balance of the road was completed after the expiration of such time. And Whereas certain tracts of land have been selected by the duly authorized agents of the Oregon and California Railroad Company as shown by such agent's original lists of selections approved by the local land officers and now on file in this office. And Whereas said tracts of land lie within the indemnity limits of said grant and are particularly described as follows, to-wit":

(Description omitted.)

The said tracts of land as described in the foregoing make the aggregate area of ninety-seven thousand nine hundred and twenty-nine acres and sixty-seven hundredths of an acre (97,829.67).

Now, Know Ye, that the United States of America in consideration of the premises and pursuant to the said Acts of Congress have given and granted, and by these presents do give and grant unto the said Oregon and California Railroad Company of Oregon, and to its assigns all the tracts of land selected as aforesaid and described in the foregoing, yet exclud-

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ing and excepting from the transfer by these presents 'All Mineral Lands' should any such be found to exist in the tracts described in the foregoing, but this exclusion and exception according to the terms of the statute 'shall not be construed to include coal and iron lands.'

To have and to hold the said tracts with the appurtenances unto the said 'Oregon and California Railroad Company of Oregon,' and to its assigns forever with the exclusion and exception as aforesaid.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this, the third day of March, in the year of our Lord, One thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

(Seal)

By the President, BENJAMIN HARRISON,

E. MACFARLAND, Asst. Secretary."

All other patents issued are in the same form, excepting that reference is not generally made in many of them to the Act of April 10, 1869, but does appear in this patent and in some others. There is a schedule showing the amount of land patented, compiled by years separately stated, and showing the Acts of Congress which are recited in such patents, attached to and made a part of the Joint and Several Answer of the Oregon and California Railroad Company, the Southern Pacific Company, and Stephen T. Gage,

marked Exhibit 11 (Vol. II., p. 1152) as hereinbefore set out at page of this statement.

It appears from the testimony (Vol. V., pp. 2404–2414, and Defendants' Exhibits 288, 336, 337, 338, Vol. XIII., p. 6835, and Vol. XIV., pp. 7303–7306), that under the provisions of the Act of July 25, 1866, the Oregon and California Railroad Company has continuously carried the property and troops of the United States, free of cost, between Portland, Oregon, and Roseville Junction, and has continued to do so from the first operation of the road as far as the same was constructed, and has at all times done so from the first operation of any portion of the constructed part of the road, and has done so as required by the United States in accordance with the provisions of the statute, and the requisitions of the United States made through its proper officers; and that this transportation in value amounted to the sum of $315,828.34 (Defendants' Exhibit 288) between 1906 and 1910, and an estimated like amount prior to 1906, on so much of the road as lies between Portland and the Oregon and California state line; and for the entire line between Roseville Junction and Portland; the sum is more than $1,250,000; and that all of said sums were on account of free movement of traffic for United States as required by the Act of July 25, 1866, section 5 (14 Stat. 239).

It also appears that from April 1, 1870, to April 30, 1911, the company had paid in taxes on these lands granted, the sum of $1,827,234.10 (Defendants' Exhibit 289; and testimony of Robert Adams, Vol. V., p. 2137; J. B. Eddy, Vol. V., p. 2552; P. A.

Worthington, Vol. V,, p. 2572; and Defendants' Exhibits 319, Vol. XIII., p. 7150; 320, Vol. XIII., p. 7167; 321, Vol. XIV., p. 7251; 331, Vol. XIV., p. 7263; 359, Vol. XIV., p. 7346); and that the total taxes paid on these lands from April 1, 1870, to April 30, 1913, is $2,758,094.07. It also appears that the Company has expended in advertising these lands, $34,784.85; in examining, cruising and grading these lands, $142,651.40; in surveying fees to the United States, $145,977.26; that it expended about $2,500,000 between March 28, 1887, and January 3, 1888, in construction of 24.135 miles from a point one and one-half miles south of Ashland to the Oregon and California state line.

It also appears from Defendants' Exhibit 257 (Vol. XI., p. 5789, to and including Vol. XII., pp. 6037–6449), that it has sold and conveyed various parcels of these granted lands from 1873 to January 16, 1907, claiming to hold title in fee simple without particular regard to the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870; and as shown by this exhibit, that deeds were executed and delivered to the various vendees, upon payment of the purchase price, and recorded by the vendees in the office of the County Recorder or County Clerk having charge of the Records of Deeds in the various counties in which the lands conveyed were situated; and that this record began about the time these conveyances were made from 1870 down to and including the year 1907; and that these records are public records under the recording acts of the State of Oregon. Each deed so recorded showed acreage sold and con-

sideration paid, and, in some instances, contracts of sale showing acreage sold and consideration paid, where recorded.

It does not appear that the United States, by its Department of Justice, or Department of the Interior, or its General Land Office, or any officer having jurisdiction over these lands while the roads were in process of construction or at any time, ever objected to the way and manner in which the company was administering the grants and disposing of its lands, or ever objected to the non-enforcement of the so-called "actual settler" clause, or that there was ever any correspondence directly relating to the same excepting the correspondence referred to between Attorney General Williams and Secretary Delano as hereinbefore set out; and it does not appear that Congress ever took any action to enforce the so-called "actual settler" clause or made any attempt to forfeit either of these grants for any breach of such "actual settler" clause, until the passage of the Resolution of April 30, 1908, under which this suit is being prosecuted. The attitude of the United States toward this subject as expressed by the opinion of Attorney General Devens, of date October 26, 1880 (16 Op. At. Gen. 572), being that the executive department of the Government could not take advantage of a breach of a condition subsequent in such a grant unless specifically authorized to do so by Congress. The defendants also claim waiver by operation of law, and implied repeal of the so-called "actual settler" clause of the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870 (if such

"actual settler" clause is or ever was enforcible), by the passage of the following statutes:

(1) Act of May 3, 1875 (18 Stat. 519), the same being "An Act for the relief of settlers on lands within railroad limits";

(2) Act of June 3, 1878 (20 Stat. 89), the same being "An Act for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory";

(3) Act of May, 3, 1879 (20 Stat. 472), the same being "An Act to grant additional rights to homestead settlers on public lands within railroad limits";

(4) Act of January 31, 1885 (23 Stat. 296), the same being "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon";

(5) Act of September 29, 1890 (26 Stat. 496), the same being "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," commonly known as the "General Forfeiture Act";

(6) Act of March 3, 1887 (24 Stat. 556), the same being "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes";

(7) Act of March 3, 1891 (26 Stat. 1097), repealing the pre-emption law;

(8) Act of March 3, 1891 (26 Stat. 1093), the same being "An Act to amend section eight of an act approved March 3rd, 1891, entitled 'An Act to repeal timber culture laws and for other purposes,' " com-

monly known as the Statute of Limitations;

(9) Act of March 3, 1896 (29 Stat. 42), the same being "An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes";

(10) Act of March 3, 1891 (26 Stat. 1095–1099), the same being "An Act to repeal timber culture laws, and for other purposes," the same being a Statute of Limitations;

(11) Act of June 4, 1897 30 Stat. 11–35–36–37), the same being an Act providing for Forest Reserve lieu lands selections;

(12) The so-called "innocent purchaser" act (37 Stat. 320), entitled "An Act Supplementing the joint resolution of Congress approved April thirtieth, nineteen hundred and eight, entitled 'Joint resolution instructing the Attorney General to institute certain suits,' and so forth."

It also appears from the testimony (Vol. V., pp. 2443–2461), that the East Side Company commenced construction in East Portland on April 16, 1868, and that in July of that year the line of the road was laid out and more or less grading was being done, and groups of men were scattered along from place to place, covering a distance of several miles, extending between Hubbard and what is now Woodburn, and in the vicinity of Gervais, Marion County, Oregon; and that there was grading in the vicinity of that place, and there was grading also between Oregon City and Portland, scattered along from about Stark Street, in East Portland, approximately up to where the town of Gervais now is, about 13 or 14 miles from

Salem; and Mr. Gaston estimated the cost of this work done by the East Side Company, in the spring and summer of 1868 and up to February 1, 1869, at $150,000 (Vol. V., p. 2423, Record). It also appears (Vol. XIII., pp. 6783–4, Record, Defendants' Exhibits 284–285), that the California and Oregon Railroad Company filed its assent within one year after the passage of the Act of July 25, 1866, as required by section 6 thereof, and also completed the construction of the first twenty miles of its road within the time required thereby.

It appears from the record that voluminous testimony has been offered, oral and documentary, on behalf of the defendants-appellants, tending to show that these lands involved in suit (where they have any value) are chiefly valuable for timber, and that they are unfit for and incapable of settlement, and are unfit for any agricultural, horticultural or other such use; that it would cost from fifty to five hundred dollars per acre to remove the timber and stumps and render the lands fit for cultivation or any settlement purpose, even where there is sufficient soil or where conditions by reason of elevation or topography would permit cultivation or use.

There is voluminous testimony on the part of the Government tending to show that the major portion of these lands covered with timber, involved in this suit, are, when the timber has been removed and the lands have been cleared by grubbing the stumps and burning the brush, fit for cultivation and settlement and would thereby be adapted to agricultural, horticultural and other such uses, and that the soil of the

major portion of these lands thus covered with timber, when the timber has been removed, is suitable for such settlement purposes.

The status of these grants also appears from Defendants' Exhibit 258 (Vol. XIII, pages 6691–6698) as follows:

B. A. McA., May 11, 1912.

Status, as of date May 1, 1912, of that part of the grant situated in Oregon, made by act of Congress approved July 25, 1866, to the California and Oregon Railroad Company, and to "such company organized under the laws of Oregon as the Legislature of said State shall designate,"—known in Oregon as the "East Side Grant."

Total acres in Primary Limits		3,823,426.71
Acres Lost for which the Company is entitled to indemnity.		
Corvallis & Yaquina Bay Wagon Road Grant July 4, 1866	12,687.85	
Willamette Valley & Cascade Mountain Wagon Road Grant July 5, 1866	19,577.45	
Oregon Central Military Wagon Road Grant July 2, 1864	26,398.36	
Donation Land Claims..	1,143,925.70	
Swamp Lands	240.98	
State Selections	74,288.56	

Private Entries	407,486.27	
Mineral Entries	9,516.60	
Fort Lane Military Reservation	113.24	
	1,694,235.01	
Acres Lost for which Company is not entitled to indemnity.		
Roseburg & Coos Bay Wagon Road Grant March 3, 1869.		
These lands inured to the Railroad Grant but were erroneously patented by the U. S. to the Wagon Road Company and Railroad Company has no recourse	33,814.40	1,728,049.41
Acres which have inured to the Grant Patented..	1,795,664.71	
Patents applied for.....	20,366.38	
Patents not yet applied for—Surveyed	51,732.21	
Patents not yet applied for—Unsurveyed	227,974.00	2,095,377.30
Total Acres in Indemnity Limits		1,791,523.13

Acres Lost.	
Indian Reservation	845.68
Corvallis & Yaquina Bay Wagon Road Grant ...	37,824.72
Willamette Valley and Cascade Mountain Wagon Road Grant ...	37,833.01
Oregon Central Military Wagon Road Grant ..	22,321.84
Roseburg & Coos Bay Wagon Road Grant ...	26,771.59
Donation Land Claims..	55,874.26
Swamp Lands	1,672.30
State Selections	31,947.68
Private Entries	81,062.21
Private Entries Pending.	3,237.40
Mineral Entries	600.86
Oregon Central R. R. Co. (West Side Co.) Primary Patents.....	3,409.07
Northern Pacific R. R. Co. Lieu Selections Patented.	15,538.94
Northern Pacific R. R. Co. Lieu Selections Pending	7,915.68
	326,855.24

Acres Reserved by U. S. National Forests	490,327.88	
Klamath Irrigation project	645.95	
	490,973.83	817,829.07
Acres which have inured to Grant.		
Patented	955,045.51	
Patents applied for.....	4,296.09	
Selected — not certified — may be rejected	5,710.46	965,052.06
Acres which are available for future selection— Unsurveyed	8,640.00	8,640.00
Acres Primary Lost which Company is entitled to indemnity		1,694,235.01
Acres Indemnity Patented and Patents Applied for	965,052.06	
Acres Indemnity available for future selection....	8,640.00	973,692.06
Acres Primary Lost for which no Indemnity is available		720,542.95
Acres Primary Lost on account of error in U. S. General Land Office		

whereby patent issued for Roseburg and Coos Bay Wagon Road		33,814.40
Total Deficit in Grant....		754,367.35
If National Forest Lands Could be selected		490,327.88
The deficit would be reduced to		264,029.47

Status, as of date May 1, 1912, or grant made by act of Congress approved May 4, 1870, to Oregon Central Railroad Company,—known as "West Side Grant."

Total area in Primary Limits		501,807.38
Acres Lost for which the Company is entitled to indemnity.		
Donation Land Claims...	197,692.94	
Swamp Lands	997.42	
State Selections		9,680.15
Private Entries		37,238.01
Oregon and California R. R. Co., Primary.....	14,204.31	
Oregon and California R. R. Co., Indemnity Selections and Patents.....	41,190.76	
Acres Lost for which the Company is not entitled to Indemnity	301,003.59	

Quadrant	103,730.16	404,733.75
Acres which have inured to grant Patented	96,844.98	
Patents applied for.....	128.97	
Patents not yet applied for	99.68	97,073.63
Total Acres in Indemnity Limits		123,907.97
Acres Lost.		
Donation Land Claims..	7,347.18	
Swamp Lands	97.31	
State Selections	6,924.93	
Private Entries	12,842.70	
Quadrant	58,853.18	
Northern Pacific R. R. Co. Lieu Selection	40.	86,105.30
Acres which have inured to Grant.		
Patented		37,788.67
Acres which are available for future selection.		
Unsurveyed		14.00
Acres of Primary Lost for which Company is entitled to indemnity.....		301,003.59
Acres Indemnity Patented	37,788.67	
Acres of Indemnity which		

are available for future Selection	14.00	37,802.67
Acres of Primary Lost for which no Indemnity is available		263,200.92

It appears as shown by Defendants' Exhibit 276 (Vol. XIII, pages 6721–6775) that selection lists were certified, approved, and lands patented continuously from July 28, 1870, as to selection lists and 1891 as to first patent, down to February 2, 1905, and that these selection lists were acted upon by the Commissioner of the General Land Office, patents issued by the direction of the President of the United States, and delivered to the Oregon and California Railroad Company as conveying or evidencing title to the lands, and for all purposes for which patents of the United States are customarily issued.

Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, the defendants-appellants, contend in substance:

(1). That the Act of July 25, 1866, vested the title of the East Side grant in the East Side company as of date October 20, 1868, when it was designated by the Legislative Assembly of the State of Oregon, at the request of the Company, pursuant to the Act of July 25, 1866, and that this title took effect as of date July 25, 1866, and could not be affected by the provisions of the Act of April 10, 1869, or the title thereby granted debased by the proviso of the last mentioned act, known as the "actual settler" clause.

(2). That, assuming that the Act of April 10, 1869, and section 4 of the Act of May 4, 1870, is enforcible and applies to such lands as are adapted to settlement, and that the "actual settler" clause has not been abrogated or waived by legislation or estopped, the Acts of Congress of July 25, 1866, and May 4, 1870, were passed for the primary purpose of constructing a railroad as a national highway, and were not passed for the purpose of promoting the settlement of the public lands; and that any provision in the Act of April 10, 1869, or the Act of May 4, 1870, for the benefit of settlers, must be taken in subordination to this primary purpose, and must give way until the discharge of the obligations incurred by sale or redemption of bonds issued for constructions funds for construction of roads.

(3). That the settlement clause of the Act of April 10, 1869, and of section 4 of the Act of May 4, 1870, is not a condition subsequent.

(4). That Congress was without lawful authority on April 10, 1869, to annex a new condition, by amendment or otherwise, to the land grant made by the Act of July 25, 1866, for the reason that the California and Oregon Railroad Company filed its assent within one year, and completed the first section of 20 miles of said railroad within two years after the passage of the act, and had the right to earn the entire grant made of the lands from Roseville Junction, California, to Portland in Oregon; and for the further reason that neither the California and Oregon Railroad Company nor the East Side company was in default on April 10, 1869.

(5). That the so-called "actual settler" clause in the Act of April 10, 1869, and section 4 of the Act of May 4, 1870, construed so as to give effect to the primary policy of Congress and to carry out the purpose of the granting acts in the light of long continued, contemporaneous, and permitted construction of these acts, as evidenced by the record, and subsequent legislation of Congress relating to land grants and public lands, did not create a condition subsequent.

(6). That the United States has waived its right to enforce the so-called "actual settler" clause, assuming that its words create a condition subsequent, and it has so waived its right by long-continued acquiescence and affirmative action and legislation with full knowledge of continued breaches by the company, from the earliest administration of the grants to the passage and enforcement of the Act of August 20, 1912; and that the United States is estopped, in view of all the facts and circumstances, to enforce the "actual settler" clause, whether a condition subsequent or a covenant or trust.

(7). That a condition subsequent must be not only express or implied, but legal, definite, and certain, and reasonably possible of performance, and not repugnant to the nature of the estate to which it is annexed. And in the absence of express limitation, a condition subsequent must be capable of performance within a reasonable time, and continually and regularly kept thereafter; and that if, within a reasonable time after the title vested in the company to any part of these lands, the company could not sell

them to "actual settlers" for the price named, in the quantities specified, the condition became impossible of performance and was thereby discharged; and that the same result would follow where performance of the condition was rendered impossible, or its performance by the company made practically impossible by legislative enactment by the United States; and that the proof shows that there was at no time since the title vested in the company, practical ability, or possibility, to sell these lands to "actual settlers" for the price named, in the quantities specified, because of the character of the granted lands, their situation and location, and because they were unfit for disposition under the settlement laws, in accordance with the terms of the condition; and that, therefore, the condition has become impossible of performance and has been discharged.

(8). That the terms of the "actual settler" clause are so indefinite and uncertain as that the company could not, under its terms, fairly construed, ascertain the legal measure of its duty so as to perform the same; and that the "actual settler" clause must fail of enforcement unless it is construed to apply to that period of time between the date of the Act and the construction of sections of road, the acceptance of the same, and the direction of the President to issue patents for lands earned by such construction.

(9). That the "actual settler" clause is repugnant to the grant and could not have been enforced without destruction of the primary and dominant purpose of Congress to aid in the construction of road.

(10). That the "actual settler" clause, if ever enforcible, should be limited to "actual settlers" who went upon the lands prior to the issuance of patents, or at least prior to the time when the President approved the reports of the Commissioners who examined the sections of constructed road and directed patents to issue.

(11). That when patents issued, that was a determination that the "actual settler" clause no longer applied to the lands thereby conveyed, excepting as to such settlers as may then have been upon the lands under the provisions of the act.

(12). That the Statute of Limitations applies to this suit, and that as to all lands patented more than five years prior to the commencement of suit which were issued prior to March 2, 1896, the suit is barred; and as to all lands for which patents issued after that date, barred within six years thereafter; that the Act of March 3, 1891 (26 Stat. 1095) and the Act of March 2, 1896 (29 Stat. 42), read in connection with the Act of September 29, 1890 (26 Stat. 496), are more than mere statutes of limitations. They vest or quiet title in fee simple, without condition or possibility of reverter.

(13). That the Oregon and California Railroad Company by the deed made to it in March 29, 1870, by the East Side Company and by the deed of October 6, 1880, made by the West Side Company and patents issued, is a bona fide purchaser of all the lands granted; and that the Union Trust Company, under its mortgage of July 1, 1887, is likewise a bona fide purchaser, and that the one owns the land

in fee simple and the other owns and holds a valid lien thereon,—each free from any right to enforce the so-called "actual settler" clause as to any of the lands involved in suit.

The Union Trust Company of New York, appellant, in substance, contends:

(1) That the proviso in the Act of 1869 applies only to lands susceptible to actual settlement and cultivation and does not include timber lands; that the words "actual settlers" mean persons actually in cultivation of the land at the time the Act took effect, and that the proviso as to actual settlement, if prospective, is limited to lands susceptible to actual settlement and cultivation; and that if the scheme of the proviso of 1869 was, that the granted lands were to be disposed of by the railroad company in analogy to the manner in which similar lands were disposed of by the Government, then timber lands were not within the purview of the proviso; that the construction placed upon the proviso by the Land Department and other officers of the Government for many years was, that it did not apply to timber lands or lands not susceptible of cultivation, and that this construction is consistent with the purposes of the grant.

(2) That the last proviso in the Act of 1869, as construed by the court below, is void because in restraint of alienation.

(3) That the last proviso of the Act of 1869 was not intended to create, and did not create, a condition subsequent.

(4) That the proviso of the Act of 1870, respect-

ing actual settlers, was not a condition subsequent.

(5) That the provisions of the Act of 1869 and of the Act of 1870 respecting actual settlers are restrictive covenants, and if enforcible at all are enforcible in a court of equity only as to lands suitable for settlement and cultivation.

(6) That no evidence was submitted of a breach of the provisions of the Act of 1869 or of the Act of 1870 regarding actual settlers, whether they be regarded as conditions or covenants, which justifies the decree of the court below or requires any decree in favor of the complainant.

(7) That the Union Trust Co. is a bona fide purchaser under its mortgage of July 1, 1887, of all the lands involved in suit, and that the United States is estopped to insist upon the performance of the "actual settlers" clause until such mortgage shall have been discharged by sale of the lands covered by said mortgage.

The United States, appellee, in substance, contends:

(1) That although the title to the granted lands under the Act of July 25, 1866, passed out of United States prior to April 10, 1869, it did not find lodgment in the East Side Company until after the passage of that Act, and that the doctrine of relation does not apply; that the title was in the West Side Company until it was renounced by that company in 1870; that filing of assent under the Act of April 10, 1869, and acceptance of grant in the manner provided by the Act of July 25, 1866, pursuant to the Act of April 10, 1869, was necessary to vest that title

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in the East Side Company; that in any event, the Oregon and California Railroad Company, is estopped under its resolution of June 8, 1869, accepting the provisions of the Act of July 25, 1866, and of all acts amendatory thereof, and filing the same—to deny the validity of the Act of April 10, 1869, and the effectiveness of the "actual settler" clause therein, and that Congress had power under Section 12 of the Act of July 25, 1866, to amend the grant and afterward exercised that power, at the request of the East Side Company.

(2) That under the rules of construction and the situation as disclosed in the Congressional debates and history of the "public land" laws and the Acts making grants of public land to railroad companies about that time, the "actual settler" clause in each Act is a condition subsequent.

(3) The record shows breaches of the conditions subsequent by sales of granted lands under each of these Acts; that is, unlawful sales in excess quantities and at excess prices, and to persons other than actual settlers, and conveyances by way of trust deeds and mortgages, as disclosed by the evidence.

(4) The breaches alleged and proven have not been waived by the United States in this: that waiver necessarily implies knowledge of the right and intention to relinquish that right, and that mere silent acquiescence in breaches of a condition does not constitute a waiver of such breaches, or of the condition, and that mere waiver of breaches of a condition will not constitute a waiver of the condition itself, and that no one but Congress can waive a breach of a

condition in a Congressional grant; that constructive notice of alleged breaches is ineffectual.

(5) That the suit is not barred by the statute of limitations, or the "actual settler" clause waived by the issuance of patents.

The Cross Complainants and Interveners, appellants, in substance, contend:

(1) That the words of the "actual settler" clause in the Act of April 10, 1869, and in section 4 of the Act of May 4, 1870, create an enforcible trust and constitute the Railroad Company trustee holding the legal title of these lands for the benefit of actual settlers who have gone upon the land, as contended by the Cross-Complainants or actual settlers who, in good faith, may apply to purchase and enter upon the lands, as contended for by the Interveners.

(2) That the United States, having created the trust in the granted lands, having accepted the benefits from the construction and operation of the road, and having offered these lands through its trustee for sale to actual settlers, cannot be held to claim a forfeiture of any portion of the trust estate, but should be required to assist in enforcing and to enforce the terms of the trust in its name for the benefit of such actual settlers.

(3) That the United States by its acquiescence in the sales made by the Company in violation of the terms of the trust, and by its issuance of patents for lands sold in violation of the terms of the trust, and by inducing actual settlers to qualify as such under the terms of the trust, is and ought to be estopped from asserting any demand for forfeiture, and should

be held to its duty of compelling specific performance for the benefit of qualified purchasers who have acquired an equitable interest in the lands applied for.

(4) That the Railroad Company having accepted all the terms of the grants with the conditions and limitations attached thereto, should not be allowed to claim any greater rights in the trust estate than is created by the law; that is, $2.50 per acre for each acre of the land granted which it could or might sell for that price.

(5) That each of the Cross-Complainants and each of the Interveners is entitled to a decree in this cause, of specific performance of the trust agreement created by the "actual settler" clause and the application of the actual settler to purchase and settle upon the lands applied for.

(6) That the words of the "actual settler" clause do not create an estate upon condition, or a condition subsequent.

Under these contentions and this statement of facts, it appears that the decision of the case on appeal depends substantially upon the proper construction of these land grants, speaking generally, and of their proper construction as to these specific lands, depending upon their character as to whether they are essentially timber lands and chiefly valuable for timber and unfit for actual settlement, or for any settlement purpose, and whether the "actual settler" clause has been waived or repealed, or the United States is estopped to enforce the same. The questions involved are of general importance and of great public interest and affect the rights of a numerous

class of persons as well as the immediate parties to the litigation. In view of such circumstances and the necessity for a speedy determination by final authority, and the very grave importance and intricacy of the questions of law involved, the following questions are hereby certified to the Supreme Court of the United States for its decision:

Questions of Law Concerning Which the Circuit Court of Appeals Desires the Instruction of the Supreme Court for Its Proper Decision.

1. Was it the primary meaning and purpose of the Act of July 25, 1866, to aid in the construction of a railroad between the points therein named, by the mortgaging of the lands granted in aid of such construction, with the attendant right to make sales and apply the proceeds thereof in redemption of the mortgage indebtedness?

2. Do sales to settlers as contemplated by the Amendment of April 10, 1869, at the prices and in the quantities mentioned in said Amendment, represent a secondary and subsequent purpose, effective in relation to the granted lands, only after the same have first been applied in aid of the construction of the railroad by sales thereof and the payment of the proceeds of such sales in redemption of the mortgage indebtedness incurred for the construction of the railroad?

3. Was it the primary meaning and purpose of the Act of May 4, 1870, to aid in the construction of a railroad between the points therein named, by the mortgaging of the lands granted in aid of such construction, with the attendant right to make sales

and apply the proceeds thereof in redemption of the mortgage indebtedness?

4. Do sales to settlers as contemplated by Section 4 of the Act of May 4, 1870, at the prices and in the quantities mentioned in said section, represent a secondary and subsequent purpose, effective in relation to the granted lands, only after the same have first been applied in aid of the construction of the railroad by sales thereof and the payment of the proceeds of such sales in redemption of the mortgage indebtedness incurred for the construction of the railroad?

5. Did the Act of Congress of April 10, 1869, which reads as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section six of an an act entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland in Oregon,' approved July twenty-fifth, eighteen hundred and sixty-six, be, and the same hereby is, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed

within one year after the passage of said act; *provided,* that nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land; *And provided, further,* that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents per acre";

and the resolution of acceptance by the defendant Oregon & California Railroad Company, which was dated April 4, 1870, together operate to constitute: (a) a condition subsequent, or (b) a trust, or (c) a covenant enforcible by specific performance at the suit of the government or of any person entitled to the benefit of it, or (d) a regulative, directory, non-enforcible covenant, or (e) a negative covenant imposed upon the railroad company that in making sales of the granted lands it would sell the same to nobody except actual settlers in the quantities and at the prices mentioned in the Act of April 10, 1869, and enforcible by injunction restraining the railroad company, in the event that it elected to make sales of the granted lands, from making such sales to anybody except actual settlers, and at the prices and in the quantities mentioned in said act?

6. Did Section 4 of the Act of Congress of May 4, 1870, which reads as follows:

"That the said alternate sections of land granted by the act excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road shall be sold by the company only to actual settlers, in quantities not exceeding one hundred sixty acres or a quarter section to any one settler and at prices not exceeding two dollars and fifty cents per acre";

and the resolution of acceptance by the Oregon Central Railroad Company, which was dated July 2, 1870, together operate to constitute (a) a condition subsequent, or (b) a trust, or (c) a covenant enforcible by specific performance at the suit of the government or of any person entitled to the benefit of it, or (d) a regulative, directory, non-enforcible covenant, or (e) a negative covenant imposed upon the railroad company that in making sales of the granted lands it would sell the same to nobody except actual settlers in the quantities and at the prices mentioned in the Act of May 4, 1870, and enforcible by injunction restraining the railroad company, in the event that it elected to make sales of the granted lands, from making such sales to anybody except actual settlers, and at the prices and in the quantities mentioned in said act?

7. Does the actual settler clause in the Act of April 10, 1869, and in Section 4 of the Act of May 4, 1870, create an enforcible trust, and constitute the railroad company a trustee to hold the legal title to the lands for the benefit of actual settlers who have

gone upon the lands since the date of the grant?

8. Is the actual settlers clause in the Act of April 10, 1869, and in section 4 of the Act of May 4, 1870, limited to persons who may have been upon the lands as actual settlers prior to the issuance of the patents for the lands earned by construction?

9. Did the issuance and delivery of patents by the United States, to the Oregon and California Railroad Company, for the lands described therein, determine that the actual settler clause no longer applied to the lands thereby conveyed?

10. Does the proviso of the Act of April 10, 1869, or of Section 4 of the Act of May 4, 1870, apply to any lands other than those susceptible of actual settlement and cultivation and do they apply to or include timber lands which are chiefly valuable for timber?

WILLIAM B. GILBERT,
ERSKINE M. ROSS,
WM. W. MORROW,
United States Circuit Judges of the Ninth Judicial Circuit and Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions or Propositions of Law to the Supreme Court of the United States Under Section 239 of the Judicial Code (36 Stat. 1157.) Filde Oct. 14, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2400.

OREGON & CALIFORNIA RAILROAD COMPANY, a Corporation, Defendants and Appellants; John L. Snyder et al., Cross-Complainants and Appellants; William F. Slaughter et al., Interveners and Appellants,

vs.

THE UNITED STATES OF AMERICA, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, to Transcript of the Record on Certificate from said Court to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing nine thousand three hundred and twenty-five (9325) pages, numbered from and including one (1) to and including nine thousand three hundred and twenty-five (9325), comprised in the preceding nineteen (19) volumes, marked, respectively, Volume I to Volume XIX, inclusive, to be a full, true and correct copy of the printed Transcript of the Record and of all proceedings had, and papers filed in the above-entitled cause, as the originals thereof remain on file and appear of record in my office, and that the same, in connection with the following original exhibits, viz: Government's Original Exhibits Nos. 109, 109-A, 109-B, 109-C, 109-D, 110, 110^{2}, 110^{3}, 110^{4}, 111, 111-A, 111-B, 111-C, 111-D, 111-E, 111-F, 111-G, 111-H, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 128, and Receipt of F. S. Steele, dated April 9, 1912, for Government's Exhibits 100-A and 100-B. Defendants' Original Exhibits Nos. 250, 251, 252, 253, 254, 255-256 [1 Exhibit], 257, 257-B, 257-C, 257-D, 257-E, 257-F, 257-G, 257-H, 257-I, 257-J, 257-K, 257-L, 257-M, 257-N, 257-O, 257-P, 257-Q, 257-R, 257-S, 258, 259, 260, 261, 262, 263, 264, 265 [in 3 parts], 266, 267, 268, 269, 270 [consisting of 93 photographs], 271, 272, 273 [consisting of 84 photographs], 274 [consisting of 6 photographs], 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313 [consisting of 4 photographs], 314, 315, 316 [in 4 parts], 317, 318 [in 19 parts], 319, 320 [in 2 parts], 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332 [in 2 parts], 333, 334, 335, 336, 337, 338, 339, 340,

341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 371 372, 373, 374, 375, 376, 377, 378 [in 2 parts], 379, 380, 381, 382, 383, 384, 385, 386 [in 2 parts], 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, and 402, and in connection with the typewritten Report of the Special Examiner, consisting of ten (10) volumes and Index, constitute a true copy of the entire record in said cause.

Attest my hand and the Seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this fourteenth day of October, A. D. 1914.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Endorsed:] File No. 24,423. Supreme Court U. S., October term, 1914. Term No. 679. Oregon & California R. R. Co. et al. vs. The United States. Transcript of record as return to writ of certiorari. Filed February 1, 1915.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

OREGON & CALIFORNIA RAILROAD COMPANY, a Corporation, et al., Defendants and Appellants; JOHN L. SNYDER ET AL., CROSS-COMPLAINANTS and Appellants; WILLIAM F. SLAUGHTER ET AL., INTERVENORS and Appellants; *v.* THE UNITED STATES OF AMERICA, Appellee.	No. 679.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION BY THE UNITED STATES FOR CERTIFICATION OF THE WHOLE RECORD.

Comes now the Solicitor General on behalf of the United States and moves that the court require the whole record and cause to be sent up for its consideration and final determination pursuant to section 239 of the Judicial Code.

THE QUESTIONS INVOLVED.

The action depends in general on the construction of two land-grant Acts, one of July 25, 1866 (14 Stat. 239), as amended by the Act of April 10, 1869 (16 Stat. 47), and the other of May 4, 1870 (16 Stat. 94), but chiefly on whether the last proviso of the amendatory Act of 1869 and Section 4 of the Act of 1870, respectively, raise a condition subsequent, a trust, or a negative, directive, and non-enforceable covenant.

BRIEF STATEMENT OF THE RECORD.

Congress by the Act of July 26, 1866, granted to such railroad company organized under the laws of Oregon as the legislature of that State should thereafter designate about 3,100,000 acres of land in Oregon, to aid in the construction of a railroad and telegraph line between Portland, Oregon, and the northern boundary of California. The legislature in 1866 designated the company to receive the grant. In 1868 it revoked the designation on the ground that the company was not properly organized at the time of the designation, and it thereupon designated another company.

The Act of 1866 required the designated company to file its assent to the Act in the Office of the Secretary of the Interior within one year after the passage of the Act. The company last designated, not having been named soon enough to do this, applied to Congress for an enlargement of the

time. This was allowed by the amendatory Act of April 10, 1869, but with this condition:

> That the lands granted by the Act aforesaid (July 25, 1866) shall be sold to actual settlers only in quantities not greater than one-quarter section to one purchaser and for a price not exceeding $2.50 per acre.

In 1870 the company first designated abandoned the field to the one last designated, and applied to Congress for a new grant to aid in the construction of another railroad. The grant was made by the Act of May 4, 1870, and contains a condition substantially the same as the one just quoted. Later, the defendant, Oregon and California Railroad Company, became the successor of both companies, and as such applied for and received patents to all the lands embraced in the two grants. It has sold upwards of 800,000 acres; and had left about 2,300,000 acres—the subject of this action—when the suit was begun. Of the lands sold, approximately 296,000 acres were disposed of in conformity with the terms of the grants and about 520,000 acres in violation of them.

There is an admission in the record by the patentee company that neither it nor its predecessors in title, regarded the conditions referred to as applicable. It is stipulated that in 1903, the patentee company withdrew from sale all the unsold lands and thereafter refused to sell any, and that *prior* to 1907 more than four thousand persons severally applied to it to purchase lands in quantities not exceeding one hundred and sixty acres for each person and at

a price not exceeding two dollars and a half per acre, and that each claimed that he desired the land for settlement, but that all applications were denied. The same company admits in testimony that *since* 1907 it has refused the applications of about ten thousand persons to purchase upon the conditions named in the grants.

In February, 1907, the Legislature of Oregon by joint resolution requested Congress to enact such laws and take such steps as might be necessary to compel the defendant railroad companies to comply with the conditions of the grants. In response to this Congress on April 30, 1908, passed the joint resolution (35 Stat. 571) in pursuance of which this action was commenced.

Some sixty-five persons claiming *to be* actual settlers on the lands; and that the railroad company held the lands in trust, and should be compelled to convey to them, upon the payment of $2.50 per acre, the lands settled upon, were permitted to become cross-complainants.

About four thousand persons, each asserting that he had tendered to the railroad company $2.50 an acre for a quarter section, that he had *offered to become* an actual settler, and that the railroad company held the land in trust and should be compelled to convey to him 160 acres, were permitted to intervene.

The Southern Pacific Company was made a party upon the theory that it owned all but a few shares of the stock of the defendant, Oregon and California

Company, and that it maintains the latter simply as a dummy, and is, in contemplation of law, the owner of the lands claimed by that company.

Stephen T. Gage is the trustee under a deed of trust given by the Oregon and California Company upon all its property, including the lands in controversy, to secure its preferred stock; and the Union Trust Company is the trustee in a mortgage covering the same property, and securing the payment of $17,745,000.

The Oregon and California Railroad Company and others demurred to the cross-complaints, the petitions of intervention, and the bill of complaint. The demurrer was sustained as to the cross-complaints and petitions of intervention, but overruled as to the bill of complaint. Neither the cross-complainants nor intervenors answered, and judgment went against them. The two railroad companies, the Union Trust Company, and Stephen T. Gage answered, and the United States in due time replied.

Nearly all the testimony in the record bears upon the character of the lands—the railroad companies, Gage, and the trust company, contending that most of the lands are not susceptible of cultivation, and, therefore, that the conditions mentioned do not apply. The Government on the other hand contends that—

(*a*) The conditions apply irrespective of the character of the lands.

(*b*) That if the condition which relates to actual settlers does not apply, the ones with respect to the

quantity and price do apply, and finally, that the land *is* susceptible of cultivation. If the Court takes the view that the conditions apply irrespective of whether the land is cultivable, there will be no conflict of fact to determine, and most of the testimony in the record will need no consideration by the Court.

The District Court found that each of the grants created a condition subsequent, and that the conditions were violated; and it entered judgment forfeiting the unsold lands of both grants to the Government. Upon appeal, the Circuit Court of Appeals certified to this court the following questions, to wit:

(1) Was it the primary meaning and purpose of the Act of July 25, 1866, to aid in the construction of a railroad between the points therein named, by the mortgaging of the lands granted in aid of such construction, with the attendant right to make sales and apply the proceeds thereof in redemption of the mortgage indebtedness?

(2) Do sales to settlers as contemplated by the Amendment of April 10, 1869, at the prices and in the quantities mentioned in said Amendment, represent a secondary and subsequent purpose, effective in relation to the granted lands, only after the same have first been applied in aid of the construction of the railroad by sales thereof and the payment of the proceeds of such sales in redemption of the mortgage indebtedness incurred for the construction of the railroad?

(3) Was it the primary meaning and purpose of the Act of May 4, 1870, to aid in the construction of a railroad between the points therein named, by the mortgaging of the lands granted in aid of such construction, with the attendant right to make sales and apply the proceeds thereof in redemption of the mortgage indebtedness?

(4) Do sales to settlers as contemplated by Section 4 of the Act of May 4, 1870, at the prices and in the quantities mentioned in said section, represent a secondary and subsequent purpose, effective in relation to the granted lands, only after the same have first been applied in aid of the construction of the railroad by sales thereof and the payment of the proceeds of such sales in redemption of the mortgage indebtedness incurred for the construction of the railroad?

(5) Did the Act of Congress of April 10, 1869, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section six of an act entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland in Oregon," approved July twenty-fifth, eighteen hundred and sixty-six, be, and the same hereby is, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of

> the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act; *provided,* that nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land; *And provided, further,* that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents per acre;

and the resolution of acceptance by the defendant Oregon & California Railroad Company, which was dated April 4, 1870, together operate to constitute: (*a*) a condition subsequent, or (*b*) a trust, or (*c*) a covenant enforceable by specific performance at the suit of the government or of any person entitled to the benefit of it, or (*d*) a regulative, directory, nonenforceable covenant, or (*e*) a negative covenant imposed upon the railroad company that in making sales of the granted lands it would sell the same to nobody except actual settlers in the quantities and at the prices mentioned in the Act of April 10, 1869, and enforceable by injunction restraining the railroad company, in the event that it elected to make sales of the granted lands, from making such

sales to anybody except actual settlers, and at the prices and in the quantities mentioned in said Act?

(6) Did Section 4 of the Act of Congress of May 4, 1870, which reads as follows:

> That the said alternate sections of land granted by the act excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road shall be sold by the company only to actual settlers, in quantities not exceeding one hundred sixty acres or a quarter section to any one settler and at prices not exceeding two dollars and fifty cents per acre;

and the resolution of acceptance by the Oregon Central Railroad Company, which was dated July 2, 1870, together operate to constitute (*a*) a condition subsequent, or (*b*) a trust, or (*c*) a covenant enforceable by specific performance at the suit of the Government or of any person entitled to the benefit of it, or (*d*) a regulative, directory, non-enforceable covenant, or (*e*) a negative covenant imposed upon the railroad company that in making sales of the granted lands it would sell the same to nobody except actual settlers in the quantities and at the prices mentioned in the Act of May 4, 1870, and enforceable by injunction restraining the railroad company, in the event that it elected to make sales of the granted lands, from making such sales to anybody except actual settlers, and at the prices and in the quantities mentioned in said act?

(7) Does the actual-settler clause in the Act of April 10, 1869, and in Section 4 of the Act of May 4, 1870, create an enforceable trust, and constitute the railroad company a trustee to hold the legal title to the lands for the benefit of actual settlers who have gone upon the lands since the date of the grant?

(8) Is the actual-settlers clause in the Act of April 10, 1869, and in Section 4 of the Act of May 4, 1870, limited to persons who may have been upon the lands as actual settlers prior to the issuance of the patents for the lands earned by construction?

(9) Did the issuance and delivery of patents by the United States, to the Oregon and California Railroad Company, for the lands described therein, determine that the actual-settler clause no longer applied to the lands thereby conveyed?

(10) Does the proviso of the Act of April 10, 1869, or of Section 4 of the Act of May 4, 1870, apply to any lands other than those susceptible of actual settlement and cultivation and do they apply to or include timber lands which are chiefly valuable for timber?

It is stipulated in the record that the two million three hundred thousand acres are worth more than thirty millions of dollars. It is believed, however, that they are worth nearer seventy millions of dollars. The great value is chiefly due to the large quantity of merchantable timber on them.

These lands are located in about twenty counties in the western part of Oregon and have all been

assessed for State, county, and city purposes. The rate of taxation upon all property in these counties was fixed upon the hypothesis that the taxes upon these lands would be paid, but the railroad company has refused to pay, pending the final determination of the suit. The delinquent taxes on the lands amount to the sum of $459,957.89, with interest. In many of the counties the taxes on the lands in question form a large percentage of the entire levy. In consequence, the financial affairs of the State, counties, and the municipalities concerned are greatly embarrassed. Contracts have been let and obligations assumed on the theory that these taxes would be paid, and as a result there is a large shortage in every fund. The public service is greatly interfered with and much inconvenience exists in the administration of State, county, and municipal affairs, and will continue to exist until the ultimate disposition of the suit.

There is now about to be tried in the United States District Court for Oregon, where this case was tried, the case of the *United States* v. *The Southern Oregon Company,* in which it is claimed by the Government that 96,000 acres of land contiguous to much of the land involved in this suit, have been forfeited because of the breach of conditions subsequent in the Act of March 3, 1869 (15 Stat. 340) granting these lands to Oregon to aid in the construction of a wagon road. The provisions restricting the power of sale in that grant are substantially the same as in the two grants involved in

this suit. Consequently, a decision in this case will greatly facilitate the determination of that case. Besides, the lands embraced in the three grants cover such a large part of western Oregon that the development of that section of the State is greatly retarded, and will continue to be until the suit has been finally determined by this Court.

REASONS FOR CALLING UP THE WHOLE RECORD IN THE CASE.

Answers to the questions certified will not dispose of the whole case, and a subsequent return to this court on appeal would undoubtedly follow. To illustrate:

None of the questions certified call for an answer to any of the following contentions:

(1) The first contention of the Oregon and California Railroad Company and others. (Cert. 245.) Moreover, an answer to that contention would require an answer to other questions, as for instance, whether the company last designated by the legislature of Oregon (the East Side Company), was sufficiently organized at the time (October 20, 1868), to be competent to receive the designation, or the grant. Also whether the West Side Company, the company first designated by the legislature, had not received the grant before the East Side Company was named. All these questions are in the case.

(2) The fourth contention of the same railroad company and others. (Cert. 246.)

(3) The sixth contention of the same railroad company and others. (Cert. 247.)

(4) The twelfth contention of the same railroad company and others. (Cert. 249.)

(5) The seventh contention of the Union Trust Company. (Cert. 251.)

(6) The contention of the Government that the defendant railroad companies are estopped to deny the applicability of the amendatory Act of April 10, 1869. (Cert. 252.)

In addition there are many other questions which will not be answered by answers to the questions certified.

Because of these things, it is submitted, the Court should have before it the entire cause with full liberty to consider every question, either patent or latent, primary or subsidiary, existing in the record, unhampered by the peculiar restrictions which affect the jurisdiction when a decision is invoked merely upon the questions certified.

All parties in interest concur in this motion.

Respectfully submitted.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1914.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

OREGON AND CALIFORNIA RAILROAD COMPANY et al. *v.* THE UNITED STATES OF AMERICA. } No. 679.

ON CERTIFCATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

The case involves the construction of two land grants. As the questions involved are fresh in memory, the court having recently granted a motion for a writ of certiorari to bring up the entire record, it is deemed unnecessary to repeat here at length the facts of the case. Reference is made to the motion for the writ of certiorari, filed November 27, 1914, for a full statement thereon.

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REASONS FOR ADVANCEMENT.

The record discloses that the 2,300,000 acres of land here in controversy are worth more than $30,000,000, but it is believed they are worth nearer $70,000,000.

These lands are located in about 20 counties in the western part of Oregon and have all been assessed for State, county, and city purposes. The rate of taxation upon *all* property in these counties was fixed upon the hypothesis that the taxes on these lands would be paid, but pending the final determination of this litigation the railroad company has refused to pay. The delinquent taxes amount to $459,957.89, with interest, and the taxes on the lands in many of the counties form a large percentage of the entire levy. The result is that the public service is interfered with and much embarrassment and inconvenience exists in the administration of financial affairs of the State, counties, and municipalities.

There is now pending in the District Court for Oregon the case of *United States* v. *Southern Oregon Co.*, involving 96,000 acres contiguous to much of the land involved in this suit, which land the Government contends is forfeited because of the breach of conditions subsequent in the act of March 3, 1869, granting these lands to Oregon to aid in the construction of a wagon road. The restrictions in that grant are substantially the same as in the two grants involved in this suit, and an early decision in this

cause will greatly facilitate the determination of that case.

The land embraced in the three grants referred to cover such a large part of western Oregon that the development of that section of the State is considerably retarded, and will continue so to be until the final determination of this suit.

Both this suit and the suit against the *Southern Oregon Co.* were brought in obedience to the specific direction of Congress, expressed in a joint resolution (35 Stat., 571).

Notice of this motion has been given opposing counsel.

JOHN W. DAVIS,
Solicitor General.

FEBRUARY, 1915.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 679.

OREGON & CALIFORNIA RAILROAD COMPANY, UNION TRUST COMPANY, AND STEPHEN T. GAGE, DEFENDANTS AND APPELLANTS; JOHN L. SNYDER ET AL., CROSS-COMPLAINANTS AND APPELLANTS, AND WILLIAM F. SLAUGHTER ET AL., INTERVENERS AND APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUGGESTIONS OF JOHN L. SNYDER ET AL. IN SUPPORT OF MOTION BY THE UNITED STATES TO ADVANCE CASE FOR EARLY ARGUMENT.

May it please your honors:

Leave to file these suggestions within three days was granted in open court on February 23, 1915.

Thirty copies hereof were filed with the clerk on February 26, 1915. On the same day service was made by mail upon all other counsel to the record, such service being made upon

Mr. A. A. Hoehling, Jr., of Washington, D. C., in behalf of the Oregon & California Railroad Company, the Southern Pacific Company, and Stephen T. Gage; upon Mr. John C. Spooner, of New York, in behalf of the Union Trust Company; upon Mr. John W. Davis, Washington, D. C., Solicitor General, in behalf of the United States, and upon Mr. John Mills Day, of Tacoma, Washington, in behalf of the interveners.

This litigation was started on September 16, 1907, by John L. Snyder, one of 65 cross-complainants whom I represent in this record. These cross-complainants were then and are now actual settlers upon certain tracts of the land involved, as is shown by the record.

It will be my endeavor to show to your honors that this case ought to be advanced for argument for April, during the present term.

The litigation has now been pending for nearly eight years. That, of itself, ought to be a strong reason for refusing now to delay the case practically another year by putting it over to October, as is desired by the railroad company. The cross-complainants, who are the only settlers on the land, have at all times been diligent and have at all times urged reasonable speed in the case, but they have been held back and hampered by long and unreasonable delays, both by the railroad company and by the United States, as will be shown by the record.

In May, 1914, nearly one year ago, the case was argued before the Circuit Court of Appeals, and at the conclusion of the argument the court announced that, owing to the importance of an early final decision, it would immediately certify the case here. That course was taken to save time. Yet no time will be saved if the case now goes over to October, for the case would have reached here by October, 1915, if the Court of Appeals had gone ahead and decided it instead of certifying it. It was clearly understood at the time of the certification that the parties would all agree to a motion to

have the entire record sent up and that the case should come on for argument at the October, 1914, term. Counsel for the railroad at that time announced that they were anxious for a final decision here, and that they would join the Government in a motion to bring up the whole record and to advance the case, and such announcement on the part of the railroad was given to the press of the Pacific Coast at the time and widely circulated. The public was given to understand that if any delay should occur in bringing the case to final issue here it would not be because of any lack of desire on the part of the railroad company for an early decision. Such an interview was given out by W. D. Fenton, leading counsel in the argument of the case for the railroad company, and was printed in the Portland Oregonian on June 5, 1914. The same is on file in the Congressional Library, and is hereby referred to and made a part hereof.

In that interview Mr. Fenton said:

> "We expect that the case, under the Federal practice, will be certified to the Supreme Court to be docketed on the October term, 1914, and that it will be regularly assigned for trial on motion to advance about March next. The statute provides that when the case reaches the Supreme Court on a certificate of the judges as to questions to be answered by the court that the Supreme Court may answer the questions or may make an order that the entire record shall be sent up.
>
> "All parties, I believe, will join in a motion in the Supreme Court to have the entire record sent up, so that that court may try the questions involved, both law and fact, without the necessity of sending the case back to the Circuit Court of Appeals with the answers to the questions to be certified.
>
> "The case, I have no doubt, will be heard upon the merits and upon the entire record by the Supreme Court as early as I have indicated, certainly within the next twelve months. This long litigation will thereby be ended, very greatly to the satisfaction of every one and to the interest of the public as well as the companies."

The foregoing certainly shows that the railroad company has had ample notice to be ready for trial and that it is ready to present its case now.

By the acts of April 10, 1869, and May 4, 1870, the Oregon & California Railroad Company received in Oregon 3,100,000 acres of land to aid in building a railroad from Portland to the California line, but with a specific provision in each grant as follows:

> "*Provided,* That the lands hereby granted shall be sold by said railroad company to actual settlers only, in quantities not greater than 160 acres to any one settler, and for prices not exceeding $2.50 per acre."

The lands were to be patented to the company as fast as the road was built. The road was completed in 1887, but most of the patents were withheld till 1895 because not applied for by the company. So the lands have actually been patented to the company only about twenty years, and during the last eight years the lands have been involved in this litigation. A few tracts have been sold and conveyed by the company since this litigation was started, no restraining order having been issued.

Prior to the starting of this litigation the company had sold, contrary to law, 800,000 acres, and, therefore, had remaining 2,300,000 acres. Since this litigation was started Congress has confirmed the titles of all those who purchased prior to the beginning of this suit. Hence the 2,300,000 acres, or thereabouts, remaining unsold in the possession of the company and unaffected by the claims of any so-called innocent purchasers are the only lands now involved.

The Oregon & California Railroad Company is the original grantee of the Government. The Southern Pacific Company gets into the case only because it owns the stock of the Oregon & California Company. Stephen T. Gage comes in only because he was a trustee in a mortgage given on the land at one time by the grantee company to secure the preferred

stockholders. The Union Trust Company is a defendant because it is trustee in a mortgage given on this land by the grantee company to secure the payment of bonds that were issued to get money to build the road. The defendants have all been named in this paragraph.

Snyder and the sixty-four other actual settlers on the land are the original complainants, and it was these settlers who instituted the present litigation in 1907. I was their attorney at the time and am still their attorney. One year later, September 4, 1908, as shown by the record, the United States intervened in the suits started by these settlers, and filed a bill in equity, asking that all the 2,300,000 acres of unsold lands here referred to be forfeited to the United States. After six years the district court for Oregon rendered a judgment of forfeiture. That was in 1913.

As stated, no opinion was expressed in the Court of Appeals, and the case is now here.

The only question involved is the very simple one of construing the meaning of the words:

> "*Provided,* That the lands hereby granted shall be sold by said railroad company to actual settlers only, in quantities not greater than 160 acres to any one settler, and for prices not exceeding $2.50 per acre."

The settlers on the land, whose suits are in the nature of test cases, claim that this language constitutes a trust which must be enforced by the court. The United States claims that it constitutes a "condition subsequent," for breach of which forfeiture is a proper remedy. And the railroad company claims that the language is so vague, indefinite, and uncertain as to be unenforceable, and, besides, that the settlers and the United States are barred by laches, and that the bills should all be dismissed for lack of equity. The Union Trust Company claims that it is an innocent encumbrancer to secure the payment of $20,000,000 in bonds, and that no judgment should be rendered cutting off its security. These

are the simple issues in the case, and no one should be concerned by the voluminous record which has been stuffed and padded with statutes, documents, and everything else that could be set out in the same.

The "interveners" are a class of people who have signified their willingness to settle upon the land and buy certain tracts from the railroad company, and who have tendered certain applications to purchase, but who do not claim to have been actual settlers at the time, and who, therefore, did not bring themselves within the terms of the statute, and clearly have no rights in the case.

The prayer of the Government's bill of complaint is in the alternative. It asks, first, for a forfeiture; and, second, if forfeiture is denied, for the appointment of receivers to administer the grant and sell the lands out to actual settlers under such rules and regulations as will secure an orderly disposition of the same. Such rules would doubtless provide for a drawing system, for the lands are now very valuable. Less than 100 settlers are actually on the land, and none can go on hereafter without the permission of the court, as the trust estate is in the custody of the court. Therefore it would be a simple matter for the court to enforce the trust.

The lands here involved would make 15,000 homes of 160 acres each, or 60,000 homes of 40 acres each. I am going to contend for the sale of the lands through receivers in tracts of 40 acres each, and through a drawing system, which would give all citizens an equal chance to get a home in this most favored of all sections of the United States. The law says the lands shall be sold to actual settlers only "in tracts not exceeding 160 acres," so that the court in administering the grant could very properly order the lands sold in tracts of 40 acres to each settler.

The suggestions to be filed by the railroad through Mr. Hoehling in favor of putting this case over to October have not yet been served upon me, and I am, therefore, in poor position to anticipate and answer them. But I can say

generally that all parties are as near ready now as they will ever be. This case was fully briefed a year ago in the Court of Appeals upon the identical record now here. Very few changes, if any, will be made in those briefs when reprinted for filing here. They could be amended as desired, and refiled here within 15 days without the slightest inconvenience.

It is very usual for railroad attorneys to urge business elsewhere as a ground for a continuance when they desire one, so I shall anticipate that argument. It is an argument that could as well be urged where the business is elsewhere pending, alleging that counsel would have to be present here. And I dare say that the railroad company has no business pending anywhere more important than this case. Counsel should get continuances elsewhere, if any continuances are necessary, and be on hand here to argue this case in April of this year.

Conservatively the lands involved in this suit are worth $25 per acre, or $50,000,000. The settlers are not trying to "get something for nothing," because, in addition to the $2.50 per acre, and all taxes and disbursements, which they offer to pay to the railroad company, the settlers will have to make homes out of the land, and they will thereby give to the United States all the lands are worth. The establishment of happy and prosperous homes in this Switzerland of America was the real consideration that Congress contemplated should pass from the settler to the Government for the land. The giving of the $2.50 per acre to the railroad company was only incidental. The railroad company was made merely the sales agent of the Government. In the debates in Congress when the lands were granted Mr. Holman, of Indiana, objected to the bill and Mr. Sargent, of California, answered in this language:

> "The gentleman, in his blind rage, does not distinguish between this grant and those which were unrestricted. He says the lands along the Union

> Pacific now sell for $10 per acre. Under the provisions of this bill the company can never realize more than $2.50 per acre for the land, even if the building of the road makes them worth $100 per acre."

And in the Senate, upon the same bill, Mr. Williams, of Oregon, who had been Attorney General of the United States, said:

> "These lands will be as open to settlers under the provisions of this bill as they are under the preemption laws of the country. Notwithstanding the grant of this aid to this railroad company, every foot of the lands granted must be sold by the company to actual settlers, and for prices not exceeding $2.50 per acre."

This much of the record is cited in order to show to your honors the great responsibility that now rests upon this honorable court to enforce a bequest of a Congress of the last generation made for the benefit of the homeless of the present generation. This honorable court may wish to hold the case under advisement during the summer vacation, in order to reach, after mature thought, the best solution for carrying out this great trust. No one could object to that. But to put the case off for argument till October would, in my opinion, be without just cause.

It is certain that the parties are not going to agree to an abbreviation of any part of the 17 volumes of the record in this case. It is certain that they are going to put on the court the burden of looking through the whole record. In fact, a proposition made by the Solicitor General to agree to an abbreviated record has already been refused by the railroad company. They simply agree that all parties shall point out in their briefs those portions of the record which they deem important. That very thing is already provided for by rule. That very thing was done in the briefs already prepared and filed in the Court of Appeals. Therefore no

stipulation recently filed can afford any excuse for giving further time to prepare briefs.

All parties have known for one year that this case would come on for hearing here this spring. All parties are, therefore, ready, or, if any party is not ready, it is his own fault, and it would be generous enough for this honorable court to give such party until April 5 to get ready.

If this case goes over till October for argument this honorable court will have but little time next fall and winter for anything else, but if the case shall be argued now, members of the court may examine the record at leisure during the coming summer vacation, and be prepared to render a decision early next winter or possibly sooner. The sooner the case is taken up the easier the task will be for all concerned. The longer it is put off the better will be the chance of the railroad to defeat justice, which it has striven craftily to do ever since the grant was made. The railroad is entitled to no further delay, but should meet the issue now. It has had eight years over the protest of the settlers on the land, who are responsible for this suit being here, and it should not be granted another year now.

With greatest respect for this honorable court, I submit these suggestions with all the earnestness at my command.

A. W. LAFFERTY,
Solicitor for Cross-complainants.

Office Supreme Court, U. S.
FILED
FEB 26 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 679.

OREGON AND CALIFORNIA RAILROAD COMPANY ET AL.

vs.

THE UNITED STATES OF AMERICA.

STATEMENT ON BEHALF OF OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE, PARTIES DEFENDANT AND APPELLANT, IN CONNECTION WITH MOTION BY THE UNITED STATES TO ADVANCE.

WM. F. HERRIN,
Counsel for said Appellants.

A. A. HOEHLING, JR.,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

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Motion by the United States to advance the above case for hearing was made and submitted by the Solicitor General on Tuesday, February 23, 1915, and this statement is submitted for consideration in connection with that motion.

At the outset it may be stated that the parties defendant and appellant, on whose behalf this statement is submitted, do not oppose said motion to advance; on the contrary, they

are entirely willing that the case be advanced for hearing, but they respectfully ask that the case be not advanced for hearing at any date earlier than the beginning of the October term, 1915, for the following reasons:

1. The case was brought to this court on certificate from the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions of law, under section 239 of the Judicial Code (36 Stat., 1157), said certificate having been duly filed and docketed in this court during the present term. Thereafter, November 30, 1914, the Solicitor General filed and submitted herein motion for certification of the whole record and cause to this court for its consideration and final determination, this under the provisions of said section 239 of the Judicial Code. That motion was granted February 1, 1915, and the present motion to advance followed, February 23, 1915, as above.

2. The printed record in this case embraces nineteen (19) printed volumes, comprising 9325 printed pages, and said certificate herein of the United States Circuit Court of Appeals embraces 259 printed pages. Thirty (30) sets of said printed record (as required by the rules of this court), embracing some 570 volumes, are in process of being sent to the clerk's office of this court; 25 sets thereof having been lodged heretofore with the clerk of said United States Circuit Court of Appeals, this in accordance with section 2, of the act of February 13, 1911, entitled "An act to diminish the expense of proceedings on appeal and writ of error, or of certiorari" (36 Stat., 901), the provisions of which section require said clerk to send up to this court said 25 extra sets of the record, so lodged with him, at the time he makes return to the writ of certiorari, and the necessary five additional sets thereof will be supplied by the railroad company. As soon as said 30 sets of the printed record are received in the clerk's office of this court it will be necessary for the latter

to properly prepare the same for use by this court, in accordance with its rules.

3. In the motion to advance herein it is stated by the Solicitor General:

> "The record discloses that the 2,300,000 acres of land here in controversy are worth more than $30,000,000, but it is believed they are worth nearer $70,000,000" (p. 2).

The case itself involves questions of law which are described in the certificate herein as being of "very grave importance and intricacy" (p. 255), while the value of the property which is the subject-matter of this suit (land grant to said railroad company) and which suit is one brought by the United States to forfeit said land grant, is sufficiently indicated by the above extract from the motion to advance.

4. The final hearing and disposition of this case has been materially expedited by the certifying to this court by the United States Circuit Court of Appeals for the Ninth Circuit of the questions of law determinative of the issues involved, as well as by the writ of certiorari granted by this court, requiring the whole record and cause to be sent up for its consideration and final determination, pursuant to said section 239 of the Judicial Code.

5. These defendants and appellants have no desire to delay the hearing and final disposition of the case by this court, but, in view of the several matters above briefly outlined, as well as the careful study and labor necessarily involved in the preparation of brief and argument in a case of such importance and magnitude, counsel respectfully suggest that there is insufficient time now remaining during the present term to afford reasonable opportunity so to do, and, moreover, it is submitted, that advancing this case to a date not earlier than

the beginning of the October term, 1915, as herein suggested, should, and doubtless will, very greatly facilitate the labors of both counsel and the court in the trial and hearing of the case.

6. While it is, perhaps, not material in connection with the odinary case, nevertheless, in a case of the rather unusual magnitude and importance of this, it may not be improper to state to the court that the counsel who is to prepare the brief for the argument on behalf of these defendants and appellants is required to be in attendance at the taking of testimony in San Francisco, California, which begins March 1, 1915, in the suit heretofore brought by the United States against the Southern Pacific Company (party defendant and appellant herein) and others in what is known as the Central Pacific merger case; and, should this case be advanced for hearing at a day during the present term, it would be exceedingly difficult for said counsel to properly prepare the brief and argument of this case before this court.

In conclusion, it is respectfully, but earnestly, asked that this case, if advanced, be set for a day not earlier than the beginning of the next term of the court.

Respectfully submitted,

WM. F. HERRIN,
Counsel for the Defendants and Appellant Above Named.

A. A. HOEHLING, JR.,
Of Counsel.

WASHINGTON, D. C., February 26, 1915.

Office Supreme Court
FILED
MAR 29 1915
JAMES D. MAHER
CLERK

No. 679.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, a corporation, et al.,
Defendants and Appellants,

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Facts on Behalf of Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, Individually and as Trustee, Defendants and Appellants.

WM. F. HERRIN,
P. F. DUNNE,
WM. D. FENTON,
Solicitors and Attorneys for said Defendants and Appellants.

FRANK C. CLEARY,
of Counsel.

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Point I. The Act of Congress of July 25th, 1866, was passed for the primary purpose, not of promoting the settlement of the public lands, but of aiding in the construction of a railroad from a point on the Central Pacific Railroad in the State of California to Portland, in the State of Oregon; and any provision in the later act of April 10, 1869, for the benefit of settlers, must be taken in subordination to this primary purpose	319 et seq.	2-55
Point II. The settlement clause of the amendment of April 10, 1869, is not a condition subsequent	319 et seq.	55-197
Point III. Congress was without lawful authority on April 10, 1869, (16 Stat. 47) to annex a new condition, by amendment, or otherwise, to the land grant made by the Act of July 25, 1866, (14 Stat. 239) as amended by the Act of June 25, 1868, (15 Stat. 80) for the following reasons:		
(1) The California and Oregon Railroad Company filed its assent within one year and completed the "first section of twenty miles of said railroad" within two years after the passage of the Act of July 25, 1866.		
(2) The Oregon Central Railroad (East Side) Company was not in default on April 10, 1869	320 et seq.	198-246
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Point IV. Under Point IV of Points and Authorities, infra, pages 246-301, the contention is made that the so-called "actual settler" clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, construed so as to give effect to the primary policy of Congress, and to carry out the purpose of the granting acts in the light of long continued, contemporaneous, and permitted construction of these acts, as evidenced		

	Brief of Facts	Brief of Law
by the record, and subsequent legislation of Congress relating to land grants and public lands, did not create a condition subsequent	333 et seq.	246-301
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Point V. Under Point V of Points and Authorities, infra, pages 301-523, the defendants-appellants contend that the United States cannot in equity, as suitor, enforce the "actual settler" clause, assuming that its words create a condition subsequent, because, (1) The United States has waived its right by long continued acquiescence and affirmative action, with full knowledge of continued breaches by the company, from the earliest administration of the grants, to the passage and enforcement of the Act of August 20, 1912. (So-called Innocent Purchasers Act.) (2) The United States is estopped, in view of all the facts and circumstances, to attempt to enforce the same	362 et. seq.	301-523
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Point VI. Under Point VI of Points and Authorities, infra, pages 523-624, the contention is made that a condition subsequent must be not only express or implied, but legal, definite, and certain, and reasonably possible of performance, and not repugnant to the nature of the estate to which it is annexed. In the absence of express limitation a condition subsequent must be capable of performance within a reasonable time, and continually and regularly kept thereafter. If, therefore, within a reasonable time after the title vested in the company to any part of these lands, it could not sell these lands to "actual settlers," for the price named, in the quantities specified, the condition became impossible of performance, and was thereby discharged. The same result would follow where performance of the condition was rendered impossible, or its performance by the company made practically		

	Brief of Facts	Brief of Law
impossible, by legislation enacted by the United States. The proof shows that there was at no time since the title vested in the company, practical ability, or possibility, to sell these lands to "actual settlers" for the price named, in the quantities specified. The character of the granted lands, their situation and location, rendered them unfit for disposition under the settlement laws, in accordance with the terms of the condition. Proof of these facts, to the satisfaction of the court, by the voluminous record, is competent and convincing to show that even though the language used shall be construed as a condition subsequent, such condition was impossible of performance. The proof also shows that the even sections within the limits of the grants, were of the same character, and that they were unfit for disposition under the settlement laws in effect on April 10, 1869, and on May 4, 1870, and in recognition of this, Congress, on June 3, 1878, (20 Stat. 81) passed the Timber and Stone Act, and on March 3, 1891, (26 Stat. 1097) repealed the Pre-emption Law of 1841, and all other laws allowing appropriation of the public lands, and on September 29, 1890, (26 Stat. 496) passed the General Forfeiture Act, and on August 20, 1912, enacted the so-called Innocent Purchasers Act, (37 Stat. 123) based upon the report of the House Committee on Public Lands, to the effect that these lands sold in alleged violation of the "actual settler" clause, were chiefly valuable for timber, and were not adapted to appropriation under the settlement laws. The proof also shows that the even sections within the limits of these grants, have been mainly appropriated by entrymen under the Timber and Stone Act, or in fraudulent evasion of the Homestead Act, and as soon as title had been obtained, the entrymen conveyed the lands to timber investors	404 et seq.	523-624
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Point VII. Under Point VII of Points and Authorities, infra, pages 625-635, the contention is made that if the terms of the "actual settler" clause be so indefinite and uncertain as that the company could not, under its terms, fairly construed, ascertain the legal measure of its duty so as to perform the same, and if the law, thus fairly construed, is not enforcible as a covenant or a trust, or contract, for the benefit of "actual settlers," it is clearly and for the same reasons not enforcible as a condition subsequent. There can be no condition subsequent, whether created by contract between private parties, or by grant by deed, or by legislative grant of public lands, to a private party, assenting to and accepting such grant, which is not clear, definite and certain in its terms. No breach can arise or be assigned upon a contract, deed, or grant, or legislative grant, which is so indefinite or uncertain in its terms as that it does not clearly and necessarily appear exactly what the grantee must (not *may*) do; in what manner the thing required to be done shall (not *may*) be done; for whom or what person it *shall* be done. If the act to be performed is not required to be done in some definite and certain way, by a definite and certain class of persons, and for a definite and certain part of the lands granted, within a certain and definite time, under certain and definite rules and regulations prescribed by law defining the "actual settler," the time and conditions of settlement, and the proof of same,—there can be no assertion of any breach by the grantor, nor re-entry by legislative declaration of forfeiture, or otherwise. The grantor cannot forfeit the estate granted, for breach of a condition the terms of which cannot be specifically and definitely found in the language of the condition. As a covenant, trust, or contract, the "actual settler" clause is not enforcible, and the court below has so held. (Opinion, Vol. II, pp. 696-791-818, Transcript

	Brief of Facts	Brief of Law
of Record. As a condition subsequent it is likewise not enforcible. The grantee is not obligated to write into the statute rules and regulations by which the Pre-emption or Homestead Laws could be executed as to these lands, nor does the statute adopt such rules or regulations as to procedure, or make the Pre-emption or Homestead Act a part of the "actual settler" clause		625-635
Point VIII. Under Point VIII of Points and Authorities, infra, pages 635-639, the contention is made that if the "actual settler" clause be a condition subsequent certain, and definite, so as to be otherwise enforcible, then it was repugnant to the grant, and could not have been enforced without destruction of the primary and dominant purpose of Congress, to aid in construction of road. If the land thus subject to sale could not have been so sold in time to give the aid intended, the condition was destructive of the fee intended to be granted, and the condition must give way as repugnant to the grant		635-639
Point IX. Under Point IX of Points and Authorities, infra, pages 639-711, the contention is made that the "actual settler" clause contemplated that the sales of land, and construction of road, should be concurrent. It was the intention of Congress that the lands granted should be "applied to the building of the road," and this application could only be made by sales of the land, when made pending construction. In that view, it must have been assumed that "actual settlers" would apply to purchase, and that the company would sell to such applicants all these lands, before such construction should be completed. Only by sales in that way could the road be built. It follows, therefore, as a necessary corollary to this primary purpose and intention of Congress, that if for any reason "actual settlers" did not apply to purchase these lands, and if they were not sold by or before the final completion		

of the road and the acceptance of such completion by the United States, as in performance of the grant, then and thereafter the "actual settler" clause would become inoperative, and whether the words of the "actual settler" clause created a covenant or condition, the estate of the company in the lands unsold, would become absolute and unconditional. It is not alleged by the United States that in sales of the lands there was violation of this clause prior to the completion and acceptance of the road, and no breach on account of any such sale is assigned.

The fact that no provision is made for the payment of taxes which may be assessed upon these lands, as belonging to the grantee companies, shows that the "actual settler" was such person as may have been upon the land when the grant was made, or as may have entered upon the land as such prior to completion and acceptance of the road, and issuance of patent by direction of the President, for the lands opposite to and coterminous with the constructed portion of the road. It shows that the title to the lands thus occupied or applied for by the "actual settler" prior to issuance of patent, was regarded as public land, as to assessment and taxation, and that until such patent issued, or the president had directed its issuance, the grant was held in trust for such "actual settler," and that jurisdiction over such land remained with the Land Department, for the benefit of such "actual settler" who could establish his settlement, residence, and cultivation, and the fact that he was a bona fide "actual settler." Under such circumstances the land thus applied for and occupied by such "actual settler" was quasi public land, and as such not subject to assessment and taxation, and hence the statute made no provision for payment of any sum other than the flat double minimum price of $2.50 per acre..... 639-711

Point X. The lands involved in suit were mainly pat-

ented more than five years prior to the commencement of this suit, and these patents were all issued by the United States with full knowledge upon the part of the Government of continuous breaches of the so-called "actual settler" clause. The cause of suit, or action, to recover these lands, and to assert the breach, arose when each breach occurred, and the United States, as to all breaches occurring prior to issuance of patents, is necessarily barred after the expiration of five years following the date of patents issued prior to March 2, 1896, and after six years following the date of patents issued after that date. The Act of March 3, 1891, (26 Stat. 1095), with the Act of March 2, 1896, (29 Stat. 42) read in connection with the Act of September 29, 1890, (26 Stat. 496) as also Rev. Stat. Sec. 1047, is more than a mere statute of limitations, **it is title in fee simple, without condition or possibility of reverter,** and if the United States is to be deemed a formal party in aid of the interest of settlers, the general defenses of laches and limitation are open.

(2) The Oregon and California Railroad Company, on March 29, 1870, by its deed of that date, became the purchaser, for value, of all the lands granted by the Act of July 25, 1866, to the East Side Company, and on October 6, 1880, by its deed of that date, for value, became purchaser of all the lands granted by the Act of May 4, 1870, to the West Side Company, and the Oregon and California Railroad Company has been ever since said dates respectively, the bona fide owner and in possession of the lands so granted, and as such, patents issued to it, and, as such, the Oregon and California Railroad Company is a bona fide purchaser, and has been recognized as such by the United States, continually, since the dates of said deeds, respectively 711-714

The taxes paid from April 1st, 1870, to April 30th,

1911, were $1,827,234.10, and from April 30th, 1911, to April 30th, 1914, $930,859.97, a total of $2,758,094.07.

Point XI. (1) The United States may, as sovereign, impose restraints upon alienation of its lands, but it cannot delegate or impose upon a private party such as a citizen, or a railroad company, the substantive administration of sales of its lands, or the administration of its settlement laws. If in granting the fee to the company, under these Acts, the United States imposed a condition which, if enforcible, required the company, in making sales, to usurp the functions and duties of the Land Department of the United States, and administer the settlement laws, and if the United States did not thereby reserve, in some way, the right to enforce or administer its land laws applicable thereto, the condition attempted to be created, is void, and the title is unaffected thereby. The estate vested, absolutely, unaffected by the attempted condition. The intended beneficiaries, if the condition was to be valid and effective, were entitled to require that the United States should retain jurisdiction of the grant, and administer the same. The beneficiaries were entitled to go before a tribunal having jurisdiction and authority, to hear and determine the facts, as to each settlement, which would bring each "actual settler" into a legal and effective relation to the parcel upon which he had settled. The railroad company could not be constituted, and is not, by the settlers clause, made such tribunal. Under the settlers clause neither the United States nor the assumed beneficiaries, the actual settlers, could compel the railroad company to act as such administrative tribunal, nor would its voluntary action bind any contesting claimant, nor could any court give any defeated contestant any relief, or afford him any remedy. The statute gives no remedy, provides no tribunal, and defines no procedure. It is therefore void.

	Brief of Facts	Brief of Law
(2) The title to these granted lands having passed from the United States to the Oregon and California Railroad Company by patents, the land having been earned by construction of roads, the estate vested in the company in fee simple. This is conceded by the United States. There is therefore no room for the application of the doctrine that a public grant will be strictly construed in favor of the grantor. Such rule of construction does not apply where the United States seeks to defeat the estate granted, whether by means of a condition subsequent, or other acts that would render the estate defeasible.		
(3) The estate once having passed, the law of the state in which the property is situated, as determined by the Supreme Court of that state, will be followed, as a rule of property, in determining whether the language of the so-called "actual settler" clause is a condition subsequent, or a covenant		747-770
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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 679.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, a corporation, et al.,
Defendants and Appellants,

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Facts on Behalf of Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, Individually and as Trustee, Defendants and Appellants.

STATEMENT OF THE CASE AS MADE BY THE TRANSCRIPT OF RECORD.

This appeal is prosecuted by the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, defendants and appellants, from a decree of the District (formerly Circuit) Court of the United States, for the District of Oregon, entered July 1, 1913, forfeiting to the United States lands of the Oregon and California Railroad Company, aggregating about 2,300,000 acres, inuring to the predecessors in interest of the company under the grants made, respectively, by the Act of Congress of July 25, 1866, (14 Stat. 239) and the Act of May 4, 1870, (16 Stat. 94).

John L. Snyder, and others, cross complainants and appellants, and William F. Slaughter, and others, interveners and appellants, not only joined in the appeal of the Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, but prosecuted their separate cross appeal as cross-complainants and appellants, claiming to be actual settlers upon some of these lands, who had taken actual possession of the several parcels described and had tendered to

the company $2.50 per acre, claiming the right to purchase the respective parcels under the Act of Congress of April 10, 1869, (16 Stat. 47) amendatory of the Act of July 25, 1866, as to the lands granted by the Act of July 25, 1866, and under Section 4 of the Act of May 4, 1870, (16 Stat. 94) as to the lands within the limits of that grant.

The cross-complainants had commenced their several suits in the District (formerly Circuit) Court of the United States, for the district of Oregon, against the defendants, Oregon and California Railroad Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, for specific performance and to enforce an alleged trust, by which each sought to secure a decree that a deed of conveyance be executed, conveying the land to each cross-complainant as such actual settler under the terms of these statutes, and these suits were all commenced prior to September 4, 1908, when the United States filed its Bill of Complaint in this case against the defendants and appellants herein and against these so-called actual settlers, who had thus commenced their separate suits and who are known in this record as cross-complainants and appellants.

After issue had been joined by the joint and several demurrer of the defendants,

Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, filed December 7, 1908, (Vol. II, pp. 677-681 Transcript of Record) to the Bill of Complaint filed by the United States May 25, 1908, (Vol. I, pp. 1-538, Transcript of Record), there was filed on January 15, 1909, a cross complaint by John L. Snyder, and others, cross-complainants and appellants herein, to which the defendants and appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, on February 13, 1909, filed their joint and several demurrer, (Vol. II, pp. 688-92 Transcript of Record) and the Union Trust Company, individually and as trustee, filed a like demurrer on March 1, 1909, (Vol. II, pp. 682-683, Transcript of Record).

On March 2, 1909, B. W. Nunally, and others, filed their petition in intervention, setting up substantially the same matters and things set out in the Bill of Complaint filed by the United States—in fact, a literal copy of such bill of complaint with express averments admitting and alleging paragraphs X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX and XX of the Bill of Complaint filed by the United States, and there-

after alleged that B. W. Nunally and the other interveners, respectively, had, prior to the commencement of the suit, applied to the Oregon and California Railroad Company to purchase certain specific quarter sections of land, and had tendered to the company for each several quarter section of land, $2.50 per acre, and that each had demanded a conveyance, and that each applicant was qualified as and intending to become an actual settler upon such tract of land; and by way of further answer and cross bill, prayed to be allowed to intervene and to have a decree that the company be directed and required to convey to each of the interveners the tracts of land applied for by each respectively, upon payment of the price tendered.

On March 1, 1909, (Vol. II, p. 639, Transcript of Record) the court made an order permitting these parties to intervene and to file their answer and cross bill, as stated, to which the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, filed their joint and several demurrer on April 7, 1909, (Vol. II, pp. 685-686, Transcript of Record).

The records show that in addition to B. W. Nunally and seven others, whose answer

and cross complaint are set out in Vol. II, pp. 541-638, Transcript of Record, several thousands of other persons in like situation pleading like facts and claiming like rights as *potential* or possible "actual settlers," were allowed to intervene, and that they filed their bills in intervention by way of answers and cross complaints, and sought the same relief as that sought by B. W. Nunally and seven others.

To each of these several bills in intervention filed by way of answers and cross complaints, the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, filed their joint and several demurrer, of like tenor and effect as the demurrer filed to the petition in intervention, answer and cross complaint of B. W. Nunally and others.

On March 13, 1909, after an extended argument upon the demurrer to the Bill of Complaint and the demurrers to the cross complaints of the cross-complainants, defendants herein, and to the petitions in intervention filed by way of answers and cross bills of the interveners and appellants herein, the cause was submitted upon the record thus made, and on April 24, 1911, the court over-

ruled the demurrer to the Bill of Complaint and sustained each of the demurrers to the cross complaints and complaints in intervention filed by way of answers and cross bills. The opinion of the court on these demurrers, announced April 24, 1911, will be found in Vol. II, pp. 696-855, Transcript of Record.

Thereafter, and within the time allowed by the court, the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, and the Union Trust Company of New York, individually and as trustee, hereinafter known in this record as defendants and appellants, on September 5, 1911, (Vol. II, pp. 859-1155, Transcript of Record) and January 2, 1912, (Vol. III, pp. 1165-1280, Transcript of Record) filed their respective amended joint and several answers to the Bill of Complaint, and on November 1, 1911, replication was filed by the United States, (Vol. III, p. 1281, Transcript of Record) to the joint and several amended answer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, and on November 3, 1911, (Vol. III, p. 1282, Transcript of Record) replication was filed by the United States to the amended answer of the Union Trust Company, it be-

ing understood that these replications should be deemed filed as of December 8, 1911, at the time the court made an order (Vol. II, p. 857, Transcript of Record) appointing Miss M. A. Fleming, of Portland, Oregon, special examiner to take and report the testimony herein.

On January 3, 1913, the defendants-appellants and the United States filed a stipulation in writing called a "Stipulation as to the Facts," (Vol. IV, pp. 1552-1731, Transcript of Record).

Thereafter, pursuant to the order of reference, testimony was offered and admitted in evidence by the respective parties and reported to the court, consisting of ten typewritten volumes, and fifty-two exhibits offered on behalf of the United States, (Vol. IX, p. 4285 to Vol. XI, p. 5767, and Vol. IV, pp. 1910-1920, in all 1492 pages, Transcript of Record), and one hundred fifty-nine exhibits offered on behalf of the defendants-appellants, (Vol. XI, p. 5767 to Vol. XV, p. 7919, Vol. IV, pp. 2034, 2044, 2048, Vol. V, pp. 2544, 2551, in all 2173 pages, Transcript of Record)*, which evidence has been embodied in a "Statement of the Evidence," (Vol. IV, p. 1551, up to and including Vol. XV, p. 7922, Transcript of the Record).

*All the exhibits of the defendants have not been printed.

Under stipulation of the parties and order of the court below, made and filed March 14, 1914, (vol. 16, pp. 8652, 8667), in order to avoid expense it was agreed that the appeal of the cross-complainants and appellants and interveners and appellants should be tried upon the appeal of the defendants-appellants upon the same transcript of record, and that the case of the defendants-cross-complainants should be heard upon the record as to the cross complaint of John L. Snyder and others, and the case of the interveners-appellants should be heard upon the record as to B. W. Nunally and others, and that it should not be necessary to include in the printed transcript of record any of the papers or proceedings pertaining to any of the other defendants-cross-complainants or any of the other interveners-appellants, and that the decision of the court on any appeal as to the cross complaint of John L. Snyder and others, and as to the appeal as to the interveners-appellants, B. W. Nunally and others, should be controlling as to all of said cross-complainants and interveners-appellants; that any part of the record which might be printed on the main or cross appeal might be considered by the court and that all questions raised by any joint assignment of error and filed in the main appeal by the cross-com-

plainants and the interveners should be considered with and have like effect as though made and filed separately by each of the cross-complainants and interveners joining therein, and that in the separate or cross appeal of the cross-complainants and interveners from the several orders of dismissal and from the judgment and decree entered, from which the appeal is prosecuted, any questions raised by any joint assignment of error filed by said cross-complainants and interveners or either of them shall be considered with and have like effect as though made and filed separately by each of the parties joining therein, and that in addition to the printed record and Statement of the Evidence, with such exhibits or parts of exhibits as might be included therein, the original report, consisting of ten type-written volumes of the evidence taken in the cause by the special examiner, together with the original exhibits referred to therein, including those described in the printed record containing the Statement of the Evidence, should be certified to the Appellate Courts to be used in the trial of the cause, and in the event of an allegation by either party of an omission or error, subject to such objections as to the competency, relevancy or materiality of any part of the testimony and exhibits as may have

been taken and duly reserved in the record, and that these reports and exhibits may be used by the parties for reference for the purpose of correcting any errors or omissions as may appear to the court, and for such direct use in the Appellate Courts as may be contemplated by the Equity Rules of the Supreme Court of the United States and as provided by the Act of February 13, 1911, page 275, United States Compiled Statutes, Supplement 1911, and as contemplated by Rule 14, subdivision 4, of the United States Circuit Court of Appeals.

The Statement of the Evidence was prepared and filed under and pursuant to Rule 75, Rules of Practice for the Courts of Equity of the United States, and on March 4, 1914, (Vol. XV, pp. 7291, 7292, Transcript of Record) the court made an order by which such Statement of the Evidence was approved, directed to be filed of that date, and to become a part of the record for the purpose of the appeal. In accordance with Rule 75, it appeared to the court that the parties were unable to agree as to the reduction of so much of the testimony to narrative form in the Statement of the Evidence as is set out therein by question and answer, and the court found that in its judgment such testimony, thus set out by question and answer,

should be reproduced in the exact words as reported and stated in the Statement of the Evidence; and it further appearing to the court that the remainder of the testimony had been reduced and stated in narrative form, the court found that the Statement of the Evidence, as thus prepared, was true, complete and properly prepared, as provided by Rule 75.

The testimony in support of the issues of the respective parties, as tendered by the pleadings, is voluminous, and such portions of the testimony as may be deemed material and controlling upon questions of fact will be set out under appropriate headings in the discussion of the questions involved.

The opinion of Judge Wolverton upon the demurrer, and consisting of one hundred fifty-nine printed pages, (Vol. II, pp. 696, 855, Transcript of Record) is grounded upon his construction of the Act of Congress of July 25, 1866, as amended April 10, 1869, and the Act of May 4, 1870, interpreted in the light of the allegations of fact in the Bill of Complaint admitted by the demurrer to be true. A like situation controlled his opinion upon the demurrer to the cross complaints of the so-called *"actual settlers,"* and the demurrer to the bills in intervention filed by

way of answers and cross complaints by the so-called intervening, *"possible actual settlers."* The cross-complainants and interveners stood upon the order of the court sustaining the demurrers interposed by the Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee. The allegations of fact made in the Bill of Complaint have not only been challenged by the amended answer of the principal defendants named, but substantive, affirmative defenses have been pleaded in the joint and several answer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, and the amended answer of the Union Trust Company, individually and as trustee. In this situation, notwithstanding the defenses thus made, and the voluminous testimony taken by the Government, as well as by the defendants, it was deemed advisable, in order to expedite the progress of the cause, to submit the case on April 28, 1913, without argument.

It is only fair to the parties and to the learned judge of the court below that this state of the record should be brought to the attention of this court.

On April 29, 1913, Judge Wolverton delivered a short, oral opinion, which, with the colloquy between counsel and the court, is as follows:

Wolverton, District Judge:

Case No. 3340, the case of the United States against the Oregon and California Railroad Company and others, was submitted on last evening, without argument, to the court, upon the merits of the cause, for its determination.

The vital and paramount question in the case is with reference to the condition that was imposed by the Government at the time the grant of these lands was made to the Oregon Central Railroad Company, the predecessor of the defendant Oregon and California Railroad Company. That condition is as follows:

"Provided, further, that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre."

At the time the cause was submitted on demurrer, it was argued very ably and

very exhaustively by counsel upon both sides, and the court, after hearing the arguments, gave long consideration and its best judgment to the questions involved, and proceeded to determine all the questions that seemed to be concerned in the cause. At this time the counsel, in submitting the cause, are not questioning the soundness of the decision rendered at that time, and it is only upon the matters of fact that the case is now submitted.

A very great deal of testimony has been taken in the case, running up into several thousand pages of type-written matter, and besides that a very great many exhibits in various forms would have to be examined should the court go through the entire testimony. But I do not deem it necessary for the court at this time, the cause having been submitted without argument, to enter into a thorough or any extended investigation of the testimony. The vital question in the case, and the paramount question, as previously observed, is touching the condition attending the grant. The court held that the condition was a condition subsequent, and that for a violation of that condition the grant should be for-

feited to the Government of the United States.

The counsel in the case have stipulated as to certain facts so as to abbreviate the evidence as much as possible, and in that stipulation is found the following:

"Item 4.

"From about 1894 to 1903, the said Oregon and California Railroad Company sold and disposed of some of its said granted lands to persons not actual settlers in quantities exceeding 160 acres to one person, and at prices exceeding $2.50 per acre; and in several instances, between the said dates, the said Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one purchaser at prices ranging from $5.00 to $20.00 per acre, in one instance at $35.00 per acre, in one instance at $40.00 per acre, and in one instance a sale of 45,000 acres at $7.00 per acre was made by the said Company to a single purchaser.

"Item 5. The defendant Oregon and California Railroad Company has heretofore made approximately 5,306 sales of

its land-grant lands, aggregating 820,000 acres; approximately 4,930 of which sales were for quantities not exceeding 160 acres to one purchaser, aggregating about 296,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres.

"Item 6. Substantially all of the said 524,000 acres were sold to persons other than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of $2.50 per acre; approximately 478,000 acres of which 524,000 acres were sold since the year 1897; and approximately 370,000 acres of the said 524,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser." (Subdivision VIII, Items 4, 5, and 6, "Stipulation as to the Facts," Vol. IV, pp. 1578-9, Transcript of Record).

Now it is further stipulated that:

"Item 4.

"On or about January 1st, 1903, the Oregon and California Railroad Company withdrew from sale all the said unsold lands; and the said Company at all

times refused, and still refuses, to approve or accept any of the applications to purchase referred to in the next preceding 'Item 3' of this subdivision hereof, claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose.

"Item 5. The defendant Oregon and California Railroad Company now assumes and asserts an absolute and unconditional estate in and to all of the said unsold lands." (Subdivision IX, Items 4 and 5 "Stipulation as to the Facts," Vol. IV, pp. 1581-2, Transcript of Record).

Upon the theory adopted by this court in its determination of the cause upon the demurrer, the facts set out in the stipulation show an infraction of the law. They show a violation of the condition subsequent, the court having held that this proviso in the statute constituted a condition subsequent which was a part of the law and must be complied with by the railroad company, and if the company violated the same by refusing to sell in quantities not exceeding 160 acres or to actual settlers, or for a price not exceeding $2.50 per acre, then that the lands

should be forfeited. This stipulation shows that the company has violated that provision, first, in selling large quantities of these lands, in tracts exceeding 160 acres to single purchasers, and for prices largely exceeding the $2.50 per acre which is prescribed by the statute. Furthermore, the stipulation shows that the railroad company has absolutely withdrawn these lands from sale. And, as I have remarked, under the theory adopted by the court, this stipulation on the part of counsel shows a clear violation of the provisos of the law, and therefore that the company has put itself in a condition or position whereby the Government is entitled to have a forfeiture of these lands declared.

Of course, there are many other questions which have been discussed, and which were discussed at the time of the previous hearing, but those questions are all subsidiary, *perhaps, save and except that the railroad company claims that the Government is estopped by standing by, knowing that these lands were being sold, and allowing them to be sold in this way, and therefore that the Government ought not to prosecute this proceeding.* I have given the gist of the defense pleaded in

that manner. But the court determined that matter in the hearing upon the demurrer. The question as raised at that time was as to the matter of estoppel, and the court then determined the legal question. I do not think, *so far as I have looked into the testimony,* that the issues are changed in the least.

Now, so far as it concerns the Union Trust Company and the mortgage that was given upon this property, it seems to the court that the grant to the railroad company carries upon its face notice of what it is. The grant is not only a grant —it is a law, and people dealing with the grant must take notice of the terms thereof, and of the law itself; and when the Union Trust Company took a mortgage upon this property, it took the mortgage with full notice of what the law required, and it must be considered to hold subordinate to any interest that the Government might acquire in the property by reason of an infraction of the law which would entail a forfeiture of the grant.

I think that will dispose of the case. The court will direct that a decree be entered forfeiting these lands to the United States Government, and adjudg-

ing that the Government recover its costs and disbursements.

Mr. Fenton: If the court please, I think your Honor inadvertently stated in the oral opinion which your Honor has just announced that the defendants conceded the soundness of your Honor's opinion in this case; and, of course, *we could not do that.*

COURT: Well, *I did not mean that.* I might put it in this way: That the counsel, in submitting the cause without argument, did not question the soundness of the opinion; that is, *did not insist upon a reargument of the legal questions heretofore determined.*

Mr. Fenton: We did not wish to be put in the attitude of having conceded that it was sound; but we are perfectly willing to have it conceded that we did not by argument challenge your Honor's opinion. *In other words, we do not wish to be considered as assenting in any way to the conclusion of law which your Honor arrived at.*

COURT: *I understand that.*

Mr. Townsend: May I inquire if the decree will also cover the other ancillary

relief prayed for in the bill, that is, quieting the title, and several prayers for injunction—enjoining against incumbrance of the title, and enjoining against waste, etc.

COURT: I suppose it will quiet the title, and in that respect would be sufficient in this case, would it not?

Mr. Townsend: I understand that the order for the decree is substantially the relief as prayed for in the bill of complaint. The first paragraph of the prayer for relief contains three alternative prayers. I understand your Honor to grant the first one for forfeiture.

COURT: Yes.

Mr. Townsend: But the other portions of the prayer for relief are not in the alternative, and are all ancillary to a decree of forfeiture, your Honor.

COURT: Well, of course, all the alternative relief should not be granted.

Mr. Townsend: I understand.

COURT: The principal relief which you pray for should be granted, and the decree may be entered accordingly. I

suppose it will be submitted to counsel on the other side before it is entered.

Mr. Townsend: May I prepare a proposed form of decree and submit it to the court and to counsel?

COURT: Yes. The form of decree should be submitted to the court and the counsel. Counsel should see the decree.

Mr. Fenton: I think, if the court please, it is at this time proper for your Honor to pass a final decree upon the cross-complaints and the complaints of the interveners. Your Honor will recall that a demurrer was sustained to each of the cross-complaints and to the complaints of the interveners, and the entry of dismissal was not made because your Honor thought it should go to the final decree in the case.

COURT: There is a stipulation entered into to that effect.

Mr. Fenton: Yes, a stipulation to that effect. And your Honor will recall there was an effort made to vacate the stipulation, and your Honor held that, independently of the stipulation, and certainly with the stipulation, it would have to go to final decree, when your Honor would, depending upon what the decree

was in this cause, enter a proper decree; and I suggest that there should be a decree against the cross-complainants and the interveners dismissing their cross-complaints and their complaints of intervention.

COURT: I think that would be proper.

Mr. Townsend: I understood that that was simply postponed until judgment was pronounced as between the Government and the railroad company.

COURT: On the main case.

Mr. Townsend: Yes.

COURT: Yes.

Mr. Fenton: Now, will Government's counsel prepare that decree on cross-complaint?

Mr. Townsend: I think you better prepart that, because it is in response to your demurrers. You see the Government did not raise any issue with the cross-complainants.

Mr. Fenton: I will submit, then, your Honor, a brief short decree dismissing those cross-complaints.

COURT: Very well.

Mr. Fenton: I was going to ask your Honor to suspend the entry of any decree in this cause until the Government's counsel and ourselves can arrange with the examiner to perfect the record and report it in. *There are some exhibits that have yet to be submitted to the examiner, by the consent of all parties.* And I suggest that when this decree is entered it might be entered as of a date later than that time, which will probably be Saturday.

Mr. Townsend: I don't expect to get that form of decree up before the other record is completed anyway.

Mr. Fenton: Very well.

COURT: How long will that take?

Mr. Townsend: Just two or three days.

Court: Oh, very well.

Mr. Fenton: I was going to suggest that the court make no order at this time of record, and that the decree be passed as of the date when the form is submitted.

COURT: Is that satisfactory to the Government?

Mr. Townsend: Yes, that is all right.

Mr. Gearin: If the court please, yesterday permission was granted to the railroad company and the Union Trust Company to file an amendment to their answers. Mr. Fenton has prepared and served his. Mine will be, as far as anybody knows, exactly the same, but your Honor understands I have to send it East, and it is understood that I may attach it at any reasonable time.

COURT: Very well, that will be understood. There will be no question about that.

Mr. Townsend: No.

COURT: The court will allow any amendment you want in that direction.

Pursuant to this oral opinion, Mr. B. D. Townsend, assistant to the Attorney General, representing the United States, prepared a decree of forfeiture which was entered on July 1, 1913, (Vol. III, pp. 1296, 1550, Transcript of Record) from which decree the defendants, cross-complainants and interveners have prosecuted their joint and several appeal to this court, and the cross-complainants and interveners have likewise prosecuted their separate appeal, and both appeals, un-

der stipulation of parties, just mentioned, are to be tried upon a single record and the appeals submitted at the same time.

By the decree of July 1, 1913, it was ordered, adjudged and decreed—

> "That all of those certain lands and estates in lands hereinafter described have become, and now are, forfeited to, and the title to all of said lands and estates in lands has reverted to, and now is revested in the United States of America, and all of said lands and estates in lands now are the absolute property of the United States of America, free from any and all claim or claims of right, title, interest or lien, in, to or upon the same or any part thereof, by or in favor of the defendants, cross-complainants and interveners herein or either or any of them, or any party or parties claiming under them or either or any of them.
>
> "That the title of the United States of America to all of said lands and estates in lands be, and the same hereby is, quieted and confirmed, and particularly as to any and all claim or claims of right, title, interest or lien, in, to or upon the same or any part thereof, by or in favor of the defendants, cross-complainants and

interveners herein, and each and every of them, and each and every party or parties claiming under them or either or any of them.

"That each and all of the defendants, cross-complainants and interveners herein, and their respective officers and agents, be, and they and each of them hereby are, forever enjoined and restrained from in any manner claiming or asserting any right, title, interest or lien, in, to or upon the aforesaid lands and estates in lands, or any part thereof; and from in any manner selling, conveying, leasing or disposing of, any of said lands or estates in lands, or any interest therein; and from negotiating, executing or recording any document or instrument, and from doing any other act or thing, which shall in any manner affect or encumber the title to said lands or estates in lands, or any part thereof; and from going upon said lands or any part thereof; and from cutting, removing or in any manner using or injuring any of the timber or other natural products thereof; and from in any manner committing trespass upon said lands or any part thereof; and from in any manner using or interfering with said

lands and estates in lands or any part thereof, or the title or possession thereof; and from contracting with, inviting, inducing or in any manner whatsoever permitting others to do any of the things aforesaid.

"It appearing to the court that demurrers or motions to dismiss were heretofore interposed by the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage and Union Trust Company, and that motions to dismiss were heretofore interposed by the complainant, the United States of America, as to each and all of the cross-complaints and bills and petitions in intervention heretofore filed herein, and that all of said demurrers and motions to dismiss have heretofore been sustained, and that each and all of said cross-complainants and interveners have declined to further plead herein, it is further ordered, adjudged and decreed that each and all of said cross complaints and bills and petitions in intervention be, and hereby are, dismissed for want of equity, with costs in favor of the prevailing parties, respectively, to be hereafter taxed.

"The court being of the opinion that the complainant is not entitled to an ac-

counting by any of the defendants in addition to the other relief granted to said complainant by the terms of this judgment and decree, it is further ordered, adjudged and decreed that the complainant's prayer for an accounting be, and the same hereby is, denied.

"It is further ordered, adjudged and decreed that the complainant, the United States of America, have and recover from the defendants Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage and Union Trust Company, its lawful costs and disbursements herein, taxed at $....., and that execution issue therefor."

On August 29, 1913, the defendants-appellants, Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, and Union Trust Company, individually and as trustee, together with the defendants-cross-complainants (appellants herein), John L. Snyder and sixty-six others, and William F. Slaughter and 5850 others, interveners-defendants, (appellants herein) filed their and each of their petition for appeal, and their and each of their assignments of errors therewith, which petition for allowance of appeal was, on

August 29, 1913, granted, and the appeal allowed (Vol. XV, pp. 7923-8021, Transcript of Record). The assignment of errors of the Oregon and California Railroad Company is set out in Volume XV, pp. 8222, 8267, Transcript of Record; the assignment of errors of the Southern Pacific Company is set out in Volume XV, pages 8138, 8198, Transcript of Record; and the assignment of errors of Stephen T. Gage, individually and as trustee, is set out in Volume XV, pp. 8077, 8198, Transcript of Record. The assignment of errors of each of the defendants named is the same. At the same time John L. Snyder and others, cross-complainants, served and filed their assignment of errors, (Vol. XV, pp. 8199, 8222, Transcript of Record) and J. H. Haggett and all other defendants-interveners, filed their assignment of errors, (Vol. XV, pp. 8283, 8391.) A petition for separate appeal, on November 11, 1913, (Vol. XVI, pp. 8428, 8469, Transcript of Record) was filed by the defendants-cross-complainants and interveners, and on the same day an order was made allowing such appeal. On November 11, 1913, the defendants-cross-complainants and interveners filed their assignment of errors, (Vol. XVI, p. 8470, Transcript of Record) which is identical with the assignment of errors filed by the defendants-cross-complainants and in-

terveners in connection with the main appeal, (Vol. XV, pp. 8283, 8391, Transcript of Record.) The errors assigned by the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, need not be restated at this time but will be discussed under the points made under the discussion of

(1) Questions of fact;

(2) Questions of law

and without further particular reference or restatement of the assignment of errors other than by reference to the same, (Vol. XV, pp. 8222, 8282, Transcript of Record.)

THE PLEADINGS.

Statement of the Case, as Made by the Bill of Complaint.

On February 17, 1907, the Legislative Assembly of the State of Oregon adopted and forwarded to the President, the Senate, and the House of Representatives of the United States, a memorial, representing, in substance, that vast tracts of public lands in Oregon were claimed and held by the Oregon and California Railroad Company under the Acts of Congress of July 25, 1866, and April 10, 1869, (Vol. I, p. 520, Transcript of Record);

that these lands were then withdrawn from sale, whereby the development and material prosperity of the state was retarded; that the company had not complied with the Act of April 10, 1869, as to the terms of sale and parcels of land to be sold; that the conditions were claimed to inure only to the United States, as grantor to the predecessor of the company, and had not been complied with; that for these reasons the memorialist asked that the Congress of the United States be and it was requested to enact such laws, and take such steps, by resolution or otherwise, as might be necessary to compel the company to comply with the conditions of the grant, and to enact and declare some sufficient penalty for noncompliance therewith, by way of forfeiture, or otherwise, as in the wisdom of Congress might seem best, and that the senators and representatives in Congress from the State of Oregon and all other land grant states, be and they were requested to use their utmost endeavor to procure the needed legislation suggested. A copy of this memorial was directed to be forwarded to the President, and to the senators and representatives in Congress from the State of Oregon. Thereupon, on April 30, 1908, Congress passed a Joint Resolution, Vol. I, pp. 67, 68 Transcript of Rec-

ord) 35 Stat. 571, by which Congress provided, in substance, that the Attorney General be and he was thereby authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he might deem adequate and appropriate, to enforce any and all rights and remedies of the United States, in any manner arising or growing out of or pertaining to the following Acts of Congress:

(1) Act of Congress of July 25, 1866, (14 Stat. 239) as amended by Act of June 25, 1868, (15 Stat. 80) and as amended April 10, 1869, (16 Stat. 47).

(2) Act of Congress of May 4, 1870, (16 Stat. 94).

(3) Act of Congress of March 3, 1869 (15 Stat. 340).

Pursuant to this resolution, the United States filed its bill of complaint, on September 4, 1908, (Vol. I, pp. 1-86) with exhibits thereto (Vol. I, pp. 89-538 Transcript of Record). After alleging the incorporation of the defendant companies, and the citizenship of the defendants, cross-complainants, the bill pleads the Acts of Congress of July 25, 1866, (14 Stat. 239), of June 25, 1868, (15 Stat. 80), the incorporation of the Oregon Central Railroad Company on October 6, 1866, (known

in this record as West Side Company), the Joint Resolution of the legislature of the State of Oregon of October 10, 1866, designating the Oregon Central Railroad Company (West Side) as the Oregon company entitled to the benefit of the Act of July 25, 1866, the acceptance of that act by the West Side Company, filed in the office of the Secretary of the Interior, July 6, 1867, with a certified copy of the Resolution of October 10, 1866, and that on August 20, 1868, the West Side Company filed in the office of the Secretary of the Interior, a general map of survey of its projected line of railroad; that on April 22, 1867, certain persons contended that the West Side Company was never lawfully incorporated, and desired to secure the benefit of the Act of Congress approved July 25, 1866, and in that behalf incorporated the Oregon Central Railroad Company, (known in this record as the East Side Company); that on October 20, 1868, the Legislative Assembly passed a Joint Resolution, (Vol. I, p. 17 Transcript of Record), rescinding House Joint Resolution No. 13, passed October 10, 1866, which attempted to designate the Oregon Central Railroad Company, (West Side) as the Oregon company entitled to the benefit of the Act of Congress of July 25, 1866, and recited that the West Side Company was not organized or in

existence on October 10, 1866, and that House Joint Resolution No. 13 was adopted under a misapprehension of facts as to the organization and existence of that company, and reciting that the designation of the company to receive the lands in the State of Oregon, so granted, and the benefits and privileges conferred by the Act of Congress, yet remained to be made, designated the Oregon Central Railroad Company, incorporated April 22, 1867, under the laws of the State of Oregon, as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the Act of July 25, 1866; that thereupon a controversy arose between the West Side Company and the East Side Company, which continued until along or about January, 1870.

The complaint attempts to plead certain conclusions of law which the Government contends are justified by the Act of Congress of July 25, 1866, the action of the legislature of the State of Oregon in respect to the two companies, and the legal result which the pleader claims followed the action of the two companies in respect to this legislation; that thereupon Congress on April 10, 1869, (16 Stat. 47) passed an act set out in the bill, (Vol. I, pp. 20, 21) under which it is claimed the grantee, and its successor in interest, was

obligated, under penalty of forfeiture for breach of alleged conditions subsequent, to sell the lands granted, to "actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding $2.50 per acre;" that thereafter, on June 8, 1869, the East Side Company adopted a resolution accepting all the provisions, rights, privileges and franchises of the Act of July 25, 1866, and of all acts amendatory thereof, and upon the conditions therein specified, and assented thereto, and directed the Secretary of the company to forward a certified copy of this resolution, under the seal of the corporation, signed by himself as Secretary, and by the President of the company, to the Secretary of the Interior, to be filed in his office, and that on or about June 30, 1869, in accordance therewith, the East Side Company filed in the office of the Secretary of the Interior, such certified copy; that on October 29, 1869, the East Side Company filed in the office of the Secretary of the Interior, a map of survey and location of the first sixty miles of its projected line of railroad, and on December 24, 1869, completed the construction of the first twenty miles of its line, commencing at the City of Portland, and on December 31, 1869, the same was examined and approved by commissioners appointed therefor, pur-

suant to the Act of Congress of July 25, 1866; that the West Side Company wholly failed to complete the construction of any part of its line of railroad, under the Act of Congress mentioned, and "on or about the month of January, A. D. 1870, said West Side Company acquiesced in the aforesaid substitution of said East Side Company as the recipient of the aforesaid grants, privileges and franchises, and abandoned and waived all claim thereto, and, in lieu thereof, applied for, obtained and accepted a separate and similar grant of lands, franchises and other benefits pertaining to its line of railroad projected as aforesaid, by Act of Congress approved May 4, 1870."

The bill then alleges that "by reason of the premises no right, title or interest in or to any of the grants, franchises or other benefits of said Acts of Congress approved July 25, 1866, was ever acquired by said West Side Company, or by, through or under it, or by said East Side Company, or by, through or under it, *excepting by virtue of, and expressly subject to, all of the terms and conditions of said Act of Congress of April* 10, 1869;" that in the meantime, as the result of certain litigation involving the East Side Company, its promoters, officers, and stockholders, on March 17, 1870, organized the Oregon and

California Railroad Company, setting out, in Exhibit A, and as a part of the bill, a copy of its Articles of Incorporation. (Vol. I, pp. 89-92 Transcript of Record). It is alleged that the principal object of this corporation was to become the successor of the East Side Company, and as such to receive and exercise the grants, franchises and privileges of the Act of Congress of July 25, 1866, and the acts amendatory thereof, and that pursuant to this object, on or about March 29, 1870, the East Side Company executed and delivered to the Oregon and California Railroad Company, a deed purporting to assign, transfer and convey to the Oregon and California Railroad Company, all the property of the former, including its right, title and interest in and to the grants, franchises and other benefits of the Acts of Congress mentioned, a copy of which conveyance is set out and made a part of the bill of complaint, marked Exhibit B, (Vol. I, pp. 93-125 Transcript of Record); "that during the months of March and April, 1870, said instrument last described was recorded in the office of the county recorder of the several counties in which was situate any part of the lands granted by said Act of Congress approved July 25, 1866, and the aforesaid acts amendatory thereof." (Vol. I, p. 26 Transcript of Record.)

It is further alleged that the purpose, intent and effect of this deed was and is, not to operate as a sale or conveyance of the lands granted by the Act of Congress, but to constitute the Oregon & California Railroad Company "the successor of said East Side Company, to construct, complete and equip the line of railroad aforesaid, and in aid thereof, to receive and exercise the grants, franchises and other benefits in that behalf extended by Congress, as aforesaid, and upon all of the terms and conditions aforesaid, and not otherwise."

It will be noted that the pleader states a legal conclusion, deducible, as it is claimed, from the instrument, the purpose being to avoid the legal effect of the sale of the grant *in solido* to the Oregon and California Railroad Company, for sufficient and adequate consideration, and the resulting breach of the alleged condition subsequent, claimed to be created by the proviso in the Act of April 10, 1869, and notice of such sale and breach by the recorded deed, so recorded in the public records of all the counties in which any part of the granted lands is situated, and so recorded as early as April, 1870.

The bill follows this allegation by an averment that on March 29, 1870, the East Side

Company was dissolved, and that no corporate powers or franchises have ever been exercised by that company since that date; that on April 4, 1870, the Oregon and California Railroad Company adopted a resolution reciting its purchase and assignment from the East Side Company of all the railroad, franchises and other property of that company, including all the right, title and interest claimed, both legal and equitable, absolute and contingent, by that company, of, in and to the lands and all other benefits granted to the Oregon company by the Act of Congress of July 25, 1866, and amendments thereto, and by said resolution accepted the grant conferred by said Act of Congress, and all the benefits and emoluments therein or thereby granted, and upon the terms and conditions therein specified, and directed the President and Secretary to file the assent of the company to such Act of Congress, and amendments thereto, in the office of the Secretary of the Interior, by filing a copy of the resolution in such office, certified under the seal of the company, and signed by the President and Secretary thereof, respectively, and "that a copy of the deed of assignment from said Oregon Central Railroad Company, certified to by the President and Secretary, under the seal of this company, be also filed in such

office of the Secretary of the Interior, and accompany these resolutions;" that on or about April 28, 1870, the Oregon and California Railroad Company filed in the office of the Secretary of the Interior, an authenticated copy of the resolution, and a certified copy of the deed of date March 29, 1870, and that at all times since that time, the Oregon and California Railroad Company has assumed, and still assumes, to be the successor of the East Side Company, and of all its rights under the Acts of Congress mentioned.

In arguendo it is pleaded that the West Side Company had abandoned and waived all claim to the grants, franchises and other benefits of the Act of Congress of July 25, 1866, and thereupon "did importune the Congress of the United States to extend to it, in lieu thereof, a similar grant of lands, etc.," pertaining to its projected line known as the West Side line, and that thereafter Congress passed the Act of May 4, 1870, (16 Stat. 94), copy of which is set out in Vol. I, pp. 28-32, Transcript of Record; that by the words "Oregon Central Railroad Company" mentioned in said Act of Congress, reference was made to the West Side Company, and that the line of railroad mentioned in the Act extended from the City of Portland to McMinnville, by way of Forest Grove, and was the

identical line theretofore projected by the West Side Company; that on July 2, 1870, the West Side Company adopted a resolution assenting to and accepting all of the provisions of the Act of Congress of May 4, 1870, and on July 20, 1870, an authenticated copy thereof was by the West Side Company filed in the office of the Secretary of the Interior; that on August 15, 1870, all of the capital stock of the West Side Company was acquired by the owners of the capital stock of the Oregon and California Railroad Company, and thereafter all of the stock of both companies was held by a single interest, and the affairs of the two companies were conducted virtually as a single enterprise, until the dissolution of the West Side Company; that all of the original capital stock of the Oregon and California Railroad Company, and substantially all of the stock of the West Side Company, was issued without consideration, and that by reason thereof, neither of the companies had any original capital or other funds for construction or other purposes, excepting as was borrowed therefor; that by the issuance, negotiation or pledge of mortgage bonds, and otherwise, approximately $8,000,000, during the year 1870, was procured by the Oregon and California Railroad Company, and approximately $1,000,000 was, during the year

1871, procured by the West Side Company, and with these funds the work of construction of the respective lines was prosecuted, until on or about January, 1873, and that during such period, the East Side line was constructed and extended from Portland to a point near Roseburg, a distance of about 197 miles, including the first twenty miles constructed by the East Side Company, and that said West Side line was constructed and completed from Portland to McMinnville, by way of Forest Grove, a distance of about 47 miles; that in January, 1873, these funds became exhausted, both companies bankrupt and insolvent, and because thereof, construction of both lines was abandoned, and that as to the East Side line, construction was not resumed until June, 1881, and as to the West Side line, was never resumed; that because of the situation, on July 24, 1874, the direction and control of the financial affairs of the two companies were assumed, and thereafter exercised, by the then creditors, under the name "Bondholders Committee;" that on February 29, 1876, all of the capital stock of both companies was for a nominal consideration, acquired by the "Bondholders Committee," and thereafter all of the affairs of the two companies were conducted by and under the direction and control of the "Bondholders

Committee;" that on October 6, 1880, for the purpose of merging said West Side Company into said Oregon and California Railroad Company, and under the direction and influence of said "Bondholders Committee," the West Side Company executed and delivered a deed to the Oregon and California Railroad Company purporting "to assign, transfer and convey" to the Oregon and California Railroad Company all of the property of the West Side Company, including the right, title and interest of that company in and to the grants, franchises and other benefits of the Act of Congress of May 4, 1870, a copy of which deed is marked Exhibit C, and made a part of the bill, (Vol. I, pp. 126-133 Transcript of Record); that "the purpose, intent and effect of said last described instrument was and is, not to operate as a sale or conveyance of any of the lands granted by said Act of Congress approved May 4, 1870, but to constitute said defendant, Oregon and California Railroad Company, the successor of said West Side Company, to construct, complete and equip the line of railroad aforesaid, and particularly that part thereof extending from Forest Grove to Astoria, and, in aid thereof, to receive and exercise the grants, franchises and other benefits in that behalf extended by Congress, as

aforesaid, and upon all of the terms and conditions aforesaid, and not otherwise."

It will be noted that the purpose, intent and effect of this instrument is thus pleaded to avoid its undoubted legal effect, as shown by the instrument, and as supported by the evidence, that it was a sale and transfer of the property of the West Side Company and of all its title to the land granted to it by the Act of Congress of May 4, 1870, for a sufficient and valuable consideration, and that it was a sale, and transfer *in solido*. It was so pleaded to avoid a breach of the alleged condition subsequent, claimed to be created by Section 4 of the Act of May 4, 1870, which is as follows:

> "*Section 4.* And be it further enacted, That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding Two Dollars and Fifty Cents per acre." (Vol. I, pp. 30, 31 Transcript of Record) (16 Stat. 94)

It is further alleged in the bill of complaint, that on October 6, 1880, the West Side Company was dissolved, and that at all times thereafter, the Oregon and California Railroad Company has assumed and still assumes to be the "successor" to said West Side Company, and that substantially all transactions subsequent to that date relate to and affect both of the aforesaid grants of land, that of July 25, 1866, being known as the "East Side Grant," and that of May 4, 1870, being known as the "West Side Grant;" that on May 7, 1881, the financial affairs of the Oregon and California Railroad Company were adjusted in such way as that all of its former capital stock was by its Board of Directors and stockholders, cancelled, the amount of its capital stock was then established, and at all times since has remained, and still is, $19,000,000, consisting of $12,000,000 preferred stock, and $7,000,000 common stock; that in payment of its then existing indebtedness, with accrued interest thereon, all of the new capital stock was then issued, ever since has been, and still is, outstanding, and "by the issue of said new capital stock, and by the use of a part of the proceeds of a new bond issue heretofore referred to, all of its then existing indebtedness was fully paid and discharged, and the several mortgages and other instruments purporting

to secure the same, were canceled and satisfied;" (Vol. I, p. 36 Transcript of Record) that on June 2, 1881, the Oregon and California Railroad Company, (hereinafter called, for convenience, the Oregon Company) executed to Henry Villard, Robert Davie Peebles, and Charles Edward Bretherton, as trustees for the owners and holders of such preferred stock, a certain instrument in writing purporting to convey to said trustees all of the lands of both of said land grants, in trust, to secure the owners of said preferred stock, some pretended rights or interest in or to said lands, and for certain other purposes, as will appear in said instrument, a copy of which is made a part of the bill of complaint, marked Exhibit D, (Vol. I, pp. 134-165 Transcript of Record), and that "said deed of trust last described purports to convey, and purports to authorize said trustees, and their successors, to sell and convey said *lands to persons other than actual settlers, and in quantities greater than one quarter section to one purchaser, and for a price exceeding Two Dollars and Fifty Cents per acre, and for purposes other than those prescribed in and by said land grants respectively; and because thereof, and otherwise, said deed of trust was and is in violation and breach of the aforesaid terms, conditions, and provisions of each of said land*

grants respectively. On or about the 28th day of June, A. D. 1881, said deed of trust was recorded in the office of the County Recorder of Multnomah County, in the State of Oregon, in Book 27 of Mortgages, at page 179; and thereafter, and at about the same time, was recorded in the office of the County Recorder of the several counties in which was situated any part of the lands granted by either of said land grants." (Vol. I, p. 37 Transcript of Record)

The complaint further alleges that thereafter such proceedings were had under the deed of trust, that the defendant Stephen T. Gage became and now is, the sole surviving trustee thereunder, and that, individually and as trustee, Gage, and the defendant Southern Pacific Company, as the present owner of all of said preferred stock, claim and assert some right, title, interest or lien in, to, or upon said lands or some part thereof, under said deed of trust, but that "because of the premises, neither of said defendants has any right, title, interest or lien in, to, or upon any part of said lands;" that by the issuance and negotiation of two separate issues of its corporate bonds, bearing date June 1, 1881, and May

26, 1883, described and known as "First Mortgage Bonds," and "Second Mortgage Bonds," respectively, the Oregon and California Railroad Company provided further construction funds aggregating about $5,000,000, and in June, 1881, work of constructing the East Side line was resumed, and continued until on or about the month of January, 1884; that during this period of construction, the East Side line was constructed and extended from Roseburg to a point about one and one-quarter miles southerly from Ashland, in Oregon, a distance of approximately 145 miles; that on or about the month of January, 1884, these construction funds became exhausted, the Oregon Company again became bankrupt and insolvent, and the work of construction was again abandoned, and not resumed until April, 1887; that on or about January 19, 1885, the First and Second Mortgage Bonds being still outstanding, in a suit instituted and then pending in the Circuit Court of the United States, for the District of Oregon, wherein certain of the holders of the First Mortgage Bonds were plaintiffs, and the Oregon Company and others, were defendants, the railroad lines and other property of the Oregon Company were placed in the hands of a Receiver, and that about May 12, 1887, and during the pendency of such receivership,

the Southern Pacific Company acquired, and thereafter exercised, ownership and control of the Oregon Company, and *"subsequently, under the direction and influence of said defendant, Southern Pacific Company, certain breaches and violations of the terms and conditions of said land grants respectively hereinafter complained of, were committed;"* (Vol. I, p. 39 Transcript of Record); that on and prior to May 12, 1887, the general status of said land grants was as follows, to-wit: under said East Side grant, during the years 1871 to 1877 inclusive, patents for approximately 323,000 acres of land, (being lands contiguous to the first 125 miles of said East Side line) were applied for, by, and issued to, the Oregon and California Railroad Company, as the successor of the East Side Company, and, excepting as stated, no patents under this grant were issued until the year 1893, and no patents were ever issued under the West Side Grant prior to the year 1895; that the total length of the East Side line is approximately 367 miles; that with the exception of the northerly 197 miles thereof, no part of said East Side line was constructed within the times prescribed by the Act of July 25, 1866, and acts amendatory thereof; that on May 12, 1887, the southerly portion thereof, extending from Ashland to the southerly

boundary line of the State of Oregon, still remained unconstructed; that of the West Side line, that part extending from Forest Grove to Astoria was never constructed, and because thereof, the granted lands contiguous to said portion were declared forfeited by Act of Congress of January 31, 1885, (23 Stat. 296); that of the granted lands, approximately 250,000 acres had been sold prior to May 12, 1887, and *"your Orator is informed and believes, and therefore states, that nearly all of the lands so disposed of were sold to actual settlers, and in small quantities, although in many instances in quantities, and for prices slightly in excess of the aforesaid limitations prescribed by said land grants respectively,"* (Vol. I, p. 41 Transcript of Record); that on or about the month of January, 1885, a certain railroad syndicate known as the "Southern Pacific System," controlling substantially all railroad lines in the southwestern part of the United States, and particularly on the Pacific Coast south of the State of Oregon, including the Central Pacific Railroad Company, (which had theretofore become the successor to the grants, franchises and other benefits in the State of California, under said Act of Congress approved July 25, 1866) organized, under the laws of Kentucky, the "Southern Pacific Company," as "a gen-

eral holding company," for said syndicate, and on or about the month of March, 1885, the Southern Pacific Company acquired, and ever since has exercised, a controlling interest in each of the corporations constituting said "Southern Pacific System," and at about the same time, became, and ever since has been, the lessee of each of these corporations, whereby it came into possession of, and at all times thereafter has operated all of said railroad lines; that several of the constituent companies of said "Southern Pacific System" held lands granted by the United States in aid of the construction of their respective lines, aggregating many millions of acres; that shortly after its organization, the Southern Pacific Company established a general land department, with offices in San Francisco, California, under the charge of a certain official known as its "Land Agent," and thereupon assumed and thereafter exercised, through its Land Agent, control over the handling and disposing of all of the lands of its constituent companies; that shortly after the affairs of the Oregon Company were placed in the hands of a Receiver, the Southern Pacific Company, designing to extend its railroad system and its land holdings by acquiring ownership and control of the Oregon Company, in that behalf entered into negotiations with the Oregon

Company, its bondholders and stockholders, and certain other parties named, and for the purpose thereof, such stockholders became and were organized under the name "Stockholders Committee;" certain owners of the mortgage bonds became and were organized under the name "Frankfort Bondholders Committee," and certain other owners of the bonds became and were organized under the name "London Bondholders Committee," said Bondholders Committees representing the owners of substantially all of the First and Second Mortgage Bonds of the Oregon Company; that on or about March 28, 1887, a contract in writing was entered into by and between Southern Pacific Company and the Oregon Company, the Union Trust Company, the "Stockholders Committee," the "London Bondholders Committee," the "Frankfort Bondholders Committee," and the Pacific Improvement Company, a copy of which contract is made a part of the bill, marked Exhibit E, (Vol. I. pp. 166-184 Transcript of Record); that by virtue thereof, all of the corporate securities of the Oregon Company were acquired by the Southern Pacific Company; that the general purpose and effect of this contract was such that the Oregon Company, together with its lines of railroad, was absorbed by and merged into said "Southern Pacific Sys-

tem," and the independent corporate existence thereof virtually ceased, "but," *by way of argument and incriminating inducement,* it is alleged that:

> "it manifestly appears from the subsequent conduct of said defendant Southern Pacific Company, and your Orator charges and states, that at the time of the negotiation and execution of said last described contract, it was the purpose and design of said defendant Southern Pacific Company to secure control of the aforesaid land grants, and to divert the same from the aforesaid lawful uses and purposes thereof, to the exclusive use, benefit and enrichment of said defendant Southern Pacific Company; and to that end, said last described contract was, by the parties thereto, so conditioned, and the conditions, options and provisions thereof were so exercised and performed, that said defendant Southern Pacific Company did thereafter maintain said defendant Oregon and California Railroad Company a corporation in name and form only, as a mere instrumentality and device, to accomplish, and at the same time to conceal its aforesaid purpose and design, and in that behalf to obtain and dispose of said lands in the name of, and under the guise

and pretense of the administration and exercise of the aforesaid land grants, by the defendant Oregon and California Railroad Company; and to that end, certain proceedings were had and transactions entered into, including that certain contract of lease and that certain mortgage deed hereinafter set forth."

(Vol. I, pp. 43-44, Transcript of Record.)

That pursuant to the terms of the contract of May 28, 1887, on or about May 12, 1887, all of the capital stock, and all of the Second Mortgage Bonds of the Oregon Company were transferred, assigned, and delivered to the Pacific Improvement Company, and all of the First Mortgage Bonds transferred, assigned and delivered to the Southern Pacific Company; that Pacific Improvement Company was a California corporation, wholly owned and controlled and directed by the owners of a majority of the capital stock of the Southern Pacific Company; that Southern Pacific Company was the actual purchaser of the capital stock and said Second Mortgage Bonds, and paid the purchase price therefor, and the Pacific Improvement Company never had any beneficial interest therein, but, under the direction and influence of Southern Pacific Company, it

was made a nominal party to the contract of March 28, 1887, *"for the purpose of concealing the true facts in the premises,"* (Vol. I, p. 45 Transcript of Record); that Pacific Improvement Company held the capital stock of the Oregon Company, for the use and benefit of Southern Pacific Company, until on or about April 9, 1901, when all of this stock was transferred to the Southern Pacific Company, which, at all times thereafter, has been and still is the owner and holder thereof; that at all times since May 12, 1887, Southern Pacific Company has controlled and directed the election of directors and officers of the Oregon Company, and the management and conduct of all of its corporate acts, including all transactions and proceedings set forth in the bill of complaint; that pursuant to the contract of March 28, 1887, on or about January 3, 1888, Southern Pacific Company and the Oregon Company entered into a lease bearing date July 1, 1887, whereby all of the railroad and telegraph lines and other property of the Oregon Company were leased to the Southern Pacific Company for the term of forty years, upon certain terms and conditions, a copy of which lease is made a part of the bill, marked Exhibit F, (Vol. I, pp. 185-188 Transcript of Record); that this lease remained in effect until on or about August 1, 1893, when the

parties entered into a further lease in writing, of that date, whereby all the railroad and telegraph lines and other property of the Oregon Company were leased to the Southern Pacific Company for the term of thirty-four years, a copy of which lease is made a part of the bill of complaint, marked Exhibit G, (Vol. I, pp. 189-196 Transcript of Record); that this last named lease has been at all times since August 1, 1893, and still is, in full force and effect, and that pursuant to these leases, Southern Pacific Company, on or about June 6, 1888, entered into possession of all the property leased, and at all times thereafter has been and still is in full possession thereof, and engaged in the operation of said lines of railroad, and during all of said times has enjoyed and is still enjoying all the benefits and profits thereof; that pursuant to the contract of March 28, 1887, and *"under the direction and influence"* of Southern Pacific Company, on or about January 3, 1888, the Oregon Company *executed and delivered to the Union Trust Company,* a certain instrument in writing of date July 1, 1887, purporting to mortgage and convey, in trust, to the Union Trust Company, certain property of the Oregon Company, for certain purposes, and upon certain terms and conditions therein expressed, and among others, to secure the payment of certain bonds there-

after to be issued and negotiated in the name of the Oregon Company, a copy of which instrument is made a part of the bill of complaint, marked Exhibit H, (Vol. I, pp. 197-223 Transcript of Record); that by a certain provision of said instrument, to-wit, "and all the property, real, personal or mixed, which on the 12th day of May, 1887, was covered by the mortgage securing the then existing First Mortgage Bonds of the Oregon and California Railroad Company," reference was had, and intended to be had, to a certain deed of trust executed by the Oregon Company, of date June 1, 1881, to Henry Villard, Horace White, and Charles Edward Bretherton, as trustees, a copy of which is made a part of the bill of complaint, marked Exhibit I, (Vol. I, pp. 224-259 Transcript of Record; *that on or about January 8, 1888, said mortgage deed bearing date July 1, 1887, was recorded in the office of the County Recorder of Multnomah County, Oregon, in Book 63, at page 437, of the Records of Mortgages, "and thereafter, and about the same time, was recorded in the office of the County Recorders of the several counties in which was situate any part of the lands granted by either of said land grants,"* (Vol. I, p. 48 Transcript of Record); that pursuant thereto, the Oregon Company executed, and the Southern Pacific Company and

Union Trust Company negotiated and delivered, certain of the bonds provided for by said mortgage deed bearing date July 1, 1887, of even date therewith, "of which approximately Seventeen Million Five Hundred Thousand Dollars ($17,500,000) in amount are still outstanding, the exact amount whereof is to your Orator unknown," (Vol. I, p. 49 Transcript of Record); that all of these bonds inured to the exclusive benefit of Southern Pacific Company, and were used by that company to purchase the securities of the Oregon Company, and *"to complete the construction of, and improve, the lines of railroad leased by it, as aforesaid;"* that by reason of the premises, these bonds "in fact represent and constitute the indebtedness of the defendant Southern Pacific Company," and "the payment of these bonds, both as to principal and interest, was and is, by endorsement thereon in writing, guaranteed by the Southern Pacific Company;" *"in so far as said mortgage deed bearing date July 1, 1887, relates to any of said granted lands, if at all, it purports to convey, and purports to authorize the defendant Union Trust Company, and its successors, to sell and convey said lands to persons other than actual settlers, and in quantities greater than one-quarter section to one purchaser, and for a price exceeding Two Dollars and Fifty*

Cents per acre, and for purposes other than those prescribed in and by said land grants respectively, and because of the premises in this bill set forth, said mortgage deed was and is in violation and breach of the aforesaid terms, conditions and provisions of each of said land grants respectively."

The bill further alleges that the Union Trust Company, individually and as trustee for the holders and owners of these bonds, claims some right, title, interest or lien in, to, or upon some of these granted lands, under the mortgage deed of July 1, 1887, but because of the premises, it has no right, title, interest or lien in, to, or upon any of said lands, in its own behalf, or as trustee; that during the year 1887, commencing in the month of April, and ending in the month of December, the last section of said East Side line, extending from Ashland to the southern boundary line of the State of Oregon, was constructed by the Pacific Improvement Company, under some form of contract with the Southern Pacific Company, the particulars whereof "are to your orator unknown, *but in furtherance of its aforesaid purpose and design;*" that about June 6, 1887, the Southern Pacific Company

did *"instigate"* and cause the Oregon Company and the Pacific Improvement Company to enter into a certain contract, by the terms of which the Oregon Company agreed to pay for said work of construction in its said bonds thereafter to be issued and guaranteed by the Southern Pacific Company, as set forth in the bill; that in truth and in fact, at the time of the execution of this contract of June 6, 1887, a large part of said work of construction had been performed under some prior contract, as thereafter set forth in the bill of complaint; that on June 6, 1888, the receivership proceedings were dismissed, the Receiver discharged, and all of the First Mortgage and Second Mortgage Bonds, (not including said issue of bonds dated July 1, 1887) together with all mortgages and trust deeds securing the payment thereof, were cancelled and discharged, and thereupon the Southern Pacific Company entered into the possession of all of the property of the Oregon Company, pursuant to the terms of the lease mentioned; that immediately after June 6, 1888, the Southern Pacific Company, through its land department, assumed, and at all times thereafter has exercised *absolute control* over the disposition and sale of the granted lands of the Oregon Company, conducting all business, however, in the name of the latter company; that "un-

til after the year 1893, there was no marked change in the manner of the disposition of said lands, but in the meantime, and under the direction and *influence* of the defendant Southern Pacific Company, preparations were made for the future *exploitation* of said land grants, to-wit: that on or about the month of June, 1888, a *large force of timber cruisers* and land examiners was organized, and thereafter kept employed until all of said lands had been examined and appraised, and prices fixed thereon, without regard to the limitations prescribed by said land grants, and that as to at least eighty per cent. of all of said granted lands, "the first sale price fixed thereon, and the lowest price for which the same was ever offered for sale, was greatly in excess of the sum of Two Dollars and Fifty Cents per acre," (Vol. I, p. 52 Transcript of Record.)

That during the years 1891 and 1892, "anticipating and *seeking to evade responsibility for the contemplated violations* of the terms and conditions of said grants, and under the direction and influence of the defendant, Southern Pacific Company," the Oregon Company and the Union Trust Company adopted quitclaim form of contracts and conveyances for use in making sales of these lands, and thereafter refused to contract for or give any

other form of conveyance except in cases where, by prior contracts, the Oregon Company had obligated itself to do otherwise.

That commencing with about the year 1891, patents were rapidly applied for and obtained. The amount patented under the East Side grant, commencing with the year 1893, aggregated approximately 2,445,000 acres, and the amount patented under the West Side grant, commencing with about the year 1895, aggregated approximately 128,000 acres, being the only patents ever applied for or issued under the West Side grant; that no patents have been issued since the year 1906 under either of said land grants.

That in the meantime the Southern Pacific Company was engaged in developing a market and demand for these lands among *"wealthy land speculators and timbermen,"* aided in that behalf by its well-equipped organization therefor, and by an extensive acquaintance previously established by its Land Department in the sale and disposition of its other land holdings; that "a sudden and rapidly increasing demand for said lands in large quantities and at rapidly increasing prices was developed, commencing with about the year 1894." (Vol. I, p. 53, Transcript of Record.)

That taking advantage of the opportunity "to violate the terms and conditions of said land grant" promoted and developed, as stated, the Oregon Company, under the direction and influence of the Southern Pacific Company, *from about the year 1894, until about January 1, 1903, "sold and disposed of said granted lands in manner and upon terms in violation and breach of the aforesaid terms and conditions of said land grants respectively,* and with the sole object of securing the greatest possible financial benefit therefrom; and in that behalf a large quantity of said lands was sold to *"speculators"* and others than actual settlers, and for speculation and purposes other than actual settlement, and in quantities greatly in excess of one-quarter section to one purchaser, to-wit, in quantities from 1000 to 45,000 acres to a single purchaser, and for prices greatly in excess of $2.50 per acre, to-wit, for prices from $5.00 to $40.00 per acre." (Vol. I, pp. 53, 54, Transcript of Record.)

That of these granted lands the Oregon Company, in the manner stated, has heretofore made approximately 5306 sales, aggregating approximately 820,000 acres, of which 4930 sales in quantities not exceeding one-quarter section, were made, amounting to 296,000 acres, and of which 376 sales, aggre-

gating 524,000 acres, were made in quantities exceeding one-quarter section.

That "substantially all of said 524,000 acres sold in quantities exceeding a quarter section to one purchaser, as aforesaid, (and a considerable portion of said other lands sold as aforesaid) were sold to *"speculators"* and others than actual settlers and *"for the purpose of speculation"* and not for the purpose of settlement, and for prices greatly in excess of $2.50 per acre. And of said 524,000 acres sold in quantities exceeding one-quarter section to one purchaser, as aforesaid, approximately 478,000 acres (or about 90% thereof) were sold or conveyed since the year 1897, and of said 478,000 acres approximately 370,000 acres were sold to thirty-eight purchasers in quantities exceeding 2000 acres to each purchaser." (Vol. I, page 54, Transcript of Record.)

That nearly all sales were made by contracts providing for payment of purchase price in from five to ten equal annual installments, and execution of conveyance upon final payment. That although sales were suspended on or about January 1, 1903, many contracts of sale were then pending, as to which the installments falling due had been collected and conveyances executed from time to time

down to and including the present, and many of such contracts are still pending.

That of the total sales made approximately 4476 have been fully executed and conveyances given, aggregating approximately 646,000 acres, and approximately 830 executory contracts are still pending, aggregating approximately 174,000 acres.

That a schedule setting forth all these conveyances heretofore made and all pending contracts, separately stated as to each of these land grants, is made a part of the Bill of Complaint, marked Exhibit "J". (Vol. I, pp. 260, 272, Transcript of Record.)

That the complainant is not informed as to the exact time these pending contracts were negotiated or executed or the exact purchase price thereof but is informed and believes and therefore states that all of these pending contracts were negotiated and entered into since January 1, 1898, and prior to January 1, 1903, and that the average purchase price thereof is approximately $10.00 per acre.

That as between the parties thereto, the mortgage deed of July 1, 1887, to the Union Trust Company, has been treated as a lien upon all of the granted lands unsold on May 12, 1887, and that as to all lands of that class

which have been sold since that date, *the Union Trust Company "has received substantially all of the purchase price"* and has joined in the execution of all conveyances, the exact amount of which and the specific application thereof are unknown to complainant, but the complainant alleges that the proceeds of all sales made since May 12, 1887, have inured to the exclusive benefit of the Southern Pacific Company, *"by application in payment of the aforesaid bonds* guaranteed by the defendant Southern Pacific Company, or otherwise."

That in the month of October, 1901, the Southern Pacific Company, with all of its constituent lines, became merged into that certain railroad system known as the "Harriman Lines," which said railroad system at all times thereafter has held *"a monopoly of railroad transportation"* affecting a large part of the United States and particularly in the State of Oregon south of Portland.

That thereupon a Land Department was organized and established at San Francisco to handle and *"exploit and manipulate all of the lands"* of the constituent companies of said "Harriman System", including the land grants of the Oregon Company. That all transactions concerning the last named land

grants were conducted in the name of the Oregon Company and sales were continued as before until on or about January 1, 1903, on which date there remained unsold approximately 2,373,000 acres, of which approximately 2,080,000 acres had been theretofore patented, and approximately 293,000 acres of unpatented lands now claimed by the Oregon Company. That approximately 1,800,000 acres are situated southerly from Eugene and constitute nearly one-half, in alternate sections, of all lands within approximately forty miles of said railroad from Eugene to the southerly boundary line of the state, and that only a small portion of said granted lands in that part of the grant has ever been sold. That this property in which these unsold lands are situated was and is *"wholly dependent for railroad transportation on the railroad lines of the Oregon Company,"* now operated by the Southern Pacific Company as one of the constituent companies of said "Harriman Lines."

That *"since said first day of January, A. D. 1903, and particularly during the last preceding two years"* certain persons, exceeding one thousand in number, have severally applied to the Oregon Company to purchase certain of these unsold lands in quantities not exceeding 160 acres to each one of them, said

"applicants to purchase intending and desiring to purchase said lands so applied for by them respectively for the purpose of *"actually settling thereupon,"* and making *"a permanent home"* thereof, and several of said applicants to purchase have actually *"settled"* and established a *"permanent home"* upon the lands so applied for by them respectively, and at the time of said applications to purchase, each of said applicants did tender to the defendant, Oregon and California Railroad Company, the sum of $2.50 for each acre of the lands so applied for, as the purchase price thereof, and in addition to said applications to purchase, a large number of persons are ready and willing to *"settle"* upon said lands and to purchase the same for the purpose of *"actual settlement"* thereupon and of making *"a permanent home"* thereof, in quantities, for the price and upon terms as prescribed by said land grants respectively, but are deterred therefrom by the defendant, Oregon and California Railroad Company, as hereinafter stated." (Vol. I, pp. 51, 59, Transcript of Record.)

That notwithstanding the premises, and "in violation and breach of the aforesaid terms and conditions of said land grants respectively," the Oregon company, under the direction and *"influence"* of the Southern Pa-

cific Company, as one of the constituent companies of said "Harriman Lines," on or about January 1, 1903, *"withdrew"* from sale all of these unsold lands, and that at all times thereafter has refused and still refuses "to sell any part thereof to *"actual settlers,"* or for the purposes of *"actual settlement,"* or in quantities or for prices as prescribed by the terms of said land grants respectively, or at all; and particularly has at all times refused and still does refuse to entertain any of the aforesaid applications to purchase or to sell any of the lands applied for, as aforesaid, to the persons aforesaid, upon the terms aforesaid, or upon any terms whatsoever." (Vol. I, pp. 59, 60, Transcript of Record.)

That ever since January 1, 1903, the Oregon Company has not only failed and neglected to encourage or *"promote the settlement"* of said lands or the purchase thereof by *"actual settlers,"* or for the purpose of *"actual settlement,"* but by divers means and methods has at all times *"discouraged, obstructed, forbidden and prevented the settlement thereof,"* or any part thereof, and the purchase thereof, or any part thereof, "upon the terms prescribed by said land grants, or otherwise, *by actual settlers, or for the purpose of actual settlement."*

That since January 1, 1903, the Oregon Company has *"assumed"* and now asserts an absolute and unconditional estate in and to these unsold lands, and has attempted and still does attempt to convert its "aforesaid conditional estate into an unconditional estate, in violation and breach of the aforesaid terms and conditions of said land grants." That by reason of the nominal corporate character of the Oregon Company, and the further premises set forth in the Bill of Complaint, the unconditional estate so asserted has inured to the benefit of and has been exercised by the Southern Pacific Company, as one of the constituent companies of said "Harriman Lines;" that "the particular effect of the premises is the same as if all of said unsold lands had been conveyed to the defendant, Southern Pacific Company *for the use and benefit of said railroad syndicate."*

That by reason of the premises and in violation of the express terms and conditions, as well as the plain intendment of said land grants respectively, all of said unsold lands, and the full value thereof, *"have been converted to the use and benefit of the defendant, Southern Pacific Company, as one of the constituent companies of the said "Harriman Lines,"* and *"a virtual land monopoly"* has

been created, and ever since said 1st day of January, 1903, has been maintained, and hereafter will be maintained *"for the selfish uses and purposes of the defendant,"* Southern Pacific Company, and said "railroad syndicate," enabling "said railroad syndicate," among other things, *"to control and restrict commercial and industrial development of the territory tributary to said line of railroad," and thereby "prevent the construction and establishment of competing railroad lines,"* which would naturally be attracted by the increase in production that would attend a normal and unrestricted development of industrial and commercial resources, if said granted lands should be sold to actual settlers and for the purpose of actual settlement pursuant to the terms and conditions of said land grants." (Vol. I, p. 61, Transcript of Record.)

That because thereof the industrial and commercial development of those portions of the State of Oregon wherein are situated these unsold lands, has been, and will continue to be, seriously retarded if not completely checked; and that the statements made concerning the withdrawal of these lands from sale, the circumstances, purposes and effects thereof, together with the subsequent opportunities to sell said lands to actual set-

tlers and for the purpose of actual settlement, and the conduct of the Oregon Company in relation thereto, except as otherwise specifically stated, apply to each of these land grants.

That a schedule of the unsold lands heretofore patented, is made a part of the Bill of Complaint, marked Exhibit "K". (Vol. I, pp. 273, 520, Transcript of Record.) That none of these unsold lands have ever been reduced to possession or improved in any way, unless by persons claiming to have settled thereupon and seeking to purchase the same, as stated, and that the reasonable present value of these lands exceeds the sum of $40,000,000.

That none thereof now are, or ever were, necessary to reserve for depots, stations, side tracks, wood sheds, standing ground, or any other needful uses in operating any of said railroad lines, or any part thereof, and no part thereof ever was reserved or used or is now reserved or used or intended to be reserved or used for any of these purposes.

That in addition to the purchase price received, the Oregon Company has received and enjoyed certain other benefits on account of said granted lands, consisting of a large num-

ber of contracts of sale which have been forfeited for non-payment of the annual installments falling due, and the installments previously paid have been retained, the exact amount of which is unknown to the complainant, but exceeds $100,000.00.

That a considerable portion of these granted lands have, from time to time, been leased for certain rentals paid to the Oregon Company, the amount of which is unknown to complainant; that the Oregon Company *"has cut and used large quantities of timber growing upon said lands and has sold large quantities of said timber,"* receiving the consideration therefor, the amount of which exceeds the sum of $200,000.00, and has received other financial benefits, the particulars of which are unknown to complainant.

That the Oregon Company has repeatedly threatened, and still threatens to, and will unless restrained, sell, contract for sale, convey, or in some manner encumber or impair the title of these unsold lands, "in violation of the terms and conditions of said land grants respectively," and has *"heretofore cut large quantities of the timber growing upon these lands"* and has otherwise committed waste thereupon, and by contract and otherwise has permitted and invited others so to

do, and threatens to and will, unless restrained, continue to commit waste upon these lands, and *"particularly as to the timber and other natural products thereof,"* and will continue to permit, contract for, and invite others so to do, to the great and irreparable injury of complainant.

That until the year 1894 there was substantially no demand for said lands except for the purpose of settlement and by persons of limited means able to purchase said lands only in small quantities and at reasonable prices, and nearly all sales were of that character; *that during a large part of said period the Oregon Company "maintained an immigration bureau, engaged in inducing immigration and settlement upon said lands,"* and ostensibly was not otherwise engaged in soliciting or promoting sales, and that by reason thereof, the occasional violations of the terms and conditions of said land grants occurring during said period, were *"concealed and were generally unknown,"* until ascertained by complainant, as stated.

That "a sudden demand arose for said lands, commencing about the year 1894, among *'wealthy speculators and timber men,'* promoted and developed as aforesaid, and the greater part of the substantial wrongs and

violations herein complained of were committed subsequent to that time;" that nearly all of the sales consummated after that time, were made by executory contracts of sale, *"not placed of record,"* and which did not merge into deeds for many years thereafter, and a considerable portion of which are still pending, and that *many* of the conveyances *for excessive quantities* of these lands *"were not placed of record"* until recently, and *"many are still unrecorded."* In many instances of sales in excessive quantities, the lands were attempted to be conveyed by several deeds, each of which was for a small quantity of land, whereby *"the true facts were concealed."*

That on or about January 1, 1903, all of said unsold lands were withdrawn from sale, and thereafter converted to certain wrongful and unlawful uses and purposes, as thereinbefore set forth in the Bill of Complaint. "But, *designing to conceal* the premises from your Orator and the general public, the defendant, Oregon and California Railroad Company, has, from time to time, *falsely and deceitfully* represented that said lands were withdrawn from sale for divers temporary reasons, and with the intention of resuming the sale thereof. An alleged confusion of the records of said Land Department, the alleged

destruction of said records during the San Francisco fire, and other similar excuses were successively used *to conceal the true character of said transaction.*"

"That by reason of the premises, the several wrongful and unlawful transactions in this bill complained of, *were concealed from,* and *wholly unknown* to your Orator until ascertained, as hereinafter stated." (Vol. I, p. 66, Transcript of Record.)

That on or about February 14, 1907, because of the great injury inflicted upon commercial and industrial conditions, as aforesaid, and it having become manifest that the several aforesaid representations concerning the withdrawal of said lands from sale *"were false,"* the Legislature of the State of Oregon adopted and communicated to complainant a certain memorial charging in general terms, "the true facts in the premises," a copy whereof is made a part of this bill, marked Exhibit "L", (Vol. I, pp. 520, 521, Transcript of Record;), whereupon the further issuance of patents was suspended, and an investigation of the subject was instituted by complainant, through its Attorney General, which was concluded on or about January, 1908, and that thereupon the subject was presented to

Congress and thereafter, the Joint Resolution of April 30, 1908, was passed (35 Stat. 571, Vol. I, pp. 67, 68, Transcript of Record); that pursuant to the provisions of this Joint Resolution, this suit was instituted; that "by reason of the several aforesaid breaches and violations of the aforesaid terms, conditions and provisions of said land grants respectively, certain of said granted lands and certain estates in certain of said granted lands, have been and are forfeited to your Orator, the United States of America, free from any and all right, title, interest, lien or claim of the defendants herein, or any of them, or any one claiming by, through, or under them, or either or any of them, which lands and estates in lands so forfeited are—

(1) All of said unsold lands;

(2) Any and all right, title and interest of any kind or nature whatsoever, vested, contingent, or expectant, if any, of the defendants herein, or either or any of them, in, to, or concerning any of the lands granted. (Vol. I, p. 69, Transcript of Record.)

That *pursuant to the authority and direction contained in said Joint Resolution, complainant does hereby assert title to and does hereby resume the title* of all of said lands and estates forfeited, as aforesaid.

That in addition to the lands and estate in lands above specified, certain of said lands which have been heretofore sold in violation of the terms and conditions of said land grants, and certain estates therein, likewise have been and are forfeited, but are not included in this suit for reasons following, to-wit:

> "The lands disposed of in violation of the terms and conditions of said land grants respectively, as aforesaid, were sold, contracted for sale, or conveyed to a large number of purchasers. Including alleged rights of succession by purchase, conveyance, mortgage, descent, devise, and otherwise, more than three thousand (3,000) persons, firms, and corporations, residing in divers parts of the United States and other parts of the world, now assert some right, title, interest or lien in, to or upon the lands sold, contracted for sale and conveyed in violation of the terms and conditions of said land grants respectively, as aforesaid. The names and places of residence of only a few of said persons, firms and corporations are as yet known to your Orator, and because of the multiplicity and complexity of said transactions, your Orator will be unable to ascertain them

in time to include said parties in this suit. Said lands were sold and purchased as aforesaid, and alleged subsequent rights have been acquired therein, under greatly varying circumstances and conditions, and because of the premises, it would be inequitable to attempt to secure an adjudication of the rights of all of said parties by making only a few of them parties defendant as representatives of all thereof. To require the making of all said persons, firms and corporations parties to this suit, or to otherwise require an adjudication herein of their respective rights in the premises, would indefinitely postpone and ultimately defeat the rights, equities and remedies of your Orator pertaining to said unsold lands, as to which the public interests require a speedy and complete adjudication and enforcement."

That the property described in the mortgage deed of July 1, 1887, (not including any of said granted lands) is of *a value largely in excess of the amount of all of said bonded indebtedness secured thereby,* and is ample security therefor, but complainant expressly denies that any of said granted lands are included in the property described in said mortgage deed, or that the Union Trust Company,

as Trustee, or any other person, firm, association, or corporation, has any right, title, interest or lien, in, to, or upon any of said lands by virtue of said mortgage deed.

That pursuant to the rules and regulations of the Department of the Interior, all of the patents were issued and based upon applications in writing, from time to time filed in the appropriate Land Office of the United States by the Oregon Company, as the successor of said East Side Company and said West Side Company, respectively, which said applications contained descriptive lists of the lands so claimed, and for which patents were so applied for, and each of said applications was accompanied and supported by *"a certain affidavit in writing,"* signed and sworn to by a certain agent of the Oregon Company thereto duly authorized, to the effect, among other things, that all of the lands so claimed, and for which patents were so applied for, *were of the character contemplated by the grant under which they were claimed* and for which patents were applied for, as aforesaid, and that *"believing and relying upon the statements contained in said applications and said affidavits,"* complainant issued said patents.

That in making sales of said lands, the Oregon Company has in and by its contracts

and conveyances, and particularly prior to June 6, 1898, made certain valuable reservations unto itself, reserving a strip of land one hundred feet wide for right of way and other purposes, and the right to take water needed for the operation of said railroad, and reserving and excepting so much and such parts of said lands as may be mineral lands, other than coal and iron, all of which said reservations are in effect a creation of permanent estates in its own favor, in and to a large part of said granted lands, in violation and breach of the terms and conditions of said land grants respectively, and were and are null and void. But, notwithstanding the premises, the Oregon Company, and each of the other defendants herein, claims some inchoate right, title or interest, in said lands by virtue of said reservations, which said right, title and interest, if any, which is denied, were and are subject to the right of forfeiture in this suit.

That in addition to the several claims of the several defendants specifically mentioned, the defendants and each of them (now cross-complainants herein) claim some right, title, interest, or lien, in, to, or upon some or all of said granted lands, the particulars whereof are unknown to complainant, concerning which a full discovery is sought; and that any and all of such rights, titles, interests, or

liens, if any, were and are subject to the right of forfeiture and to the relief sought herein.

That a schedule, accurately setting forth all maps of survey and location filed in the office of the Secretary of the Interior, pursuant to the provisions of said land grants respectively, is made a part of this bill, marked Exhibit "M". (Vol. I, pp. 522, 523, Transcript of Record.)

That a schedule, accurately setting forth the time of the construction and completion of several sections of said railroad and telegraph lines, together with the examination, approval and acceptance thereof, separately stated, is made a part of this bill, marked Exhibit "N", (Vol. I, pp. 524, 525, 526, Transcript of Record); that a schedule, accurately setting forth the quantity of lands patented from time to time under each of said land grants, compiled by years, and separately stated, is made a part of this bill, marked Exhibit "O", (Vol. I, pp. 527, 528, Transcript of Record); that all of said patents were applied for by and issued to the Oregon Company, as the successor of said East Side and said West Side Companies, respectively; that each of said defendants (now cross-complainants herein) asserts some right, title or interest in or to certain of said unsold lands, and each alleges to have, in good faith, ac-

tually settled upon certain of said unsold lands, not exceeding one-quarter section in quantity, with the intention of making a permanent home thereof, and to have applied to the Oregon Company to purchase the same, and to have tendered to the Oregon Company the sum of $2.50 for each acre applied for, as the purchase price thereof, and the Oregon Company has at all times refused and still refuses to entertain said applications to purchase, and sell or convey to said defendants (now cross-complainants herein), respectively, the land as applied for by them respectively, upon the aforesaid terms or otherwise, and that by reason of the premises alleged by said cross-complainants-defendants herein, respectively, as aforesaid, the truth whereof is unknown to complainant, said defendants, (now cross-complainants herein), severally assert some right, title or interest in or to the lands so applied for by them respectively, and each thereof, has instituted a suit in equity against the defendants, Oregon and California Railroad Company, Stephen T. Gage, and Union Trust Company, to compel a sale and conveyance of the lands so applied for, to said parties, which said suits are still pending, none of which have proceeded to any issue other than exceptions to certain portions of the several bills in said suits; that the suit

instituted by the defendant, Roy W. Minkler, is pending in the Circuit Court of the United States, for the Western District of the State of Washington, and all of the other said suits are pending in the Circuit Court of the United States, for the District of Oregon; that a schedule accurately setting forth, as to each of said suits, the court number thereof, the names of the parties thereto, the date of the institution thereof, and a description of the land involved therein, separately stated as to each of said land grants, is made a part of the Bill of Complaint, marked Exhibit "P", (Vol. I, pp. 529, 537); that unless enjoined, said defendants, (now cross-complainants herein) instituting said suits, will proceed, or attempt to proceed, to some form of final judgment or decree; that each of said suits relates to and materially affects the rights and equities of complainant, and that the rights and equities of complainant, and the relief prayed for herein, relate to and affect all of the alleged rights of said defendants respectively, (now cross-complainants herein); that if said suits shall proceed further, the rights and remedies of complainant will be hindered, obstructed and delayed, if not substantially prejudiced, and that because of a multiplicity of said suits, complainant has made said persons parties defendant in

this suit, to the end that further proceedings in each of said suits may be enjoined, and, if the court shall so order, said parties be permitted to set forth herein their respective claims for adjudication.

The Bill of Complaint concludes with a prayer for judgment and decree—

(1) Adjudging all of said unsold lands, whether patented or unpatented, and the reservations mentioned, to have been forfeited, and that the title has been and "is reverted to and reinvested in", and that all of said lands and estates in lands are now the property of complainant, and quieting and confirming the title of complainant thereto, and that the defendants and each of them forthwith surrender to complainant, the United States of America, "*full possession and control of said lands* and estates in lands, and every part thereof," or, if the foregoing relief shall be denied,

(2) Adjudging and decreeing that all of said unsold lands are subject to purchase by, and sale and conveyance to, actual settlers in quantities not exceeding 160 acres or one-quarter section to any one purchaser, and for a price not to exceed $2.50 per acre, pursuant to the terms and conditions of said land

grants respectively; that a receiver or receivers be appointed and invested with the title and possession of said unsold lands, and be authorized and directed *"by such method as the court shall prescribe"*, to offer for sale, and sell and convey said lands to persons of the character, in the quantities, and for the price, as aforesaid, until all of said lands shall have been sold and disposed of in the manner aforesaid; and providing that during the continuance of the receivership, said receiver be authorized and directed, out of any moneys derived from the sale of any of said lands, to pay any and all proper costs, charges, and expenses for the care and protection of said lands; and the sale and disposition thereof, *"including any and all taxes and assessments, if any, which from time to time are properly chargeable against any unsold lands which may,* from time to time, remain unsold and undisposed of," and providing for accountings from time to time, and the application and disposition of all moneys and funds which may come into the hands of such receiver from the sale or disposition of said lands, after the payment of all costs, charges and expenses incurred, rendering final accounting and final application and disposition of said moneys and funds in such manner and to such parties as the court shall

direct; or, if the foregoing relief shall be denied,

(3) That a mandatory injunction shall be issued, requiring the Oregon Company to offer for sale and sell and convey said unsold lands "to any bona fide actual settler who may apply to purchase the same in good faith", in quantities not exceeding 160 acres or one-quarter section, for the price of $2.50 per acre, *under such restrictions, in such manner, and by such method as the court shall deem adequate and expedient;* and providing that any and all persons aggrieved by the refusal or neglect of the Oregon Company to sell said lands to him or them, in conformity with the terms hereof, or who may be in any other manner aggrieved, may hereafter apply to the court at the foot of said decree for the enforcement thereof in his or their behalf; and that unless otherwise provided by the decree, each and all of the defendants, their officers and agents, be enjoined and restrained from making any claim or asserting any right, title, interest or lien, in, to, or upon said lands and estates in lands, or any part thereof, and from in any manner selling or offering to sell, or conveying, or in any other manner disposing of any of said lands or estates in lands, or from negotiating, executing, or recording any document or in-

strument, or doing any other act or thing which shall in any manner affect the use or title of any of said lands or estates in lands, and from going upon the same, or from cutting, removing, or in any other manner using any of the timber, trees, or other natural products thereof, or committing waste thereupon, or from in any manner using or interfering with any of said lands or estates in lands, or any part thereof; and that defendants, Oregon and California Railroad Company, Southern Pacific Company, and Union Trust Company, account for and pay over to the United States any and all sums which they or either of them may have realized, or in any manner received or obtained, from or by virtue of such sales or conveyances of any of said lands to others than actual settlers, or in quantities exceeding 160 acres to any one purchaser, or for a price exceeding $2.50 per acre, together with lawful interest thereon, from the time of the receipt thereof; and that they do forthwith account for and pay over to the complainant any and all sums of money and profits of every name and nature which they or any of them may have realized or obtained from *cutting down or in any other manner using the trees, timber or other natural products of any of said lands,* or in any other manner from the use, occupation, rents,

issues, profits, accretions or increments of said lands, or any part thereof, together with interest thereon from the time of the receipt thereof; that during the pendency of this suit, the other defendants, (now cross-complainants herein) be enjoined from proceeding further in their said suits; that pending this suit, the defendants and all persons claiming under them, or either of them, be enjoined from using, occupying, leasing, or in any manner exercising dominion, use, ownership, or occupation of, or in any manner whatsoever interfering with any of said unsold lands, or any part thereof, or from *cutting, removing, selling, or in any manner whatsoever interfering with or impairing the value of any of the trees or timber upon, or other natural products of said lands,* or any part thereof, or from in any manner committing waste upon any of said unsold lands, *"and particularly as to the timber and other natural products thereof,"* and from selling, conveying, or offering for sale, and from leasing or offering to lease, or in any other manner disposing of any of said lands or estates in lands alleged to be forfeited, and from negotiating, executing, or recording any document or instrument, or doing any other act or thing which shall in any manner affect the use or the title of any of said lands or said estates in lands.

The Bill of Complaint concludes with a prayer for full disclosure and discovery, but waives answer under oath.

SUMMARY OF THE MATERIAL ALLEGATIONS OF THE BILL OF COMPLAINT.

Divested of allegations which are clearly immaterial and irrelevant to any proper issue in this case, and which allegations were presumably deemed to be prejudicial to a dispassionate and judicial consideration of the real issues involved, the material allegations of the Bill of Complaint may be narrowed to the following:

FIRST: Citizenship and residence of the parties.

SECOND: Construction of the Acts of Congress of July 25, 1866, June 25, 1868, April 10, 1869, and May 4, 1870.

THIRD: The incorporation of the Oregon Central Railroad Company (West Side) October 6, 1866, with a copy of its Articles of Incorporation and the Joint Resolution of the Legislature of the State of Oregon of October 10, 1866; the Resolution of the West Side Company of May 25, 1867, assenting to the provisions of the Act of Congress of July

25, 1866, and the filing in the office of the Secretary of the Interior, on July 6, 1867, of an authenticated copy of said Resolution, together with a certified copy of its Articles of Incorporation, and certified copy of the Joint Resolution of October 10, 1866, and the filing of its general map of survey of its projected line of road with the Secretary of the Interior on August 20, 1868.

FOURTH: The incorporation, on April 22, 1867, of the Oregon Central Railroad Company of Salem, (East Side); the passage of the Joint Resolution of October 20, 1868, by the Legislature of the State of Oregon; the adoption of the Resolution of June 8, 1869, by the East Side Company, assenting to the provisions of the Act of July 25, 1866, and of all acts amendatory thereof, and the filing, on June 30, 1869, in the office of the Secretary of the Interior, of a certified copy of this Resolution, and the filing, on October 29, 1869, by the East Side Company, in the office of the Secretary of the Interior, of a map of survey and location of the first sixty miles of its projected line, and that on December 24, 1869, the East Side Company completed construction of the first twenty miles of its line of railroad, commencing at the City of Portland, and that on December 31, 1869, the same was examined and approved by Com-

missioners appointed therefor pursuant to the provisions of Section 4 of the Act of July 25, 1866.

FIFTH: That the West Side Company wholly failed to complete the construction of any part of its line of railroad pursuant to the terms and conditions of the Act of July 25, 1866, and acts amendatory thereof, and that by an Act of Congress, approved May 4, 1870, there was granted to the Oregon Central Railroad Company of Portland, (West Side Company) the grant of lands as described in said act.

SIXTH: That on March 17, 1870, the Oregon and California Railroad Company was duly incorporated under the laws of Oregon, and by its Articles of Incorporation was to become, and it became, the purchaser of the grants, franchises, and privileges of said Act of Congress of July 25, 1866, and the acts amendatory thereof, and on March 29, 1870, the East Side Company conveyed to the Oregon Company all the property of the East Side Company, including its right, title and interest in and to the grants, franchises and other benefits of the Act of Congress of July 25, 1866, and acts amendatory thereof, which deed was duly recorded during March and April, 1870, in the counties wherein any of

the lands or property described therein were situated.

SEVENTH: That on March 29, 1870, the East Side Company was dissolved according to law, and that on April 4, 1870, the Oregon Company adopted a resolution accepting the grant conferred by the Act of Congress of July 25, 1866, and acts amendatory thereof, and directed a certified copy of such resolution, together with a copy of the deed of conveyance from the Oregon Central Railroad Company to the Oregon Company, to be filed in the office of the Secretary of the Interior, and that on April 28, 1870, the Oregon Company so filed such certified copy of said Resolution, and such certified copy of said deed, and that thereafter the Oregon Company assumed and still assumes to be the owner of all the property formerly owned by the East Side Company, including all of the lands granted, as described in said Act of July 25, 1866, and acts amendatory thereof.

EIGHTH: That on July 2, 1870, the West Side Company adopted a resolution assenting to and accepting the provisions of the Act of Congress of May 4, 1870, and on July 20, 1870, filed in the office of the Secretary of the Interior an authenticated copy thereof.

NINTH: That on August 15, 1870, the original capital stock of both companies was held by a single interest and was continued until the West Side Company was dissolved; that all of the original capital stock of the Oregon Company, and substantially all of the capital stock of the West Side Company was issued without consideration, and that by reason thereof, neither of said companies had any original capital or other funds for construction or other purposes, except such as was borrowed therefor; that the Oregon Company borrowed, upon mortgage, in 1870, $8,000,000.00 and the West Side Company borrowed, in 1871, $1,000,000.00, and with these funds proceeded with construction of road until January, 1873, constructing the East Side line to Roseburg, 197 miles, and the West Side line to McMinnville, 47 miles; that in January, 1873, the construction funds became exhausted, both companies bankrupt, and insolvent, and further construction was abandoned and not resumed as to the East Side line until June, 1881, and as to the West Side line, was never resumed; that because thereof, on July 24, 1874, the creditors of the two companies, under the name "Bondholders Committee," assumed control, and on February 29, 1876, for a nominal consideration, acquired all of the capital stock of both com-

panies; that on October 6, 1880, the West Side Company conveyed all of its property, including the lands granted by the Act of Congress, approved May 4, 1870, to the Oregon Company, and thereupon the West Side Company was dissolved.

TENTH: That on May 7, 1881, all of the former capital stock of the Oregon Company was cancelled, the amount of its stock then established, and at all times since, was and is $19,000,000.00, composed of $12,000,000.00 preferred stock, and $7,000,000.00 common stock, and that in payment of its then existing indebtedness, with accrued interest thereon, all of said new capital stock was then issued and ever since has been and still is outstanding, and that by the issuance thereof and by the use of the proceeds of a further bond issue, the then existing indebtedness of the Oregon Company was fully paid and discharged, and the several mortgages and other instruments securing the same, cancelled and satisfied; that on June 2, 1881, the Oregon Company executed a trust deed to secure the preferred stockholders, which was, on June 28, 1881, duly recorded in the Records of Mortgages of Multnomah County, Oregon, and thereafter, about the same time, in the office of the County Recorder of the several counties in which any of the granted lands

were situated; and that Stephen T. Gage is the sole, surviving Trustee under said trust deed.

ELEVENTH: That under the mortgages of June 1, 1881, and May 26, 1883, the Oregon Company obtained approximately $5,000,000.00 for construction funds, and in June, 1881, resumed construction of its East Side line, which was continued until the month of January, 1884, extending this line from Roseburg to a point about one and one-quarter miles southerly from Ashland, in Oregon, a distance of 145 miles, and that in January, 1884, the construction funds became exhausted, the Oregon Company bankrupt and insolvent, the work of construction was abandoned, and not resumed until April, 1887; that on or about January 19, 1885, the first and second mortgage bonds being still outstanding, a suit was brought in the Circuit Court of the United States, for the District of Oregon, and the railroad lines and other property of the Oregon Company were placed in the hands of a receiver; that on May 12, 1887, the Southern Pacific Company became the owner of the capital stock of the Oregon Company, took the title to said stock in the name of the Pacific Improvement Company, and that at that time the condition of the grant, as to patents, the length of mileage

constructed, and the disposition of the unearned portion of the grant of May 4, 1870, was as stated in the Bill of Complaint; that prior to May 12, 1887, approximately 250,000 acres of these lands had been sold, and that nearly all thereof were sold to actual settlers in small quantities, although in many instances in quantities and for prices in excess of the limitations prescribed by the said land grants respectively.

TWELFTH: That while the various affairs of the Oregon Company were in the hands of a receiver, the stockholders of the Oregon Company became and were organized under the name "Stockholders Committee;" certain of the bondholders under the name "Frankfort Bondholders Committee"; and certain other bondholders under the name "London Bondholders Committee", representing the owners of substantially all of the first and second mortgage bonds then outstanding; that on March 28, 1887, a preliminary contract was entered into between Southern Pacific Company, the Oregon Company, Union Trust Company, Stockholders Committee, London Bondholders Committee, Frankfort Bondholders Committee, and Pacific Improvement Company, by the terms of which the securities of the Oregon Company were to be acquired by the Southern Pacific Company, and

that on or about May 12, 1887, all of the capital stock, and all of the second mortgage bonds of the Oregon Company, were transferred to Pacific Improvement Company, and all of the first mortgage bonds to the Southern Pacific Company, and that on April 9, 1901, the Pacific Improvement Company transferred the capital stock of the Oregon Company to the Southern Pacific Company, which has been ever since, and now is, the owner thereof; that on July 1, 1887, the Oregon Company leased its railroad to the Southern Pacific Company for forty years, which lease was displaced by a subsequent lease of date August 1, 1893, for the term of thirty-four years, now in effect; that on June 6, 1888, the Southern Pacific Company took possession of the property leased and has been ever since, and still is, in full possession thereof, engaged in the operation of the lines of railroad, and enjoying all of the benefits and profits thereof; that on or about January 3, 1888, the Oregon Company executed and delivered to the Union Trust Company its trust deed or mortgage of July 1, 1887, to secure contemplated bond issue, under which bonds are outstanding of the par value of $17,500,000.00, and which bonds, principal and interest, are guaranteed by Southern Pacific Company, and which mortgage purports to con-

vey, in trust, to the Union Trust Company, the lands granted and then unsold, and which trust deed or mortgage was duly recorded about January 18, 1888, in the Records of Mortgages of Multnomah County, Oregon, and thereafter, about the same time, in the office of the County Recorder of the several counties in which any part of the lands granted was situated; that pursuant thereto there was issued, negotiated and sold, bonds to the amount stated.

THIRTEENTH: That during the month of April, 1887, ending in the month of December, the last section of the East Side line from Ashland to the Oregon and California boundary line was constructed by Pacific Improvement Company under contract with Southern Pacific Company, by which the Oregon Company agreed to pay for the work in its bonds; that on June 6, 1888, the receivership proceedings were dismissed, the receiver discharged, all of said first mortgage bonds and said second mortgage bonds, together with all mortgages and trust deeds securing the payment thereof, were cancelled and discharged.

FOURTEENTH: That from about 1894 until January 1, 1903, the Oregon Company sold and disposed of said granted lands in

violation and breach of the terms and conditions of said land grants, as stated; that on January 1, 1903, there remained unsold of said granted lands approximately 2,373,000 acres, all of which had been theretofore patented excepting 293,000 acres; that since January 1, 1903, and within the last and preceding two years, certain persons, exceeding one thousand in number, have applied to the Oregon Company to purchase certain of these unsold lands in accordance with the terms and provisions of the Act of Congress, and have been refused, and that these persons were qualified to become, and intended to become, actual settlers within the meaning of these Acts of Congress; that notwithstanding, on January 1, 1903, the Oregon Company withdrew from sale all of these unsold lands and has refused and still refuses to sell any part thereof to actual settlers or for purposes of actual settlement, as provided by these Acts of Congress, claiming to own the title in fee simple; that Congress, pursuant to the memorial of the Legislature of the State of Oregon, adopted February 14, 1907, passed the Joint Resolution of April 30, 1908, and that this suit is prosecuted under said Joint Resolution.

FIFTEENTH: That by reason of the several breaches assigned, the unsold granted

lands have been and are forfeited to the United States.

CROSS COMPLAINT OF JOHN L. SNYDER, ET AL.

The cross complaint of John L. Snyder and sixty-six others, after alleging the citizenship and residence of the parties, avers as to each one severally, the commencement of his suit in the Circuit Court of the United States, for the District of Oregon, against the Oregon and California Railroad Company, Union Trust Company and Stephen T. Gage, in which the complainant sought to enforce a specific trust as to the quarter section claimed to have been actually settled upon, and prayed for a decree of specific performance and the execution of a deed conveying the title to the so-called actual settler.

The cross complaint further alleges that each applicant was an actual settler upon the particular tract, and for the bona fide purpose of making the said land his home, and for the purpose of purchasing the land from the Oregon and California Railroad Company at the price of $2.50 per acre, under the Act of Congress of May 4, 1870, and due tender of such purchase price, the consolidation of said suit

with the main suit, an order of court allowing him to file his cross complaint. The cross complaint sets out the Act of May 4, 1870, under which all of the cross-complainants claimed, and that pursuant thereto, the West Side Company duly filed its assent thereto with the Secretary of the Interior, "and the said Oregon Central Railroad Company, for itself and its successors, did thereby and in that manner expressly contract and agree with the United States, among other things, that said Oregon Central Railroad Company would sell all of the lands granted by said Act in quantities as great as and not exceeding 160 acres, or a quarter section to any one settler, and at a price not exceeding $2.50 per acre, * * * and that said contract was entered into by and between the United States and said Oregon Central Railroad Company, and its successors, for the benefit of any and all citizens of the United States, who should thereafter actually settle upon said lands."

The cross complaint further alleges construction of road from Portland by way of Forest Grove to McMinnville, in accordance with the Act of Congress; the sale of the property, including the land grant, on October 6, 1880, to the Oregon and California Railroad Company by the West Side Company; the issuance of patents to the latter

company; the ownership by that company of the lands specifically described; the interpretation of the act of May 4, 1870, as contended for by the cross-complainants; the tender of the purchase price by each of these so-called actual settlers for each tract of land, and specifically "that from the date of said settlements down to the present time cross-complainants have remained in possession of and occupied and inhabited the said lands above described as their homes, to the exclusion of homes elsewhere, and that it is their bona fide purpose and intention to make said quarter sections of land their homes for the future, and to improve, clear, husband and cultivate the same. That immediately after settling upon said quarter sections of land as aforesaid, cross-complainants erected their dwelling houses thereon, in which they have resided at all times since and are now residing."

That prior to the commencement of each original suit, each complainant "offered to defendant, the Oregon and California Railroad Company, their applications to purchase said quarter sections of land, and each tendered the sum of $400.00 in United States gold coin, and *each tendered and offered to reimburse defendant for all taxes and disbursements paid out by defendant on account of said lands, in payment for said quarter sec-*

tions of land, that being $2.50 per acre therefor."

The pleader further alleges refusal of the company to accept the proffered tender; the alleged trusteeship of the company as to these lands; the alleged contention of the company as to its reason for refusing to accept the tenders or make the sales or convey the property; "that said defendant has never at any time been willing to comply with the terms of said Act of Congress of May 4, 1870, by conveying said lands to actual settlers in quantities not exceeding 160 acres, at prices not exceeding $2.50 per acre."

The cross-complaint alleges the issuance of patents to the amount of 128,616.13 acres, the sale of 49,358.26 acres of these lands for the average price of $7.00 per acre to certain firms and corporations, and sales in tracts of thousands of acres to single purchasers, and that from such sales defendant received a sum far in excess of $2.50 per acre for the entire lands patented to it, and all taxes and disbursements paid out by defendant on account of said lands.

DEMURRER OF OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE, TO THE BILL OF COMPLAINT.

The defendants-appellants demurred to the Bill of Complaint, (Vol. II, pp. 677-680, Transcript of Record) upon the following grounds, briefly stated:

(a) That the bill is without equity and cannot be maintained as to either grant, and does not set forth any matter, equity or cause entitling complainant to any discovery as to either grant.

(b) That the bill does not show any matter, equity or cause entitling complainant to any relief as to either grant.

DEMURRER OF OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE, TO THE CROSS COMPLAINT OF JOHN L. SNYDER AND OTHERS.

The defendants-appellants demurred to the cross complaint of John L. Snyder and others

(Vol. II, pp. 688-691, Transcript of Record) and for cause of demurrer showed:

(a) That the cross complaint fails to show that the matter in dispute therein exceeds, exclusive of interest and costs, the sum or value of $2000.00 as to each of the said cross complainants.

(b) That the cross complaint fails to show any matter, equity or cause entitling either of the cross complainants to file or maintain the same.

(c) That the cross complaint fails to show any matter, equity or cause entitling the cross complainants or either of them to any discovery whatsoever, or to any relief whatsoever.

(d) The defendants demurred to so much of said cross complaint upon the same grounds hereinabove stated as is exclusive of sub-division XVIII and preceding same and demurred to sub-division XVIII upon the same grounds hereinabove stated.

DEMURRER OF OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE, TO THE BILL IN INTERVENTION OF B. W. NUNALLY AND SEVEN OTHERS, FILED BY WAY OF ANSWER AND CROSS COMPLAINT.

The defendants-appellants demurred to the petition in intervention of B. W. Nunally and seven others, filed by way of answer and cross complaint, (Vol. II, pp. 685, 686, Transcript of Record) and upon the grounds that

(a) The said petition in intervention filed by way of answer and cross complaint fails to show that the matter in dispute, as to each or any of said persons therein named, exceeds, exclusive of interest and costs, the sum or value of $2000.00.

(b) That the same fails to show any matter, equity or cause entitling said B. W. Nunally, or any other person or persons therein named, to file or maintain the same, or to any discovery or relief whatever.

The court below, on April 24, 1911, (Vol. II, pp. 696, 855, Transcript of Record) announced its opinion and made an order pur-

suant thereto, overruling the demurrer to the Bill of Complaint and sustaining the demurrer to the cross-complaint of John L. Snyder and others, and the demurrer to the petition in intervention filed by way of answer and cross complaint by B. W. Nunally and others, and the same orders as to all other cross complainants and interveners. The cross complainants and interveners declining to plead further, orders of dismissal were entered on July 1, 1913, at the time final decree was entered.

STATEMENT OF THE CASE AS MADE BY THE JOINT AND SEVERAL AMENDED ANSWER OF THE DEFENDANTS OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE.

The joint and several amended answer of the defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, admits and denies certain allegations of the bill, and in substance and effect pleads facts tending to show long continued acquiescence upon the part of the United States in these sales as made by the company, tend-

ing to show, and showing, that the United States had full knowledge and notice of the alleged breaches of the "actual settler" clause, and that with such knowledge, it acquiesced in such sales; that it waived these alleged breaches by various affirmative acts of legislation and conduct, and that the United States is now estopped to claim that the company has violated the "actual settler" clause, or that any cause for forfeiture has arisen by reason of these sales.

It is admitted that on or about October 6, 1860, proceedings were had by which certain persons attempted to organize, under the general incorporation laws of the State of Oregon, the Oregon Central Railroad Company, (West Side), but it is alleged that the incorporation of this company was not, nor was its organization perfected, until after October 10, 1866, the date when Joint Resolution No. 13, designating the West Side Company, was adopted by the legislature of the State of Oregon. (Vol. II, p. 859, Transcript of Record.) The amended answer denies that the Act of July 25, 1866, prescribed, as a condition precedent to the vesting of any of the grants contained therein, that the company designated by the legislature of Oregon should file in the Interior Department, within one year thereafter, or at all, its assent to

said act, or any terms or conditions thereof, and alleges affirmatively that the Act of July 25, 1866, authorized and empowered the California and Oregon Railway Company and such company (if any) organized under the laws of Oregon as the legislature of that state should designate, *or either of said companies,* to construct the railroad to be constructed between Roseville Junction and Portland, and to earn the grant of lands made in aid thereof, and that under and pursuant to said act, the California and Oregon Railroad Company duly filed its assent to said act, on or about October 8, 1866, and duly completed the first twenty mile section thereof, on or about October 28, 1867, and thereafter, prior to December, 1887, the California and Oregon Railroad Company, (hereinafter known as the California Company) and the Central Pacific Railroad Company, its successor by amalgamation and consolidation, completed the construction of the railroad in California, and aided the Oregon Company to complete its railroad from Ashland, in Oregon, to connection with the California Company, at or near the southern boundary line of Oregon, and that the filing of such assent, and construction *and subsequent acceptance by the United States of the constructed road, constituted full and specific performance of the require-*

ments of said Act of July 25, 1866, and that none of the provisions of Section 8 of said Act were at any time operative, in whole or in part.

The amended answer denies that the West Side Company did not complete the construction of any part of its line of railroad pursuant to the terms and conditions of the Act of Congress of July 25, 1866, and amendments thereto, or that at any time the West Side Company acquiesced in the substitution of the East Side Company, or that there was any substitution, as alleged, and denies that the West Side Company ever abandoned or waived all or any claim to the grants, privileges or franchises of which the East Side Company became and was the recipient, or that the grant of lands or franchises conferred on said West Side Company by the Act of May 4, 1870, was applied for, obtained, accepted, or made, in lieu of any grant of lands or franchises or benefits provided by the Act of July 25, 1866; denies that no right, title or interest in or to any grants, franchises, or other benefits provided by the Act of July 25, 1866, was ever acquired by or through the West Side Company, or that no right, title or interest in or to any grants, franchises or other benefits provided by said act, were ever acquired

by, through, or under the East Side Company, except by virtue of or subject to the terms or conditions of the Act of April 10, 1869, and in this behalf the amended answer alleges that no condition or conditions was or were, expressly or otherwise, imposed by the Act of April 10, 1869, but that all the grants, franchises and other benefits in Oregon, provided by said Act of July 25, 1866, were acquired by the East Side Company and these defendants, and were so acquired otherwise than by virtue of or subject to any provisions of said Act of April 10, 1869.

The amended answer denies that the principal object of the Oregon Company, in fact, or as stated in its Articles of Incorporation, was, to become *the successor* of the East Side Company, or, as such, to receive or exercise the grants, franchises or privileges of the Act of July 25, 1866, or acts amendatory thereof, but alleges that the *principal object* of the Oregon Company, in fact, and as stated in its Articles of Incorporation, was, *to construct, operate and maintain a railroad and telegraph line from Portland, in Oregon, southerly through the Willamette, Umpqua and Rogue River Valleys, to connection on the southern boundary of Oregon, with the railroad and telegraph line then being con-*

structed northerly through California, by the California Company; denies that the purpose, intent, or effect of the deed of date March 29, 1870, executed by the East Side Company to the Oregon Company (Exhibit B, of bill of complaint, Vol. I, page 93 Transcript of Record) was to constitute the Oregon Company *the successor* of the East Side Company, to construct, complete or equip the said line of railroad, otherwise than as *grantee by purchase* and under the said deed of conveyance, or that by reason of said instrument, or otherwise, the Oregon Company became or was in any wise obligated by the terms and provisions of the Act of April 10, 1869, or that the East Side Company became or was dissolved on or about March 29, 1870, or has not exercised any corporate powers or franchises since that date; denies that the West Side Company at any time abandoned or waived all or any claim to any of the grants, franchises or other benefits of the Act of July 25, 1866, or importuned Congress to extend to it, in lieu thereof, or otherwise, or at all, any grant of lands or franchises or other benefits pertaining to its said projected line of railroad known as the West Side line, or that in such behalf, Congress passed the Act approved May 4, 1870; denies that on or about August 15, 1870, or at any time, or

at all, all or any of the capital stock of the West Side Company was acquired by the then or any owners of the capital stock of the Oregon Company, or that thereafter, or at any time, or at all, all or any of the capital stock of both said companies was held by a single interest, or that the affairs of the two companies were conducted virtually or at all as a single enterprise, until the dissolution of the West Side Company, or at all, and denies that all of the original capital stock of the Oregon Company, or substantially all of the capital stock of the West Side Company, was issued without consideration, or that by reason thereof, or otherwise, neither of said companies had any original capital or other funds for construction or other purposes, excepting such as was borrowed therefor.

The amended answer denies that further construction of either railroad of the East Side Company or the West Side Company *was abandoned at any time,* and denies that on or about October 6, 1880, the West Side Company became and was dissolved; denies that on or about May 7, 1881, the original capital stock of the Oregon Company was cancelled, for the reasons set forth in the bill of complaint; denies that the trust mortgage of June 1, 1881, (Exhibit D, of bill of

complaint, Vol. I, page 134, Transcript of Record) was or is in violation or breach of any terms or conditions of each or either of said land grants, and denies that neither of the defendants has any right, title, interest or lien in, to, or upon all or any part of the lands covered by said trust mortgage.

The amended answer denies that on or about May 12, 1887, or during the pendency of the receivership, the Southern Pacific Company acquired, or thereafter exercised, ownership or control of the Oregon Company, excepting that about the year 1901, the Southern Pacific Company acquired certain capital stock of the Oregon Company, and thereafter exercised the ordinary rights and privileges as such stockholder, and denies that during the pendency of such receivership, or at any time, any breach or violation of any condition or conditions of said land grants, or either of them, was or were committed, under the direction or influence of the Southern Pacific Company, or at all; denies that about the month of January, 1885, or at any time, a certain railroad syndicate known as the "Southern Pacific System," controlled substantially all railroad lines in the southwestern part of the United States, and particularly on the Pacific Coast south of the State of Oregon, including the Central Pacific Rail-

road Company, or the Southern Pacific Company, as a holding company for said or any syndicate, or that about the month of March, 1885, or at any time, Southern Pacific Company acquired, and ever since has exercised, the controlling or any interest in each of the corporations constituting said "Southern Pacific System," or that at about the same time, or at any time, it became, or ever since has been, the lessee of each of said corporations, whereby it came into possession of, or at all or any times has operated all of said railroad lines, or that several of the constituent companies of the said "Southern Pacific System" held lands granted by the United States in aid of the construction of their respective lines of railroad, aggregating many millions of acres of land, or that there is or ever was such organization or syndicate as the "Southern Pacific System," and denies that shortly after its organization, or at all, it established a general or any land department in San Francisco, California, or elsewhere, or that thereupon or thereafter it assumed or exercised, through its land agent, control over the handling or disposing of all or any lands of its constituent companies.

The amended answer denies that shortly after the affairs of the Oregon Company were placed in the hands of a Receiver, the

Southern Pacific Company, designing to extend its aforesaid or any railroad system, or its aforesaid or any land holdings, by acquiring ownership or control of the Oregon Company, in that behalf or otherwise, entered into negotiations with the Oregon Company, or its bondholders or stockholders, or other parties, and denies that any of said committees was or were organized for any of the purposes set forth in the bill of complaint; denies that by virtue of the contract of March 28, 1887, (Exhibit E, to bill of complaint, Vol. I, page 166 Transcript of Record) or otherwise, all or any corporate securities of the Oregon Company was or were acquired by Southern Pacific Company, or that the general or any purpose or effect thereof was such, that the Oregon Company, or its railroad lines, were absorbed by or merged into said "Southern Pacific System," or that the independent existence of the Oregon Company ceased therewith, or at all, or that it appears from the subsequent conduct of the Southern Pacific Company, or otherwise, or that it is in any wise true, that at the time of the negotiation or execution of said contract, or at any time, it was the purpose or design of the Southern Pacific Company to secure control of said land grants, or either thereof, or to divert the same from any law-

ful use or purpose, to the exclusive or any use, benefit or enrichment of the Southern Pacific Company, or at all, or that said contract was so conditioned, or the conditions, options or provisions thereof so exercised or performed that the Southern Pacific Company did thereafter, or at any time, maintain the Oregon Company, a corporation in name or form only, as a mere instrumentality *or device, to accomplish or at the same time to conceal its alleged or any purpose or design, or in that behalf, or otherwise, obtain or dispose of said lands, in the name of or under the guise or pretense of administration or exercise of said grants, or either thereof, by the Oregon Company, or that to that end certain or any proceedings were had, or transactions entered into, including the contract or lease or mortgage of July 1, 1887.*

The amended answer denies that the Pacific Improvement Company was wholly owned, controlled, or directed by the owners of a majority of the capital stock of the Southern Pacific Company, or that Southern Pacific Company was the actual purchaser of said stock or Second Mortgage Bonds, or any thereof, or paid the purchase price therefor, or any thereof, or that the Pacific Improvement Company never had any beneficial interest therein, or that under the direction

or influence of Southern Pacific Company, the Pacific Improvement Company was made a nominal party to said contract of March 28, 1887, *for the purpose of concealing the true facts, but alleges that it was a real, and not in any wise nominal, party to said contract; denies that Pacific Improvement Company held said capital stock of the Oregon Company, or any part thereof, for the use or benefit of the Southern Pacific Company, until on or about April 9, 1901, or at any time,* and denies that at all or any times since May 12, 1887, Southern Pacific Company has controlled or directed the election of directors or officers of the Oregon Company, or the management or conduct of the corporate acts of the Oregon Company, including all or any of the transactions or proceedings set forth in the bill of complaint; *denies that any proceeds from the sale of the bonds issued pursuant to the mortgage deed of July, 1, 1887, of which approximately $17,500,000 in amount are still outstanding, were used by the Southern Pacific Company to purchase securities of the Oregon Company, or that said bonds inured to the exclusive or any benefit of the Southern Pacific Company, or that the outstanding bonds in fact or at all represent or constitute the or any indebtedness of the Southern Pacific Company,* and

denies that said mortgage deed purports to convey or authorize the Union Trust Company to convey the land, or any thereof, thereby conveyed, for any purposes other than those prescribed in and intended by said land grants respectively, and denies that said mortgage deed was or is in violation or breach of any terms or conditions of each or either of said land grants; denies that the construction or any thereof, of the line of railroad during the year 1887, from a point near Ashland, to the southern boundary line of Oregon, was under some or any form of contract with the Southern Pacific Company, other than the contract of October 11, 1886, copy whereof is attached as Exhibit No. 1, and made a part of the amended answer, (Vol. II, pp. 949-956 Transcript of Record); or that in furtherance of any purpose or design set forth in the bill, or otherwise, or at all, the Southern Pacific Company on or about June 6, 1887, or at any time *"instigated"* or caused the Oregon Company or the Pacific Improvement Company to enter into said contract, except as set forth in said Exhibit No. 1; denies that immediately after June 6, 1888, or at any time, Southern Pacific Company, through its land department, or otherwise, assumed, or at all, or any times thereafter exercised absolute or any control over

the disposition or sale of the granted lands of the Oregon Company, or any thereof, or conducted all or any business in the name of the Oregon Company, or otherwise, and alleges that the Southern Pacific Company has not now, nor did it, at any time have a land department, and denies that at any time until the year 1893, or continuously thereafter, or at all, under the direction or influence of the Southern Pacific Company, or at all, preparations were made for future exploitation of the said land grants, or for any examination or administration thereof, otherwise than by the Oregon Company, in the same, but not in any different manner or way than the said lands had been theretofore exploited, examined and administered by the Oregon Company, and denies that as to at least eighty per cent. of all of said granted lands, the first or any sale price as fixed thereon, or the lowest price for which the same was ever offered for sale, was greatly or at all, in excess of the sum of $2.50 per acre, or that during the years 1891 and 1892, or at any time, anticipating or seeking to evade responsibility for contemplated violation of any terms or conditions of said grants, or under the direction or influence of Southern Pacific Company, the Oregon Company or Union Trust Company adopted quitclaim form of

contracts or conveyances, for use in making sales of said lands, or thereafter refused to contract for or give any other form of conveyance except in execution of formal contracts providing for a different conveyance; denies that between 1893 and 1906, or at any time, the Southern Pacific Company was engaged in developing a market and demand for said lands, among *"wealthy land speculators or timber men,"* or at all, aided by its well-equipped organization therefor, or otherwise, or by an extensive or other acquaintance previously established by its, or any, land department, in the sale or disposition of other holdings in the bill of complaint mentioned, or otherwise, or that, taking advantage of the opportunity to violate the terms or conditions of said land grants, or either thereof, promoted or developed, as alleged in the bill, the Oregon Company, under the direction or influence of the Southern Pacific Company, or otherwise, from about the year 1894 until about January 1, 1903, or at any time, sold or disposed of said granted lands, or any thereof, in manner or upon terms in violation of the terms or conditions of said land grants, or either thereof, or with the sole object of securing the greatest possible financial benefit therefrom, or otherwise, or at all, or, in that behalf, that a large quan-

tity of such land was sold to "*speculators, or others,* for *speculation,*" or that said lands were sold generally in quantities of 1,000 to 45,000 acres to a single purchaser, at prices from $5.00 to $40.00 per acre, or that "nearly all" of the said sales mentioned in the bill of complaint were made by contracts providing for payment of purchase price in from five to ten equal annual installments, and execution of conveyances upon final payment, or that many of said contracts were still pending at the time this suit was brought.

The amended answer denies that the proceeds of all or any sales made since May 12, 1887, or at any time, inured to the exclusive or any benefit of the Southern Pacific Company, by application in payment of the bonds issued under the mortgage of July 1, 1887, or otherwise, except in so far as that by the payment thereof the Southern Pacific Company was to that extent released of liability as a guarantor; denies that in the month of October, 1901, or at any time, the Southern Pacific Company, with all or any of its constituent lines, became merged in that certain railroad system known as the "Harriman Lines," or that a railroad system known as the "Harriman Lines," at all times thereafter, or at any time, held "a *monopoly* of *railroad transportation affecting a large or*

any part of the United States, or particularly or otherwise in the State of Oregon south of Portland, or that thereupon or at any time a land department was organized or established, at San Francisco, or elsewhere, to handle, "*exploit,* or *manipulate*" all or any lands of the constituent or any companies of said "Harriman Lines," including both or either of said land grants of the Oregon Company; denies that the territory in which said unsold lands are situated, was or is wholly dependent on the railroad lines of the Oregon Company, now operated by the Southern Pacific Company; *denies that the applicants to purchase the quarter sections mentioned in the bill of complaint, or any thereof, intended* or *desired to purchase the lands so applied for by them, or in their names, respectively, for the purpose of actually settling thereon, or making a permanent or any home thereon, or that several of said applicants had actually settled or established a permanent or any home upon the lands so applied for by them, or in their names, respectively,* or that at the time of said applications to purchase, each of said applicants did actually tender to the Oregon Company the sum of $2.50 per acre for each acre so applied for, as the purchase price thereof, or that, in addition to said applicants to purchase, a large or any num-

ber of persons are ready or willing to *"settle" upon said lands, or to purchase the same for the purpose of actually settling thereon, or of making a permanent or any home thereon,* in quantities not exceeding 160 acres to each person, or for the price of $2.50 per acre, or upon any terms prescribed by the said land grants, or are deterred therefrom by the Oregon Company, as stated in the bill of complaint, or at all; denies that in violation or breach of any terms or conditions of said land grants, or either of them, respectively, the Oregon Company, under the direction or influence of the Southern Pacific Company, as one of the constituent companies of said "Harriman Lines," or otherwise, on or about January 1, 1903, or at any time, withdrew from sale all or any of said unsold lands, or that at all times thereafter, the Oregon Company *has refused or still refuses to sell any part thereof to actual settlers, or for purposes of actual settlement,* or in any quantities, or for prices as prescribed by any terms of said land grants, or either of them, or at all, and denies that ever since January 1, 1903, or at any time, the Oregon Company has failed or neglected to encourage or promote the settlement of any of said lands which are susceptible to settlement, for the establishment of homes thereon, or the pur-

chase thereof by actual settlers for the purpose of actual settlement, or that by divers or any means or methods, the Oregon Company has at all or any times discouraged, obstructed, forbidden, or prevented the settlement of any of said lands which are susceptible of settlement, or the purchase thereof or any part thereof upon terms prescribed by the said land grants, or either thereof, by actual settlers, or for the purpose of actual settlement; denies that the Oregon Company at any time attempted or is attempting to convert any conditional estate into an unconditional estate, in violation or breach of any terms or conditions of the said land grants, or at all, or that by reason of any nominal character of the Oregon Company, or of any other premises set forth in the bill of complaint, or at all, the unconditional estate in the lands so asserted and claimed by and in the name of the Oregon Company, has inured to the benefit of, or has been exercised by the Southern Pacific Company, as one of the constituent companies of the said "Harriman Lines," or otherwise, or that the practical or any effect of the premises is the same as if all or any part of said unsold lands had been conveyed to the Southern Pacific Company for the use or benefit of said (so-called) "Railroad Syndicate," or otherwise, or that

by virtue of the premises, or in violation of the express terms or conditions, as well as the plain or any intendment of the said land grants, respectively, or otherwise, all or any of the said unsold lands, or the full or any value thereof has or have been converted to the use or benefit of the Southern Pacific Company, as one of the constituent companies of the (so-called) "Harriman Lines," or otherwise, or that a virtual or any *"land monopoly"* has been created, or ever since January 1, 1903, or at any time, has been maintained, or hereafter will be maintained for the selfish or any uses or purposes of the Southern Pacific Company or said (so-called) "Railroad Syndicate" or otherwise, enabling said (so-called) "Railroad Syndicate," among other things, or at all, to control or restrict commercial or industrial development of the territory tributary to said line of railroad, or otherwise, or thereby prevent the construction or establishment of competing railroad lines which would naturally or otherwise be attracted by the increase in production that would attend a normal or unrestricted development of industrial or commercial resources if said granted land should be sold to actual settlers, or for the purpose of actual settlement, pursuant to any terms or conditions of said land grants, or other-

wise, or that because of the premises, or otherwise, the industrial or commercial or any development of those portions of the State of Oregon wherein are situated said unsold lands, or any part thereof, has been or will continue to be seriously, or at all, retarded or completely, or otherwise, checked.

The amended answer denies that none of said unsold lands have ever been reduced to possession, or in any way improved, unless it be, by persons claiming to have settled thereupon, or seeking to purchase the same, as in the bill of complaint stated, or that the reasonable present value of said unsold lands exceeds the sum of $40,000,000. The amended answer alleges:

> "That the defendant Oregon and California Railroad Company has at all times since the year 1870, been and still is in open and notorious possession of and dominion over the said lands, as follows: 'The said Company has at all said times openly and notoriously claimed, and prior to about the time of the commencement of this suit was recognized as and admitted by all to be such owner thereof; has, at all times, openly and publicly mortgaged, leased and offered for sale, the said lands; has at all times, caused

the said lands to be protected by field-agents who traveled over and protected the same against depredation and waste; has, at all times paid the taxes levied and assessed upon and against the said lands—which payments amount, in all, to $1,827,234.10; and in divers other ways has openly and notoriously proclaimed and asserted, and been in, possession of, the said lands. Besides, large and different portions of said lands have been reduced to possession and improved, from year to year, by persons holding leases thereof for grazing and other purposes, from the defendant Oregon and California Railroad Company; and other large portions of the said lands have been reduced to possession as right of way, station grounds, depot grounds, and the like, for the railroad purposes of the defendant Oregon and California Railroad Company, as is hereinafter more particularly shown." (Vol. II, pp. 912, 913 Transcript of Record).

The amended answer denies that none of said unsold lands are now or ever were necessary to reserve for depots, stations, side-tracks, wood-sheds, standing ground, or any other needful uses in operating any of said railroad lines or any part thereof, or that

no part thereof ever was reserved or used, or is now reserved or used, or is intended to be reserved or used, for any of said purposes; denies that in divers or any other ways, the Oregon Company has received or enjoyed financial benefit on account of said granted lands, the particulars concerning which are known or unknown to the complainant, or that any allegation or statement made in subdivision X, of the bill of complaint, contrary to or contradictory of the statement contained in paragraph X, of said amended answer, is true, wholly or in part, *but alleges that from April 1, 1870, to April 30, 1911, the total amounts received by the Oregon Company, and disbursed by that Company, from and in the sale and disposition of the lands of these grants, were $4,368,360.70* received from sale of lands, from sale of timber on lands, and from timber depredation settlements; $1,119,-660.02, for forfeitures under contracts, for interest on contracts, and for land leases, aggregating in all $5,488,020.72, and the sum of $3,011,776.94 has been disbursed for taxes on lands, stationery and printing, surveys, and office expenses, United States surveying, grading lands, law expenses, and advertising, leaving a net balance of $2,476,243.78 from April 1, 1870, to April 30, 1911, applicable to aid in construction of said railroads,

or in redemption of bonds issued to obtain construction funds, or to redeem indebtedness on account of construction of said roads. (Vol. II, pp. 914, 915 Transcript of Record).

The amended answer denies that the Oregon Company has repeatedly threatened, or threatened at all, or still threatens, to, or will unless restrained therefrom, sell, contract for sale, or in any manner encumber or impair the title of said unsold lands, or any part thereof, in violation of any terms or conditions of the said land grants, or either of them, or that it has heretofore cut *large or any quantities of timber growing on said unsold lands,* or has otherwise committed waste thereon, or, by contract or otherwise, has permitted or invited others so to do, except as accounted for in said paragraph X of said amended answer, or that said Oregon Company threatens to, or will unless restrained therefrom by this court, continue to commit waste on said unsold lands, or any thereof, or *particularly as to the timber or any products thereof,* or will continue to permit, contract for, or invite others so to do, to the great or irreparable or any injury of complainant in the premises; denies that a sudden demand arose for said lands, commencing about 1894, among *"wealthy speculators or timber men,"* or that nearly all or that any

excepting a few, of the sales consummated after that time, were made by executory contracts of sale, which were not placed of record, or which did not merge into deeds, for many years thereafter, or otherwise than shortly thereafter, or that a considerable or other than a small portion thereof, are still pending, or that any conveyances for excessive quantities of said land were not placed of record until recently, except as to a few, or that many are still unrecorded, excepting a few thereof, or that in any instances all sales in excessive quantities (that term being understood herein to mean quantities in excess of 160 acres) the lands were conveyed or attempted to be conveyed by several deeds, each for a small quantity of land, or that *thereby the true facts were concealed,* or that any such or *any device of concealment* was resorted to, or that the said lands, or any thereof, were on or about January 1, 1903, or at any time, converted to certain or any wrongful or unlawful uses or purposes set forth in the bill of complaint, or at all, or that, *designing to conceal the premises from complainant, or the general public, or at all,* the Oregon Company from time to time, or at all, *falsely or deceitfully represented* that said lands were withdrawn from sale for divers or other temporary reasons, or with

the intention of resuming the sale thereof, or that the alleged confusion of the records of the land department, or the alleged destruction of the said records during the San Francisco fire, or other similar or any *excuses* were used successively, or at all, *to conceal the true character* of said transaction, or that by reason of the premises, or otherwise or at all, the several or any transactions characterized in the bill of complaint as or in fact wrongful or unlawful, *were concealed from or unknown to complainant,* until ascertained as stated in the bill of complaint,

> "and in this behalf they say that all of said transactions were open and notorious, and many if not all thereof actually known to complainant at the times thereof, respectively, or soon thereafter, and complainant also had constructive notice of all or substantially all of the said transactions at or about the times thereof, respectively, commencing as early as March 1870, and continuously thereafter to the present time. They say that complainant at all times acquiesced in all, and in many instances expressly approved and ratified certain, of the said transactions; a few of the many instances of such acquiescence, approval and ratification, other than those

> hereinbefore and hereinafter set forth, are shown by 'Exhibit No. 9' and 'Exhibit No. 10,' hereto attached and made a part of this answer. * * * and by 'Exhibit A' attached to and made a part of this amendment."
>
> (Vol. II, p. 921, Transcript of Record).

EXHIBIT A, referred to and made a part of the amended answer, is a succinct statement taken from "Reports of Oregon & California Railroad Company to Auditor of Railroad Accounts of the Interior Department, and official Report thereof by Secretary of Interior to Congress as printed in the Annual Report of 'Executive Documents' and 'House Documents,' showing the average and maximum price received from the sale, and asked for the unsold lands of the said Railroad Company's land-grant lands, during each year from 1879 to 1903, inclusive," and showing under appropriate columns, for that period, "Land Sold, average price, received per acre, and maximum price received per acre; Lands Unsold, average price asked per acre, and maximum price asked per acre," giving volume and page of such Executive and House Documents, and showing that the *average price received* per acre for the year ending 1879, was $2.39 per acre, for the year

1884, $2.73 per acre; for the year 1885, $2.73 per acre; for the year 1886, $2.99 per acre; for the first half of 1887, $3.19 per acre, and for the last half of 1887, $3.40 per acre; for the year 1889, $4.96 per acre; for the year 1890, $6.32 per acre; for the year 1892, $5.61 per acre; for the year 1896, $3.57 per acre; for the year 1898, $3.95 per acre; for the year 1900, $5.02 per acre; for the year 1901, $5.35 per acre; for the year 1902, $7.85 per acre, and for the year 1903, $4.22 per acre, and that the *maximum price received* per acre during the second half of the year 1879, was $15.00 per acre; for the first half of 1881, $10.00 per acre; for the second half of 1882, $15.00 per acre; for all of the years 1883, 1884, 1885, 1886, down to and including 1890, $15.00 per acre; for the years 1892 to 1903, both inclusive, $30.00 per acre; that for the second half of 1879, the *maximum price asked* per acre was $7.00, and ranged from $7.00 up to $25.00 per acre for the year 1894, and from 1895 up to and including 1902, the maximum price asked per acre ranged from $15.00 to $20.00 per acre.

The amended answer admits that Exhibit L, (Vol. I, p. 520 Transcript of Record) is a correct copy of the Memorial passed by the legislature of Oregon on or about February 14, 1907, but alleges *that it does not purport*

to and does not disclose any concealments made, or said to have been made, by the Oregon Company, and did not and could not have given complainant notice of any of the transactions characterized in the bill of complaint as "concealed from and wholly unknown to" complainant; denies that the said Memorial was made because of any injury inflicted upon the commercial or industrial conditions of the State of Oregon, or because of its having become manifest, or its being in any wise true, that any representations made by the Oregon Company were false, and in this behalf alleges: *"That the said Memorial was imposed and procured to be passed by the Oregon Legislature by a few influential politicians for interests personal to themselves and other persons, the facts respecting which are not disclosed therein, nor by the bill."* While admitting that Congress passed the Joint Resolution of April 30, 1908, in pursuance of and influenced by this Memorial, and that this suit was instituted pursuant thereto, the amended answer says:

> "But in making this admission they do not concede, or admit, but on the contrary deny, that this is a suit brought in accordance with the provisions of the said Joint Resolution, or intent of Congress in adopting said Joint Resolution,

or is one that the Attorney General has authority to bring in this Court under or in pursuance of the said Joint Resolution, or at all; and they deny that the bill presents or shows any cause of suit or action which may be properly considered by a Court of Equity."

The amended answer denies that because of the several or any breaches or violations of any terms, conditions or provisions of the said land grants respectively, or either of them, or at all, certain or any of the said granted lands or estates therein, have been or are forfeited to the United States, free from any or all right, title, interest, lien or claim of the defendants, or persons claiming by, through, or under them, or any of them, or otherwise, or at all; denies that the United States does by the bill in this case, assert title to lands, and estates in lands described in the bill, by reason of alleged forfeiture thereof unto the United States, and says that the assertion so made has no foundation in fact, nor authority in law, and denies that the United States has resumed, or has lawful authority to resume, title to all or any of the said lands or interest in lands, pursuant to said resolution of April 30, 1908, by the filing of the bill of complaint, or otherwise, and thereupon alleges:

"Upon advice of counsel which they believe to be correct, that were it in anywise true in fact or law, that the said lands or any thereof, or any interest therein, had or have become forfeited unto the United States for breach or violation of some or any condition in grant, the United States has a speedy, adequate and complete remedy at law respecting the same, and no question of fact as to such forfeiture can be enquired into or found, nor can such forfeiture be in anywise enforced, by this Court. Wherefore, these defendants, reasserting their demurrer for no equity shown by the bill, and denying especially the jurisdiction of this Court to hear or determine this cause in so far as it is, or purports to be, a suit to ascertain, determine, or enforce a forfeiture, file this answer upon protest, and protesting against this Court's jurisdiction submit to trial because they must, under this Court's ruling on demurrer."

The amended answer denies that any estates or interests in lands other than the said unsold lands described or referred to in the bill of complaint, have been sold in violation of any terms or conditions of said land grants, or either thereof, or that any estate or in-

terest therein which has or have been forfeited to the United States is not included in this suit, because sold, contracted for sale, or disposed of in violation of any terms or conditions of said land grants, or otherwise, or at all, to a large or any number of persons, or because such transactions or any thereof, include alleged or any rights of succession by purchase, conveyance, mortgage, descent, device, or otherwise, of more than 3,000 or any number of persons, firms or corporations residing in divers or any parts of the United States or other parts of the world, who or which now assert or have some right, title, interest or lien in, to, or upon any lands sold, contracted for sale, or conveyed in violation of the or any terms or conditions of the said land grants, or either of them; denies all other allegations of the bill of complaint in respect to the reasons why these persons have not been made parties to this suit.

The amended answer denies that the property described in the mortgage deed of July 1, 1887, (which includes the unsold lands belonging to these grants which remained unsold on May 12, 1887, together with the railroad of the Oregon Company) exclusive of the said lands exceeds in value the amount of said bonded debt, or was ample security therefor at the time the said mortgage deed was

given, or at any time prior thereto; denies that the patents applied for and issued to the Oregon Company, or any of them, was or were issued solely because of statements or affidavits made by the agent or agents of the Oregon Company, or the belief of any officers of the United States therein, but aver that the said patents, and all thereof, were duly issued pursuant to the records of the local and general land offices of the United States, and pursuant to due and diligent inquiry, investigation, report and determination by the proper officers of the United States, as to the true facts and particulars in that behalf which authorized and made it the duty of said officers to issue the said patents, under and pursuant to the provisions of the said Acts of July 25, 1866, and May 4, 1870, respectively; denies that the reservations or any thereof, referred to in paragraph XVII of the bill of complaint, creates a permanent estate or permanent estates in favor of the Oregon Company, or these defendants, in or to a large or any part of said granted lands, in violation or breach of any terms or conditions of the said land grants, or either thereof, or that these reservations are, or either thereof is, in any wise null or void; that the ownership, or any right, title or interest therein claimed by the Oregon Com-

pany, or Union Trust Company, is subject to any right of forfeiture or right or remedy of complainant set forth in the bill of complaint, or otherwise.

The defendants plead as affirmative defenses in the amended answer, the following: "These defendants say, that from the time of the making of said grants of land to the East Side Company and West Side Company, owned by the defendant Oregon and California Railroad Company since 1870 as to the East Side grant and since 1880 as to the West Side grant, about forty years has elapsed during which the United States has had actual and constructive notice, as hereinbefore set forth, of sales of lands thereof in quantities in excess of 160 acres to one purchaser other than an actual settler, at prices in excess of $2.50 per acre; during all of which time the United States, as hereinbefore stated, remained silent and apparently acquiesced in such sales.

> "During all of said time the United States has accepted and approved the said railroads as constructed, and has demanded and accepted (since as well as at all times before commencement of this suit) the free use and benefit of the said railroads in the transportation of troops

and munitions of war, of the approximate total value of $1,000,000.

"Because of the said acceptance, approval and use of the said railroads, and relying on the acquiescence of the United States in such sales, the defendant Oregon and California Railroad Company has paid taxes on the said unsold lands to the amount of $1,827,234.10, as aforesaid, and the other costs and expenses set forth in subdivision "X" hereof, including the payment of $145,977.26 unto the United States for the costs of surveying and patenting of the said lands; no part of any of which sums has been paid, repaid or tendered to these defendants, or any of them.

"And because of the said acceptance, approval and use of the said railroads, and reliance on the said acquiescence of the United States, the defendant Southern Pacific Company guaranteed the payment of (approximately) $17,500,000 in bonds still outstanding, issued and sold under the Trust Mortgage of July 1st, 1887, covering the said lands, as hereinbefore set forth."

(Vol. II, pp. 935, 936 Transcript of Record).

"These defendants say that any and all causes of suit or action set forth in the bill are barred as follows:

(a) By section 391 of Lord's Oregon Laws.

(b) By section 8 of the Act of Congress approved March 3rd, 1891, entitled, "An Act to amend section 8 of an Act approved March 3rd, 1891, entitled, 'An Act to repeal Timber culture laws, and for other purposes,' " published in Vol. XXVI, U. S. Statutes at Large, page 1093.

(c) By the first section of the Act of Congress approved March 2nd, 1896, entitled, "An Act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes," published in Vol. XXIX, U. S. Statutes at Large, page 42.

(d) By acquiescence, and laches, of complainant.

(Amendment allowed by leave of court, April 28, 1913, as follows:

"That during all the times mentioned in the bill of complaint, and particularly

from and after the 20th day of May, 1872, down to April 30, 1908, the United States well knew that the Oregon and California Railroad Company, and its predecessors in interest, had continuously and uniformly claimed to own said land grants in fee simple without any condition as to the sale of said lands, and as earned by construction of said roads, and had sold, mortgaged and conveyed the same to secure funds for the construction of said roads, and to refund said indebtedness for said construction funds, by the execution of certain of the mortgages described in said bill of complaint, and other mortgages, and the negotiation and sale of bonds issued thereunder, and that the said present outstanding stock of the said Oregon and California Railroad Company was issued and delivered to the owners and holders of the mortgage bonds issued and sold under said mortgage of April 15, 1870, and in satisfaction of said mortgage, and that the proceeds of said bonds were used in the construction of the first 198 miles of the East Side road and of said 47½ miles of said West Side road, and the United States during all said time from May 20, 1872, down to April 30, 1908,

well knew the way and manner in which said Oregon and California Railroad Company continuously and uniformly was administering and had administered said land grants, and was selling and had sold said land granted by said Acts of Congress, and during all said times well knew that said company was selling and had sold said lands so sold by it without any particular regard to the alleged limitations or restrictions of said Act of April 10, 1869, or said Section 4 of said Act of May 4, 1870, except in so far as the same may be construed to apply to actual settlers upon any of said lands prior to completion of the separate sections of said roads and the acceptance thereof by the United States as provided by said Act of July 25, 1866, and said Act of May 4, 1870, and the direction of the President to issue patents for the lands so earned, and that notwithstanding such knowledge during all said time, between May 20, 1872, and April 30, 1908, of all said matters, and of all the matters and things alleged in the bill of complaint as pretended breaches of the provisions of said Act of April 10, 1869, and Section 4 of said Act of May 4, 1870, and notwithstanding such knowledge

during all said time of all the matters and things alleged in the Joint and Several Answer of the defendants, as heretofore filed and amended, the United States, from said May 20, 1872, to April 30, 1908, asserted no claim of any breach, made no objection to the execution of said deeds, mortgages or conveyances, or to any action of the company in respect to the administration of said grants, or either of them, or the sale of any lands thereby granted, and in no wise asserted any claim that the company was at any time misconstruing said acts, or either thereof, or in any way was violating or had violated said Act of April 10, 1869, or said Section 4 of said Act of May 4, 1870, but on the contrary the United States permitted and allowed the company to mortgage said lands to secure said construction funds so borrowed and used, as aforesaid, and permitted and allowed the company to expend large sums of money in surveying fees, and other fees paid to the United States, and to expend large sums of money in taxes upon said lands, and in advertising said lands for sale, and in examining, cruising and grading said lands as timber lands, and also large sums of money in com-

pleting said railroad in the first instance from Portland to Roseburg, Oregon, and next in extending the same from Roseburg to Ashland, Oregon, and finally in completing the same to the Oregon and California State line, and also in completing said railroad from Portland to McMinnville, Oregon, and during all said times the United States exacted from said company, and said company furnished, the free transportation of the troops and property of the United States, as required by said Act of July 25, 1866, at the cost and expense of said company, aggregating a sum in excess of $600,000.00; that relying upon the acquiescence and action of the United States, as aforesaid, the Oregon and California Railroad Company expended all said sums, as aforesaid, incurred all said liabilities, and so mortgaged, sold and conveyed said lands, claiming to own the same in fee simple without any condition; applied for, accepted and placed of record all the patents issued by the United States for such lands, and so sold and conveyed to purchasers such portions of said granted lands as alleged in said bill of complaint, and has applied the proceeds of said sales, and of all sales of said

lands, to the redemption of said bonds so issued to secure said construction funds: That on the 31st day of July, 1885, the Oregon and California Railroad Company and Central Pacific Railroad Company, relying upon the said acquiescence and action of the United States, as aforesaid, executed and delivered the agreement of that date, identified as Exhibit No. 9 to the Stipulation as to the Facts on file herein, and which is made a part hereof, and to which reference is made as if the same were fully written herein; and on October 11, 1886, said Central Pacific Railroad Company, the Pacific Improvement Company, and the Southern Pacific Company, relying upon the said acquiescence and action of the United States, as aforesaid, executed and delivered the agreement of that date, identified as Exhibit No. 1 to the Joint and Several Answer of the defendants herein, and which is made a part hereof, and to which reference is made as if the same were fully written herein; and on March 28, 1887, the Stockholders' Reconstruction Committee of the Oregon and California Railroad Company, the London Boldholders' Committee, the Frankfort Bondholders' Committee, the South-

ern Pacific Company, and the Union Trust Company, relying upon the said acquiescence and action of the United States, as aforesaid, executed and delivered the agreement of that date, identified as Exhibit "E" to the bill of complaint, and which is made a part hereof, and to which reference is made as if the same were fully written herein, and thereafter the parties to all said agreements, relying upon the said acquiescence and action of the United States, as aforesaid, consummated, carried out and performed said several agreements, and in pursuance thereof, and in reliance upon said acquiescence and action of the United States, as aforesaid, the said Oregon and California Railroad Company executed and delivered, on January 3, 1888, its said mortgage and trust deed of date July 1, 1887, to the Union Trust Company, and issued and delivered its bonds thereunder to the amount of $20,000,000.00, and said Southern Pacific Company, being the owner of all the stock of the Central Pacific Railroad Company, caused said Pacific Improvement Company and the Central Pacific Railroad Company to purchase the said stock of the Oregon and California Railroad Com-

pany for its benefit, and otherwise carried out said agreements, and then and there guaranteed to pay the principal and interest of all said bonds so issued and to be issued by said Oregon and California Railroad Company; that in reliance upon said acquiescence and action of the United States, as aforesaid, the Southern Pacific Company thereby purchased and became the owner of all said stock of the Oregon and California Railroad Company and assumed the debts and liabilities of the Oregon and California Railroad Company and caused said railroad to be constructed to the Oregon and California state line, and thereby guaranteed to pay all said bonds, principal and interest, and became the beneficial owner of all said granted lands then unsold, and but for said acquiescence and action of the United States, as aforesaid, said Southern Pacific Company would not have purchased said stock nor assumed said debts and liabilities nor caused said road to be constructed to completion nor guaranteed said bonds, principal or interest, and the Oregon and California Railroad Company would have been unable to sell or dispose of its railroad or said land grants, or either of them, or

completed said railroad, as required by said Act of Congress, and its creditors would have been compelled to foreclose said existing mortgage securing the then outstanding bonds, and sell all said property, to the great injury and loss of said company and its creditors, and to the great injury and loss of the United States. That the United States, from July 31, 1885, up to April 30, 1908, and during all said time, well knew of the existence of all of said agreements, including the said mortgage of date July 1, 1887, and of the purpose and intention of all the parties thereto, and of all the matters and things hereinbefore set out, and notwithstanding such knowledge during all of said time from July 31, 1885, to April 30, 1908, and of all the matters and things alleged in the bill of complaint as pretended breaches of the provisions of said Act of April 10, 1869, and Section 4 of said Act of May 4, 1870, asserted no claim of any breach, made no objection to the execution or performance of either of said contracts or of the execution of said mortgage of date July 1, 1887, or to any action of the Oregon and California Railroad Company in respect to the administration of said grants,

or either of them, or the sale of the lands thereby granted, and in no wise asserted any claim that the company was at any time misconstruing said acts, or either of them, or was in any way violating or had violated said Act of April 10, 1869, or said Section 4 of said Act of May 4, 1870.

"That from time to time the United States caused to be enacted divers and various statutes affecting said Act of July 25, 1866, as amended April 10, 1869, and said Act of May 4, 1870, some of which are the Act of May 3, 1879, (20 Stat. 472) by which homestead settlers on the even sections within the limits of said grant, could enter 160 acres instead of 80 acres; the Timber and Stone Act of June 3, 1878, (20 Stat. 89) by which the lands of the United States in the even sections within the limits of the grant, could be purchased at $2.50 per acre, in quantities of 160 acres, without any settlement, by any citizen, or any person who had declared his intention to become a citizen of the United States; and the Act of March 3, 1891, (26 Stat. 1097) by which the pre-emption laws were repealed; and the Act of June 4, 1897, (30 Stat. 1136) by which lands

owned by any one within forest reserves of the United States could be reconveyed to the United States, and thereby exchanged for the even sections within the limits of said grants, without any settlement thereon; and the Act of February 10, 1909, (35 Stat. 639); and the Act of June 17, 1910, (36 Stat. 531); and the Act of June 6, 1912, (37 Stat. 123), all amending the Homestead Act of May 20, 1862, (12 Stat. 392); that said statutes and the due administration of the same, as applied to the character and class of lands involved in this suit, which are chiefly valuable for timber and are unfit for settlement, and all lands belonging to the company now unsold, have prevented the company from further compliance with the provisions of said Act of April 10, 1869, or said Section 4 of said Act of May 4, 1870, than as alleged in the bill of complaint.

"That on August 20, 1912, Congress passed an Act, Public No. 278, H. R. 22002, approved that date, entitled, "An Act supplementing the Joint Resolution of Congress, approved April 30, 1908, entitled 'Joint Resolution instructing the Attorney General to institute certain proceedings, etc.,'" whereby the United

States, in substance and effect, waived the alleged breaches of said Act of April 10, 1869, and Section 4 of said Act of May 4, 1870, as to all the lands described in the bill of complaint and now owned by the Oregon and California Railroad Company, and particularly as to all said lands sold to persons other than actual settlers, in quantities of 1000 acres or more, and aggregating about 400,000 acres, and particularly described in forty-five suits brought by the United States against said purchasers, and these defendants, in this court, to which said suits and the proceedings therein, reference is here made as if the same were fully written herein and made a part hereof, and whereby the United States has agreed to convey by patent all said lands to said so-called innocent purchasers in said suits for $2.50 per acre, and whereby the United States has so waived said alleged breaches and so agreed to sell and convey said lands because said lands are and were at the time of such sales so made by the company, unfit for settlement or cultivation and not adapted to entry or settlement under the settlement laws of the United States or under said Act of April 10, 1869, or Section 4 of

said Act of May 4, 1870, and because said lands are and were at the time of such sales, chiefly valuable for timber. That but for the said acquiescence and action of the United States, as aforesaid, said Oregon and California Railroad Company would not have expended said sums, as aforesaid, or otherwise done as it has done, as aforesaid. And the defendants therefore say and allege that by reason of all the matters, things and acts hereinafter set out, and by reason of the matters and things in the premises, alleged in their said Joint and Several Answer, as heretofore amended and now herein amended, the United States has fully, effectually and finally exercised and waived any and all right it may have had at any time to claim or assert forfeiture of any lands of the said grants, and is and of right ought to be estopped from having or asserting any such or any claim of forfeiture. These defendants further say, that by reason of the matters, things and premises aforesaid, and by reason of the passage by Congress of the Act approved January 31st, 1885, entitled "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," made a part of this

Answer by reference to it as published in Vol. XXIII, U. S. Statutes at Large, page 296, and the passage by Congress of the Act approved September 29th, 1890, entitled, "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," made part of this Answer by reference to it as published in Vol. XXVI, U. S. Statutes at Large, page 496 and following, the United States fully and finally exercised and waived any and all right it may have had to claim or assert forfeiture of any lands of the said East Side grant or West Side grant, and is thereby estopped from having or asserting any such claim or forfeiture."

(Vol. II, pp. 936-946 Transcript of Record).

The case being at issue by the filing of replications to the Joint and Several Amended Answer of the Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, and to the amended answer of the Union Trust Company, testimony was taken on behalf of the parties, which testimony will be found in "Statement of the Evi-

dence," (Vol. IV, p. 1551, to and including Vol. XV, p. 7920, Transcript of Record) and contained therein, by literal copy, are all the exhibits offered or admitted on behalf of the United States, all the oral testimony offered or admitted on behalf of either party, and a literal copy of many of the exhibits offered and admitted on behalf of the defendants. Volume XVIII comprises the photographic exhibits known as Defendants' Exhibits 267 to 270 both inclusive, 273, 274, 313, 367, 371, and Government's Exhibit 124, with the description of each, as deduced from the testimony of the witnesses. The exhibits named, offered and admitted on behalf of the defendants, show the timber and non-settlement character of a portion of these lands involved in suit, and claimed to have been "settled" upon by the so-called "actual settlers," some of whom are known in this record as cross-complainants herein. Some of these photographic exhibits show other lands involved in suit, applied for by that numerous class known in this record as "*potential or possible actual settlers,*" and called herein "interveners," and others of said photographic exhibits show the *general timber and non-settlement character of the lands involved in suit.*

THE CASE MADE BY THE EVIDENCE.

On January 3, 1913, complainant and the defendants-appellants, reserving the right to introduce further and additional evidence, agreed upon and filed in the cause, as a part of the evidence, a "Stipulation as to the Facts," (Vol. IV, pp. 1552, 1731, Transcript of Record,) which may be summarized as follows:

The Articles of Incorporation of the Oregon Central Railroad Company of Portland, (Vol. IV, pp. 1625, 1626, Transcript of Record,) were presented to the Secretary of State on October 6, 1866, by Joseph Gaston, who requested the Secretary to file the same and permit him (Gaston) to immediately withdraw them for exhibition to the Legislature of Oregon, then in session, whereupon the Secretary wrote with a lead pencil the date, October 6, 1866, on the back thereof, or on an envelope containing the same, and Gaston immediately departed with the document and envelope in his possession. They were not returned to the office of the Secretary of State until November 21, 1866, when they were filed in the office of the Secretary of State on that date at 10½ o'clock A. M. At the time they were presented to the Secretary, as stated, no certificate or certificates

of acknowledgment were appended thereto, and the only signatures thereto were those of J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, F. A. Chenoweth, Joel Palmer and H. W. Corbett. When returned to the office of the Secretary on November 21, 1866, they were in the form shown in Volume IV, pages 1625, 1628, both inclusive, Transcript of Record, from which it appears that M. M. Melvin signed and acknowledged the Articles on October 23, 1866, George L. Woods on November 10, 1866, R. R. Thompson, J. C. Ainsworth, S. G. Reed, John McCracken, and C. H. Lewis on November 16, 1866, and that B. F. Brown, Thomas H. Cox and Joseph Gaston signed and acknowledged the same on November 20, 1866. The Legislature, in 1866, met on the *10th* day of September, 1866, and adjourned on the *20th* day of October, 1866. The Articles were filed November 21, 1866.

The Oregon Central Railroad Company (West Side) projected its railroad line from Portland by way of Forest Grove and thence southerly to and beyond McMinnville, on the westerly side of the Willamette River. On October 6, 1866, the Legislative Assembly adopted, and the Governor approved, Joint House Resolution No. 13, attempting to designate the West Side Company as the company

entitled to receive the benefits of the Act of Congress of July 25, 1866, (Vol. I, pp. 14, 15, Transcript of Record). On May 25, 1867, the West Side Company adopted a resolution assenting to this Act of Congress, and on July 6, 1867, filed a certified copy thereof in the office of the Secretary of the Interior, with a certified copy of its Articles of Incorporation, and of said Joint Resolution of the Legislative Assembly, and on August 20, 1868, filed in the Department of the Interior a map of survey of its projected line of railroad, a copy whereof, on a reduced scale, is set out in Volume IV, page 1629, Transcript of Record. The Articles of the Oregon Central Railroad Company of Salem, (East Side) were filed in the office of the Secretary of State on April 22, 1867, and on or about that date the incorporators, contending that the West Side Company was never lawfully incorporated or organized, and designing to secure the benefits of the Act of Congress of July 25, 1866, caused proceedings to be taken which were intended to organize the company under the General Incorporation Laws of the State of Oregon, on that date, a copy of which Articles of Incorporation are set out in Volume IV, pages 1630, 1632, Transcript of Record. The East Side Company projected its railroad line on the easterly side of the Wil-

lamette River, and in furtherance of its design to secure the benefit of the Act of July 25, 1866, procured the Legislature of the State of Oregon to adopt and the Governor to approve, on October 20, 1868, the Joint Resolution, (Vol. I. pp. 17, 18, Transcript of Record) attempting to rescind House Joint Resolution No. 13, adopted October 10, 1866, and attempting to designate the East Side Company as the company to receive the benefits of the grant of the Act of Congress of July 25, 1866. A controversy arose between the West Side Company and the East Side Company as to which of these companies was entitled to the benefit of the Act of Congress of July 25, 1866, which continued until about January, 1870. The act of July 25, 1866, is set out in Volume I, pages 6, 13; the Act of June 25, 1868, is set out in Volume I, pages 13, 14; the Act of April 10, 1869, is set out in Volume I, pages 20, 21; the Act of May 4, 1870, is set out in Volume I, pages 28, 32, Transcript of Record. On June 8, 1869, (Vol. I, pp. 21, 22, 23, Transcript of Record) the East Side Company adopted a resolution accepting the benefits of the Act of July 25, 1866, and all acts amendatory thereof, and assented thereto, and on June 30, 1869, filed a certified copy thereof in the Department of the Interior, and on October 29, 1869, filed in the office of the Sec-

retary of the Interior a map of the survey and location of the first sixty miles of its projected line of railroad, extending southerly from Portland, and on December 4, 1869, completed the construction of the first twenty miles thereof, commencing at Portland and extending southerly therefrom, and on December 31, 1869, this section of constructed road was approved by Commissioners appointed pursuant to the provisions of Section 4 of the Act of Congress of July 25, 1866, who had theretofore examined the same. On March 17, 1870, the Oregon and California Railroad Company was incorporated, a copy of the Articles of which are set out in Volume I, pages 90, 92, Transcript of Record, and these Articles were filed on that date in the office of the Secretary of the State of Oregon, and they were executed and filed in triplicate,—one in the office of the Secretary of State, one in the office of the County Clerk of Multnomah County, Oregon, being the county in which the principal office of the company was located, and one in the office of the Secretary of the company at Portland, Multnomah County, Oregon. On March 29, 1870, the East Side Company executed and delivered to the Oregon and California Railroad Company a deed, a copy of which is set out in Volume I, pages 93, 125, Transcript of Record, which

was recorded in the office of the County Recorder of the several counties in which any part of the lands intended to be granted by the Act of Congress of July 25, 1866, was situated. This deed, for the consideration stated therein, purports to grant, bargain, sell, alien, assign, transfer, set over, enfeoff, convey, deliver and confirm to the Oregon and California Railroad Company, its then constructed railroad of twenty miles in length, with any extensions then under construction, together with all its other property of every kind, "and also and especially all the lands, rights, titles, franchises, interests, claims, property and demand whatsoever, both legal and equitable, present and prospective, absolute and contingent, which the Oregon Central Railroad Company * * * now has, owns, or possesses, or to which it is now of right entitled, legally or equitably, or to which it may at any time hereafter become entitled, in and to the franchise and grant of lands made by the Congress of the United States to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," by the Act of July 25, 1866, and amendments thereto, and "also the lands included in such grant, and all the right, title and interest which the party of the first part now has to

the same, hereby giving, granting and assigning unto said party of the second part all the right, title, interest and claim which the party of the first part now has in or to the lands, franchises, property, benefits, and emoluments granted or entitled to be granted by virtue of the Act of Congress, aforesaid, and the acts amendatory thereof or supplemental thereto; also all the right, title and franchise which the party of the first part has for any purpose whatever by virtue of any act or resolution of the Legislature of the State of Oregon, or judgment or decree of any court, either state or federal."

On April 4, 1870, the Oregon and California Railroad Company adopted a resolution, (Vol. I, pp. 26, 27, Transcript of Record) reciting its purchase of, and assignment from, the East Side Company of the property mentioned, and accepting the grant conferred by such Act of Congress, and directing that an assent of the company be filed in the office of the Secretary of the Interior by filing a certified copy of the resolution and a copy of the deed of March 29, 1870, and on April 28, 1870, such certified copies were filed in the office of the Secretary of the Interior, and at all times since March 29, 1870, the Oregon and California Railroad Company has assumed and still assumes itself to be the suc-

cessor of the East Side Company in and to all the franchises, rights and property granted or intended to be granted by the said Acts of Congress; by the words "Oregon Central" in the Act of May 4, 1870, Congress intended to and did refer to the West Side Company. On July 2, 1870, the West Side Company assented to an acceptance of the provisions of the Act of May 4, 1870, and on July 20, 1870, filed its assent in the office of the Secretary of the Interior. On October 6, 1880, as proceeds of negotiations or pledge of mortgage bonds, the Oregon and California Railroad Company, during the year 1870, procured approximately $8,000,000.00, and during 1871, the West Side Company, in the same way, procured approximately $1,000,000.00 and with these funds the work of constructing the lines of railroad contemplated by the Acts of Congress of July 25, 1866, and May 4, 1870, respectively, was prosecuted continuously until about January, 1873. During the years 1871 and 1872, with the funds procured by it in 1870, the Oregon and California Railroad Company completed the construction of the East Side railroad from the point at which the East Side Company had quit the work, twenty miles south of Portland, to a point near Roseburg, a distance of approximately 197 miles, and the West Side Company, with

the funds procured by it in 1871, completed construction of its railroad from Portland to McMinnville, by way of Forest Grove, a distance of approximately 47 miles. About January, 1873, these funds became exhausted and because thereof further construction of each of these railroads was at that time discontinued, and was not resumed by the Oregon and California Railroad Company until about June, 1881, and was never resumed by the West Side Company. On or about July 24, 1874, the direction and control of the financial affairs of the two companies were assumed, and thereafter exercised, by the creditors thereof, organized under the name "Bondholders' Committee," which, on or about February 29, 1876, acquired all capital stock of both companies, and thereafter, and until on or about June 1, 1881, the affairs of the two companies were conducted by and under the control of the Bondholders' Committee. On October 6, 1880, the West Side Company executed and delivered to the Oregon and California Railroad Company a deed, a correct copy of which is set out in Volume I, pages 126, 133, Transcript of Record, whereby the West Side Company purports to convey to the Oregon and California Railroad Company, for the consideration stated, all its property of every kind, including the railroad

constructed from Portland to St. Joseph, Yamhill County, Oregon, and also "all its lands not heretofore conveyed by it, acquired and which it shall hereafter acquire or to which it is entitled under and pursuant to the provisions of the Act of Congress," of May 4, 1870. A certified copy of this deed was filed with the Secretary of the Interior on or about October 20, 1880, and at all times since October 6, 1880, the Oregon and California Railroad Company has assumed and still assumes itself to be the successor of the West Side Company in and to all the franchises, rights and property granted or intended to be granted by the Act of Congress, approved May 4, 1870. On or about May 7, 1881, all of the capital stock of the Oregon and California Railroad Company was, by action of its Board of Directors and stockholders, cancelled, and the amount of its capital stock then was established at, has ever since remained, and still is of the total par value of $19,000,000.00, consisting of $12,000,000.00 preferred stock, and $7,000,000.00 common stock, and in payment of its then existing indebtedness, with accrued interest thereon, all of said new capital stock was then issued, ever since has been, and still is outstanding. By the issuance thereof and use of a part of the proceeds of this bond issue in 1870, above mentioned, all of its in-

debtedness then existing was fully paid and discharged, and the several mortgages and other instruments purporting to secure the same, were cancelled and satisfied. On June 2, 1881, the Oregon and California Railroad Company executed and delivered to Henry Villard, Robert Peebles and Charles Edward Bretherton, as trustees for the owners and holders of the preferred stock, a trust deed, a copy of which is set out in Volume I, pages 134, 165, Transcript of Record, which trust deed purports to convey to said trustees, for the purposes stated therein, all the property of the Oregon and California Railroad Company and particularly "also all lands granted by the United States in aid of the construction of the said railroads already completed between the termini aforesaid, and not yet sold, estimated to be in amount about 1,900,000 acres, and all other lands now or which may be hereafter granted to said company by the United States and which lands are intended to be more particularly identified as the same are patented by the United States * * * ." The trust deed describes the railroad mileage conveyed as being constructed and in operation between East Portland and Roseburg, Portland and Corvallis, and Albany and Lebanon, and as intending to cover "the Pacific extension thereof from

Forest Grove to Astoria," all in accordance with the Act of Congress of May 4, 1870, and the extension from Corvallis to Junction, and the southerly extension thereof from Roseburg to California, to a junction with the Central Pacific, in accordance with the Act of Congress of July 25, 1866. This trust deed, on or about June 28, 1881, was recorded in the office of the County Recorder of Multnomah County, Oregon, and thereafter, about the same time, in the office of the County Recorder of the several counties in which was situated any part of the lands granted by either of said land grants, and thereafter such proceedings were had, under the same, that the defendant, Stephen T. Gage, became and now is the sole, surviving trustee thereunder, and the said Stephen T. Gage, as such trustee, and the defendant, Southern Pacific Company, as the present owner of all of said preferred stock, claim and assert a lien upon the said lands under said trust deed.

The Oregon and California Railroad Company, by negotiation of two separate issues of its corporate bonds of date June 1, 1881, and May 6, 1883, respectively, known as "First Mortgage Bonds" and "Second Mortgage Bonds" respectively, provided approximately $5,000,000.00 further construction funds, and on or about June 1, 1881, the work

of constructing the East Side railroad was resumed and thereafter continued until about January, 1884. During that time the road was constructed and extended from Roseburg to a point about one and one-quarter miles southerly from Ashland, in the State of Oregon, a total distance of approximately 145 miles. About January, 1884, these construction funds became exhausted and the work of further construction was discontinued until about April, 1887, when it was resumed. About January 19, 1885, these last-mentioned bonds being outstanding, in a suit brought in the United States Circuit Court for the District of Oregon, by certain holders of the First Mortgage Bonds, against the company and other parties, the railroads and other property of the company were placed in the hands of a receiver then and in that suit appointed for that purpose.

On May 12, 1887, during the years 1871 to 1877, inclusive, under the East Side grant, patents for 323,078.68 acres of land (being lands contiguous to the first 125 miles of the East Side railroad) were applied for by and issued to the company, and, except as stated, no patents under the East Side grant were issued until the year 1893, and none under the West Side grant prior to the year 1895.

The total length of the East Side railroad is approximately 367 miles. With the exception of the northerly 197 miles thereof, no part of the East Side railroad was constructed within the times prescribed therefor; on May 12, 1887, the portion of the East Side railroad extending from Ashland to the southerly boundary line of the State of Oregon, remained unconstructed. That part of the West Side railroad from Forest Grove to Astoria, was never constructed, and because thereof, the granted lands contiguous to the unconstructed railroad were forfeited by Act of Congress approved Jan. 31, 1885. The company sold, prior to May 12, 1887, of its granted lands, 163,430.28 acres. Nearly all of the lands were sold to actual settlers in small quantities, although in a few instances such sales were made in quantities exceeding 160 acres to one person, and for prices slightly in excess of $2.50 per acre.

The Southern Pacific Company was incorporated by an Act of the General Assembly of the State of Kentucky, entitled, "An Act to incorporate the Southern Pacific Company," approved March 17, 1884, which act was amended March 21, 1888. Copies of these two acts are set out in Volume IV, pages 1633, 1639, Transcript of Record.

A copy of Articles of Association, Amalgamation and Consolidation of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, filed in the office of the Secretary of State of the State of California on June 23, 1870, amalgamating and consolidating said companies into the Central Pacific Railroad Company, incorporated as such by the said Articles, is set out in Volume IV, pages 1640, 1651, Transcript of Record. A copy of Articles of Amalgamation and Consolidation between the Central Pacific Railroad Company and the California and Oregon Railroad Company and the other railroad companies therein mentioned, filed in the office of the Secretary of State of the State of California on August 22, 1870, is set out in Volume IV, pages 1652, 1662, Transcript of Record. On August 22, 1870, at the time the Articles of Amalgamation and Consolidation, just mentioned, were filed, the Central Pacific Railroad Company was the owner of all unsold lands west of a point near Ogden, in Utah, co-terminous with its railroad from Ogden by way of Elko and Reno, in Nevada, Colfax, Auburn, Sacramento, Stockton, Niles and San Jose to San Francisco, in California, granted by the Act of Congress approved July 1, 1862, (12 Stat. 489) as amended July 2, 1864, (13 Stat. 356)

and the California and Oregon Railroad Company was the owner of all unsold lands in California granted by the Act of Congress of July 25, 1866, (14 Stat. 239). From August 22, 1870, until July 29, 1899, the Central Pacific Railroad Company remained the owner of all lands of the three several land grants mentioned, which were unsold at that date, and were not thereafter, from time to time, prior to July 29, 1899, sold by the Central Pacific. On July 29, 1899, the Central Pacific Railroad Company conveyed to the Central Pacific Railway Company, all of said land grants remaining unsold on that date, a copy of which deed is set out in Volume 4, pages 1663, 1678, Transcript of Record. The Central Pacific Railway Company was incorporated under the laws of the State of Utah by Articles of Association of date July 26, 1899, a copy of which Articles of Association is set out in Volume 4, pages 1679, 1696. On February 17, 1885, an agreement was entered into between the Central Pacific Railroad Company and the Southern Pacific Company by which the former leased to the latter its railroad from Ogden to San Francisco and branch thereof from Roseville Junction to Delta, together with certain other railroads and property therein described, and pursuant to which the Southern Pacific Company has

held possession of the railroads and other property therein described and operated the said railroads, as such lessee, continuously since February 17, 1885, and still continues to so operate the same. A copy of this agreement is set out in Volume II, pages 957, 967, Transcript of Record, and it recites that a part of the through business heretofore done by the Central Pacific Railroad Company, running from Ogden to the waters of the Pacific, has been diverted by the Northern Pacific, Atlantic & Pacific, and Atchison, Topeka & Santa Fe railroads, and that the Union Pacific Railroad Company has secured the control of the road known as the Oregon Short Line and thereby secured an outlet to the Pacific other than over the Central Pacific Railroad, and thus in that respect placed itself in opposition to the interests of the Central Pacific Railroad Company; and further recites that it now appears that the through business hitherto done by the Central Pacific Railroad Company will thereby be further diverted and that it is not only to the best interests of, but absolutely necessary, that the Central Pacific Railroad Company, in order to maintain itself against these diversions, should be operated in connection with a friendly through line to the waters of the Atlantic; and further recites that the South-

ern Pacific Company has a line of railroad under its control, for a period of ninety-nine years, extending continuously from the Pacific Ocean to the Atlantic Ocean, and that the lines of each company are doing a large local traffic, and it is important to both that the same should be conducted in harmony. It further recites that "to accomplish the purposes aforesaid, in consideration of the premises and of the mutual promises herein, the Central Pacific Railroad Company hereby leases to the said Southern Pacific Company for the term of ninety-nine years from the first day of April, A. D. 1885. the whole of its railroad * * *."

On July 1, 1887, the Oregon and California Railroad Company executed a lease to the Southern Pacific Company of all of its railroad lines and appurtenances (but not other property) for the term of forty years, upon the terms therein stated, a copy of which is set out in Volume 1, pages 185, 188, Transcript of Record. Under this lease, the Southern Pacific Company has held possession of and operated its railroads, as such lessee, continuously from June 6, 1888, until August 1, 1893, when it executed to the Southern Pacific Company another lease of the same property, pursuant to which the Southern Pacific Company has held possession of and operated the

said railroads continuously from August 1, 1893, to the present time, and still continues to so hold possession of and operate the same, a copy of which is set out in Volume 1, pages 189, 196, Transcript of Record.

On January 1, 1888, the Central Pacific Railroad Company leased its railroad from Delta to the northern boundary line of the State of California, to the Southern Pacific Company, pursuant to which that company has held possession of and operated said railroad, as such lessee, continuously since that date, and still continues to so operate the same, a copy of which is set out in Volume II, Pages 3968, 3970, Transcript of Record. This lease recites that since the date of the execution of the agreement of February 17, 1885, above mentioned, the lines of the Central Pacific Railroad Company have been extended from Delta, California, to the boundary line between Oregon and California, forming, at the last-mentioned point, a connection with the line of railroad of the Oregon and California Railroad Company, and since the execution of the lease of February 17, 1885, and on or about December, 1887, the line of railroad to the boundary line between the States of California and Oregon, constituting part of the line from San Francisco, California, to Portland, Oregon, has been de-

livered by the Central Pacific Railroad Company to the Southern Pacific Company for operation, and for that reason a modification of the previous lease of February 17, 1885, became necessary. On or about December, 1887, the principal stockholders of the Central Pacific Railroad Company of California became the principal stockholders of the California and Oregon Railroad Company, and on or about August 1, 1899, the Southern Pacific Company became, and ever since remained and still is, the principal stockholder of the Central Pacific Railroad Company. On or about August 1, 1899, the Southern Pacific Company became, has ever since remained, and still is, the principal stockholder of the Central Pacific Railway Company; on or about April 9, 1901, the Southern Pacific Company became, has ever since remained, and still is the principal stockholder of the Oregon and California Railroad Company. On July 31, 1885, the Oregon and California Railroad Company and the Central Pacific Railroad Company made an agreement, in writing, a copy of which is set out in Volume IV, pages 1689, 1696, Transcript of Record, by which the Oregon and California Railroad Company agreed to sell and transfer to the appointee of the Central Pacific Railroad Company, all its railway lines extending from

East Portland to about one and one-half miles south of Ashland and from Portland to Corvallis and from Albany to Lebanon, about 451 miles in length, with other appurtenances, and its lands remaining unsold at that date, and its rights and interests in lands, and rights to acquire and earn lands, and all its rights, grants and franchises granted by the United States, and all its interests of every description in the Northern Pacific Terminal Company for $8,000,000.00 par value of the shares of the Central Pacific Railroad Company, and $10,500,000.00 par value of the bonds made or guaranteed by the Central Pacific Railroad Company, to be secured on the property purchased. The agreement was to be void unless the stockholders of the Oregon and California Railroad Company, within two months from its date, should ratify the same, and the two committees known as the "London Bondholders Committee" and the "Frankfort Bondholders Committee" should, within the same time, execute in due form, a confirmation and acceptance thereof. On October 11, 1886, the Central Pacific Railroad Company and the Pacific Improvement Company, organized under the laws of the State of California in 1878, and the Southern Pacific Company, entered into an agreement, a copy of which is set out in Volume II, pages

949, 956, Transcript of Record, wherein it is recited that there was about 104 miles of the line between Roseville Junction and the southern boundary line of Oregon, contemplated by the Act of Congress of July 25, 1866, that had not been constructed, and that the Oregon and California Railroad Company had been in an embarrassed condition and unable to complete its road, to the northern boundary line of California, and that until the whole of that line is completed, making a through connection between Portland, in Oregon, and the City of San Francisco, in California, no part of the line could be advantageously or profitably operated, "nor the Act of Congress in relation thereto be carried into effect according to the spirit and intent thereof, towit, the construction and maintenance of a continuous railroad between the said cities, which the Government of the United States may use for the transportation of its property, troops, and munitions of war, when necessary, and to aid in the construction of which has granted quantities of the public lands;" and further recites that the completion by the Central Pacific Railroad Company of its own road to the southern boundary line of Oregon without assurance of the completion of that portion of the road from Portland to said boundary line would be a waste of

money, the road having to be constructed through a rugged and mountainous country at great expense and without sustaining local traffic; and further recites that it was of the greatest importance to the Central Pacific Railroad Company that it should have an opening into Oregon both for local traffic and the through business of the two cities, and also to furnish business for its entire line from Ogden "for the purpose of completing its said road and securing the completion of the road between the California state line and Portland, Oregon, thus making a through line between said cities of Portland and San Francisco and a connection with the Union Pacific Railroad at Ogden, and in order to secure the business of the northern portion of the State of California, and as much as possible of the business of the State of Oregon, and to bring such business to its line from Ogden, and for the purpose and with the intent of carrying into effect the provisions of said Act of Congress," agreed with the Pacific Improvement Company that the latter company should construct, finish, furnish and complete the 104 miles of railroad from Delta to the Oregon-California boundary line, to connect with the road of the Oregon and California Company, with all rolling stock and appurtenances, within a time stated, for

the consideration stated. The Pacific Improvement Company agreed that it would, within a reasonable time, and as soon as it could be done to advantage, obtain possession and control of the Oregon and California Railroad, or would purchase the whole of, or a majority of the capital stock of the Oregon and California Railroad Company, and would, within a reasonable time, complete its line of railroad to connection with the Central Pacific Railroad at a point on the boundary line between California and Oregon; the Southern Pacific Company agreed that it would accept a lease of the railroad thus constructed and acquired and pay a rental stated; the Pacific Improvement Company was to receive, as compensation for work and for its purchase of the properties of the Oregon and California Railroad Company, 80,000 shares of the capital stock of the Central Pacific, and in addition $4,500,000.00 in mortgage bonds to be issued by the Central Pacific Railroad Company and to be secured by its first mortgage, to be used towards the construction of its railroad between Roseville Junction and the Oregon state line. Prior to the execution of the agreement of July 31, 1885, and October 11, 1886, the stockholders of the Oregon and California Railroad Company became and were organized under the name "Stockholders

Committee," certain owners of the First and Second Mortgage Bonds outstanding became and were organized under the name "Frankfort Bondholders Committee," and certain others under the name "London Bondholders Committee." These Bondholders Committees represented the owners of substantially all of the First Mortgage Bonds and Second Mortgage Bonds of the Oregon and California Railroad Company.

On March 28, 1887, a contract was made by and between the "Stockholders Re-constructed Committee" of the Oregon and California Railroad Company, called the "Stockholders Committee," the Pacific Improvement Company, the "London Bondholders Committee," the "Frankfort Bondholders Committee," these two Bondholders Committees representing British and German holders of the First Mortgage Bonds of the Oregon and California Railroad Company, the Southern Pacific Company, the Oregon and California Railroad Company and the Union Trust Company, a copy of which contract is set out in Volume I, pages 166, 184, Transcript of Record. By this agreement the Stockholders Committee agreed to sell to the Pacific Improvement Company 117,290 shares of the preferred stock, out of a total 120,000 shares thereof, 67,785 shares of the common stock,

out of a total of 70,000 shares, and Second Mortgage Bonds of the Oregon and California Railroad Company to the amount at their par value of $2,610,000.00, being the total issue of the Second Mortgage Bonds, and agreed to deliver to the Pacific Improvement Company all of these on or before April 1, 1887. The Pacific Improvement Company, in consideration thereof and in payment therefor, agreed, upon delivery and deposit with the Union Trust Company, by the London and Frankfort Bondholders Committees, of bonds to the amount of at least $8,400,000.00, par value, First Mortgage Bonds, secured under the trust deed of June 1, 1881, executed to Villard, White and Bretherton, as trustees, and for which the Farmers Loan & Trust Company was then sole trustee, to deliver to the Stockholders Committee one share of the capital stock of the Central Pacific Railroad Company, out of a total not exceeding 680,000 shares, against every two shares of Oregon and California Preferred Stock sold and delivered, as agreed, and one share of Central Pacific against every four shares of Oregon and California Common Stock to be sold and delivered, and would pay the sum of Four Shillings sterling for every share of Oregon and California Preferred Stock and Three Shillings sterling for every share of Oregon

and California Common Stock so sold and delivered.

In case the Stockholders Committee should, on or before April 1, 1887, acquire any additional amount of Preferred or Common Stock beyond the amount mentioned, then the Stockholders Committee agreed to sell and deliver the same to the Pacific Improvement Company on or before April 1, 1887, and the Pacific Improvement Company agreed to pay for the same in cash and stock at the same rate and in the same manner above specified. The Bondholders Committees agreed to sell to, and exchange with, the Southern Pacific Company, upon its purchase thereof by the Southern Pacific Company, the First Mortgage Bonds mentioned, secured, as stated, out of a total outstanding, at that time, of $8,606,-000.00 par value, to the amount at their par value of $8,400,000.00, bearing all unpaid coupons belonging thereto, and for that purpose the Bondholders Committees agreed to deposit this $8,400,000.00 par value of said bonds within forty days after March 28, 1887, with the Union Trust Company. The Southern Pacific Company upon its part agreed to deliver to the Union Trust Company, to be delivered by it to the Bondholders Committees, new bonds of the Oregon and California Railroad Company of the par value of $9,240,-

000.00, being at the rate of 110% new bonds upon the amount of old bonds exchanged, and the new bonds to bear interest at the rate of 5% per annum from July 1, 1886, and to be guaranteed, both principal and interest, by the Southern Pacific Company, and to be secured by a first mortgage upon the railroad of the Oregon and California Railroad Company and its other property covered by the then unsatisfied mortgage dated June 1, 1881, securing the First Mortgage Bonds then outstanding. The Southern Pacific Company also agreed to pay the sum of Four Pounds sterling for each then existing bond of $1000.00 received in exchange, as stated. Such new bonds were to be delivered by the Southern Pacific Company in payment and exchange for outstanding bonds, as stated, and were to be payable, principal and interest, in gold, forty years after date, and to bear interest at 5% per annum, payable half yearly, and to be guaranteed, as stated, and the mortgage was to be executed to the Union Trust Company. The amount of bonds to be issued under the new mortgage were to be at the rate of $30,000.00 per mile for every mile of standard gauge road then or thereafter to be constructed or acquired, and covered by the mortgage, and $10,000.00 per mile for every mile of narrow gauge road then or at any time

thereafter constructed or to be constructed and acquired and covered by the mortgage. The mortgage deed called for by this agreement was afterwards executed on January 3, 1888, and bears date July 1, 1887, (Vol. I, pp. 197, 223, Transcript of Record.) The other details of the exchange of securities are specifically stated. The Southern Pacific Company also agreed to accept a lease of the railroad of the Oregon and California Railroad Company for a period of at least forty years from the date of issue of the new bonds, and the Railroad Company agreed to execute the same. When the bonds and stock had been thus exchanged and all documents executed, as required by the agreement, the Pacific Improvement Company and the Southern Pacific Company agreed that the Second Mortgage Bonds of the Oregon and California Railroad Company, theretofore delivered by the Stockholders Committee to the Pacific Improvement Company, should be cancelled, and thereupon the First Mortgage Bonds deposited by the Bondholders Committees should also be cancelled, and the mortgages satisfied of record.

Pursuant to the provisions of the contract of March 28, 1887, and on or about May 12, 1887, all of the capital stock and all of the Second Mortgage Bonds of the Oregon and

California Railroad Company were transferred, assigned and delivered to the Pacific Improvement Company, and all of the First Mortgage Bonds to the Southern Pacific Company. The Pacific Improvement Company held this capital stock until April 9, 1901, when it was assigned and transferred to the Southern Pacific Company, which has ever since remained and still is the owner and holder thereof. The Pacific Improvement Company owned and held the controlling interest in the Oregon & California Railroad Company from about March, 1887, until after April 9, 1901.

In the trust mortgage of July 1, 1887, there is a certain provision which reads as follows: "And all the property, real, personal and mixed, which on the twelfth day of May, 1887, was covered by the mortgage securing the then existing First Mortgage Bonds of the Oregon and California Railroad Company." This referred to and was intended to refer to a deed of trust executed by the Oregon and California Railroad Company to Henry Villard, Horace White and Charles Edward Bretherton, as trustees, of date June 1, 1881, a copy of which is set out in Volume I, pages 224, 259, Transcript of Record. The trust mortgage of July 1, 1887, was recorded on January 20, 1888, in the office of the County Recorder of Multnomah County, Oregon, and

about the same time in the office of the County Recorder of each of the several counties in which was situated any of the lands granted by the Acts of Congress of July 25, 1866, or May 4, 1870. The Oregon and California Railroad Company executed and delivered certain of the bonds provided for by the trust mortgage of July 1, 1887, of which $17,745,000.00 in amount are still outstanding; the payment of all which bonds, both principal and interest, was and is guaranteed by the Southern Pacific Company. The bonds secured by the trust mortgage of July 1, 1887, were issued in large part pursuant to the contract of March 28, 1887, to retire the bonds secured by the earlier mortgages of June 1, 1881, and May 26, 1883, respectively, which had been sold abroad and a large part of the balance of said bonds secured by the mortgage of July 1, 1887, also were negotiated abroad and most of such bonds "are now owned abroad—especially in Holland and Germany," (Vol. IV, p. 1575, Transcript of Record.) By the issuance and negotiation of two separate issues of its corporate bonds of date June 1, 1881, and May 26, 1883, respectively, above mentioned, the company provided funds aggregating approximately $5,000,000.00, which were used in the construction of its railroad; and the bonds se-

cured by the mortgage to the Union Trust Company of date July 1, 1887, were used to retire the bonds secured by the mortgages of 1881 and 1883, "and to complete the construction of the said railroad," (Vol. 4, p. 1575, Transcript of Record.) The total amount of bonds issued under the trust mortgage of July 1, 1887, was $20,000,000.00, and from the proceeds of the sale of lands received by the Oregon and California Railroad Company, the Union Trust Company has paid off $2,255,000.00 of said bonds, leaving a balance outstanding of $17,745,000.00. The Union Trust, as trustee for the owners and holders of these bonds, claims to have a lien upon the granted lands under the trust mortgage of July 1, 1887. During the year 1887 the last section of the East Side railroad, extending from a point near Ashland to the southern boundary line of Oregon, and the section of railroad in California extending from Delta to connection with the said East Side railroad at the said southern boundary line of Oregon, were constructed by the Pacific Improvement Company. On or about June 6, 1887, a contract was made and executed by and between the Oregon and California Railroad Company and Pacific Improvement Company, a copy of which is set out in Volume IV, pages 1697, 1702, Transcript of Record. At that time a

large part of the work of construction had been performed by the Pacific Improvement Company, but it is not intended to stipulate, and it is not agreed, whether said prior work of construction was performed pursuant to the contract of October 11, 1886, supra, (Vol. II, pp. 949, 956, Transcript of Record,) or some other contract, or otherwise. On or about June 6, 1888, the receivership proceedings were dismissed, the receiver discharged, and all of the First and Second Mortgage Bonds (not including the bonds issued under the trust mortgage of July 1, 1887) together with all mortgages and trust deeds securing the payment thereof, were cancelled and discharged, and thereupon, and ever since, the Southern Pacific Company has continued in possession, pursuant to the leases mentioned (Vol. II, pp. 85, 196, Transcript of Record) of the railroads and appurtenances therein described. These leases do not affect or appertain to any part of the granted lands except such as may have been granted as right of way or station grounds under the Acts of Congress of July 25, 1866, and May 4, 1870. On February 7, 1891, the Board of Directors of the Oregon and California Railroad Company adopted a resolution prescribing the form of deeds to be executed by the Oregon and California Railroad Company, one a deed

of grant, bargain and sale, the other a deed of conveyance, release and quitclaim, (Vol. IV, pp. 1702, 1710, Transcript of Record.) On March 14, 1892, the Board of Directors of Oregon and California Railroad Company adopted a resolution prescribing another form of deed specifically called a quitclaim deed, (Vol. IV, pp. 1710, 1713, Transcript of Record.) These forms of deeds are the forms of deeds referred to in subdivision 8, third paragraph of the Bill of Complaint, (Vol. I, p. 52, Transcript of Record) and which the Bill charges were adopted "anticipating and seeking to avoid responsibility for the contemplated violations of the terms and conditions of said grants."

At this point it is proper to call the attention of the court to the testimony of William Singer, Jr., who prepared these forms of deeds and these resolutions, and who testified (Vol. V, pp. 2507, 2510, Transcript of Record) that he had been Land Attorney since 1884 or 1885 for the Central Pacific Railroad Company's land grant, and for the entire land grant of the California and Oregon Railroad Company, both in Land Office proceedings and in courts, other than federal courts, and that in 1894 there was added to his jurisdiction the federal cases for the California and Oregon, Oregon and California, Central

Pacific and Southern Pacific Company's land grants. Referring to the form of deed described, Judge Singer testified that upon investigation of the operation of the Land Department of the Oregon and California, he found that warranty deeds were being given for patented and unpatented lands. He recommended to Mr. Mills, in 1889 to 1890, that the issuance of warranty deeds be discontinued and that a deed granting and conveying the land be given to patented lands and that a deed quitclaiming all the right, title and interest which the company had or might thereafter acquire, be given to unpatented lands for the Oregon and California land grants, and his recollection is that he drafted these deeds. "The primary object of these forms of deeds was to standardize the forms of deeds, although an important consideration with him was to dispense with warranty deeds, which, in his experience as a railroad attorney, were not given by any railroad other than the Oregon and California. There was no purpose by these instruments, or the adoption of these forms, to anticipate or meet any contention or claim now made by the United States in this suit as to the provisions of Section 4 of the Act of May 4, 1870, or the Act of April 10, 1869. His recollection is that prior to that time he had given a written

opinion that the proviso in the Act of May 4, 1870, was a covenant and not a condition, and that the Act of April 10, 1869, imposed no covenant if it had any effect at all."

2,422,708 acres of lands in the East Side grant were patented to the company between the years 1893 and 1906, both inclusive, and 128,618.13 acres belonging to the West Side grant were patented to the company between the years 1895 and 1903, both years inclusive. These patents were issued from time to time between said dates mentioned pursuant to applications made therefor by the company from time to time between the years 1876 and 1906. No patent has issued to the company under either of these grants since the year 1906, except Supplemental Patent No. 3, of date June 21, 1909, for 161.75 acres of land in the indemnity limits of the East Side grant. A rapidly increasing demand for the lands of the company in large quantities and at increased prices, commenced about 1889 or 1890, and has continued ever since. From about 1894 to 1903 the company sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person, and at prices exceeding $2.50 per acre; and in several instances between these dates, the company sold lands of the grants in quantities from 1000 acres to

20,000 acres to one purchaser, at prices ranging from $5.00 to $20.00 per acre. In one instance at $35.00 per acre; in another instance at $40.00 per acre; and in one instance 45,000 acres at $7.00 per acre, to a single purchaser. The company has heretofore made approximately 5306 sales of its land grant lands, aggregating 820,000 acres, approximately 4930 of which said sales were for quantities not exceeding 160 acres to one purchaser, aggregating 296,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. Substantially all of the said 524,000 acres were sold to persons other than actual settlers, who purchased the lands for purposes other than settlement, and at prices in excess of $2.50 per acre. Approximately 478,000 acres of these 524,000 acres were sold since the year 1897, and approximately 370,000 acres of these 524,000 acres were sold to 38 purchasers in quantities exceeding 2000 acres to each purchaser; approximately three-fourths, in number, of all sales made since the year 1897 were made by contracts providing for payment of purchase price in from five to ten equal annual payments, and execution of conveyance upon final payment; many of which sales were still pending under such contracts on January 1, 1903,

conveyances under which were executed from time to time thereafter, and a considerable number of these contracts were still pending when this suit was brought, September 4, 1908. Of the total sales made, 4508 had been fully executed and conveyances given, aggregating 740,002.45 acres, at the time the Joint and Several Answer was filed, September 5, 1911. At that time 571 executory contracts were still pending, aggregating 81,684.31 acres. Exhibit No. 4 to the Joint and Several Answer, (Vol. II, pp. 971, 986, Transcript of Record) is substantially a correct statement of all land sales made by the company, including all sales executed by conveyances and all sales under contracts not executed by conveyances, up to September 5, 1911. From this Exhibit No. 4 the court will note five classifications giving acreage sold from 1871 down to 1910, both inclusive, as follows:

(1) Sales not exceeding one-quarter section or 160 acres to one person, at a price not exceeding $2.50 per acre.

(2) Sales in excess of one-quarter section or 160 acres to one person, but at a price not exceeding $2.50 per acre.

(3) Sales not exceeding one-quarter section or 160 acres to one person but at a price exceeding $2.50 per acre.

(4) Sales in excess of one-quarter section or 160 acres to one person, at a price exceeding $2.50 per acre.

(5) Acres sold, as to which, owing to destruction of Land Department records, no information is at hand to show the price for each sale.

The sales under classifications Nos. 2, 3, and 4, would be in breach of the alleged conditions subsequent relied upon by the United States in this suit, and sales under classification No. 1, would be the only legal sales that the company has made, except such as may have been legal under classification No. 5, which may be presumed to have been legal in the absence of affirmative proof to the contrary.

It also appears from this Exhibit No. 4, (Vol. II, p. 972, Transcript of Record) that 85 sales were made by the European and Oregon Land Company from 1871 to 1874, both inclusive, but contracts were fulfilled subsequent to 1874 by the Oregon and California Railroad Company, and that these sales covered 6581.15 acres, of which 78 sales were for a consideration of $20,859.99; that 33 of these sales averaged $2.25 per acre, and 57.16 acres to each purchaser; that one sale in excess of

160 acres to one person was made; that 39 sales averaged $4.16 per acre, and five sales were made in excess of 160 acres to one person and in excess of $2.50 per acre, to-wit, $3.65 per acre average price and 2146.41 acres average acreage, each of said five sales, all belonging to the East Side grant, according to the classification of these sales stipulated to be and which are substantially correct.

The total sales made in the West Side grant were 335, of which 105 would be legal as the Government construes Section 4 of the Act of May 4, 1870; 220 of these sales would be illegal as thus construed, and as to 10 sales, it cannot be known whether they were legal or illegal. As thus interpreted, the total illegal sales from the years 1871 to 1910, both inclusive, of the lands in the East Side grant, are 376, covering 524,200.42 acres for $3,735,-735.08, and these so-called "illegal sales" were uniform and continuous during that period.

Exhibit "J", (Vol. I, pp. 260, 270, Transcript of Record) is substantially a correct statement of all conveyances of granted lands made by the company, and of all contracts pending at the time it was compiled on July 1, 1908. Exhibit "J" is a schedule of all sales of granted lands, including conveyances and

pending contracts, separately stated as to each land grant, and the general source from which the information therein has been obtained, is from conveyances executed prior to June 11, 1879, as recorded in the office of the Recorder or Clerk of each of the counties in which any of the granted lands is situated, and from conveyances executed on and after June 11, 1879, as shown by the records of the minutes of the proceedings of the Board of Directors of the company, and as to pending contracts, the annual return of the companies to the Assessors of the several counties in which any part of the lands granted is situated. The sales are classified according to the quantity of land sold, the purchase price per acre, and are designated as

(a) Sales in quantity not exceeding one-quarter section and for a price not exceeding $2.50 per acre.

(b) Sales in quantity not exceeding one-quarter section but for a price exceeding $2.50 per acre.

(c) Sales in quantity exceeding one-quarter section but not exceeding 640 acres.

(d) Sales in quantity exceeding 640 acres but not exceeding 2000 acres.

(e) Sales in quantity exceeding 2000 acres, and these sales are classified under each land grant.

The information contained in this exhibit may be recapitulated as follows:

RECAPITULATION

Years	Total Sales	Total Acres	Total Purchase Price
Sales in quantities not exceeding 160 acres:			
1872-1897	2501	155,618.55	$ 420,950.10
1898-1908	2429	140,108.97	813,588.41
	4930	295,727.52	$1,234,538.51
Sales in quantities exceeding 160 acres, but not exceeding 640 acres:			
1872-1897	117	33,530.43	$ 77,292.35
1898-1908	163	57,904.24	325,432.94
	280	91,434.67	$ 402,725.29
Sales in quantities exceeding 640 acres, but not exceeding 2,000 acres:			
1872-1897	11	10,756.91	$ 36,985.21
1898-1908	45	45,609.38	373,773.91
	56	60,366.29	$ 410,759.12
Sales in quantities exceeding 2,000 acres:			
1872-1897	1	2,234.70	$ 4,579.40
1898-1908	39	370,164.76	2,917,671.27
	40	372,399.46	$2,922,250.67

Total sales in quantities exceeding 160 acres:

Years	Total Sales	Total Acres	Total Purchase Price
1872-1897	129	46,522.04	$ 118,856.96
1898-1908	247	477,678.38	3,616,878.12
	376	524,200.42	$3,735,735.08

Total sales:			
In quantities not exceeding 160 acres	4930	295,727.52	$1,234,538.51
In quantities exceeding 160 acres	376	524,200.42	3,735,735.08
Total	5306	819,927.94	$4,970,273.59

The apparent discrepancies between said "Exhibit No. 4" (Vol. II, pp. 971, 986, Transcript of Record) and "Exhibit J" (Vol. I, pp. 260, 272, Transcript of Record) are explained by the fact that "Exhibit No. 4" is compiled with reference to the original date of sales, while "Exhibit J" is compiled with reference to the date of the executed conveyances, except as to pending contracts. Moreover, the classification of sales, (as to purchase price and quantities sold to each purchaser) in "Exhibit No. 4" differs from the

classification used in "Exhibit J." At or about the time the Joint and Several Answer was filed on September 5, 1911, there remained unsold of these granted lands, 2,306,492.81 acres, of which 2,075,616.45 acres were theretofore patented, and 284,876.36 acres unpatented, all of which unsold lands are claimed by the company under its land grants. Approximately 180,000 acres of these unsold lands are situated southerly from Eugene and constitute more than one-third, in alternate sections, of all lands lying within approximately twenty miles on each side of the East Side railroad from Eugene to the southern boundary line of Oregon, and only a small portion of these lands in that part of the East Side grant has ever been sold. Since January 1, 1903, and principally since February 14, 1907, (the date when the Legislature of Oregon adopted its memorial to the President and requested Congress to enact such laws and take such steps as might be necessary to compel the railroad company to comply with the grant and to enact and declare some sufficient penalty for noncompliance therewith, by way of forfeiture, as Congress may deem best, (Vol. I, pp. 520, 521, Transcript of Record), persons exceeding four thousand in number have severally applied to the company to purchase certain of

these unsold lands in quantities not exceeding 160 acres to each person, claiming that they desired such lands to settle and establish a home upon, and in a few instances claiming that they had settled and established a home upon the lands applied for by them, and at and about the time these applications were made, each applicant stated that he then was willing and able to tender payment at the rate of $2.50 per acre for the lands applied for by him, and in a few instances such tender was made. (The record shows that 67 of these applicants are parties to this suit as cross-complainants, claiming to be actual settlers, and there are interveners who are parties to this appeal, who claim to have been applicants to purchase these lands for the purposes and upon the terms stated, and to be what are called by this record, possible or potential settlers.)

B. A. McAllaster testified as a witness, (Vol. IV, pp. 1958, 1960, Transcript of Record) that

> "About 10,000 applications to purchase quarter sections of timber lands belonging to the company at $2.50 per acre have been made to the company and refused since the commencement of the first Lafferty suit, about that time, up to

July 30, 1912. These applications are made usually in this way. Some person comes in to the office with a bunch of applications, any where from 5 to 10 up to 50 or 100 and presents one application and tenders the sum of $400.00 with it and that being rejected, this person follows by presenting another application and tendering the same $400.00 and that being rejected, the process is gone through with the entire bunch that the party brings in. This party is attorney or agent for the applicant, or at least claims so to be and in nearly all cases the blanks used by these so-called applicants are printed forms. He has prepared a memorandum showing the number of applications of that class up to a certain time and whether or not several persons have made application for the same quarter section. This memorandum was prepared about March 1, 1909, and shows the applications that were in his hands at that time. There were 7991 applications in his hands on March 1, 1909, covering 6168 quarter sections, or in some cases less—occasionally an 80 acres. The entire number of applications up to July 30, 1912, would, he thinks, approximate 10,000. When this table was made up

> March 1, 1909, there were 4749 tracts of land each covered by one application; there were 1097 tracts each covered by two applications; 256 tracts each covered by three applications; 54 tracts each covered by four applications; 8 tracts each covered by 5 applications, and 4 tracts each covered by six applications."

On or about January 1, 1903, the company withdrew from sale all of these unsold lands, and at all times refused and still refuses to approve or accept any of the applications to purchase, just mentioned, claiming that all the lands so applied for "are essentially timber lands unsuitable for any other purpose," (Vol. IV, p. 1582, Transcript of Record.) The company now assumes and asserts an absolute and unconditional estate in all these unsold lands.

Exhibit "K" to the Bill of Complaint, (Vol. I, pp. 273, 519, Transcript of Record) as corrected by Exhibit No. 5 to the Joint and Several Answer, (Vol. II, pp. 987, 1002, Transcript of Record) contains a true list and description of all the unsold lands which have heretofore been patented.

Exhibit No. 6 to the Joint and Several Answer, (Vol. 2, pp. 1002, 1039, Transcript of

Record) contains a true and correct list and description of all unsold, unpatented, primary lands, and of all unsold selected but unpatented indemnity lands claimed by the company under its land grants.

The reasonable value of these unsold lands exceeds the sum of $30,000,000.00 (It is believed, but not stipulated, that the description found in the decree of the court below, entered July 1, 1913, Vol. III, pp. 1296-1550, Transcript of Record, contains an accurate description of all of the lands of the company of every class attempted to be forfeited by the decree, as well as a schedule describing the right of way lands excepted from the operation of the decree.)

The company, in addition to the purchase price received from sales of granted lands, has received and enjoyed, between April 1, 1870, and April 30, 1911, other benefits on account of said granted lands, as follows:

(a) $88,205.06 forfeited by purchasers upon defaulted contracts;

(b) $5532.07 rentals for certain portions of granted lands leased;

(c) $18,850.25 stumpage value of timber cut and used by the company from these lands;

(d) $10,687.92 collected from persons who, without permission, have cut timber growing on these lands.

The company has not cut, nor permitted others to cut, timber growing on these lands since the commencement of this suit, and all of these unsold lands now are and at all times since this suit was brought, September 4, 1908, withdrawn from sale by the company. Until about the year 1890 or 1891, there was substantially no demand for said granted lands except for the purpose of settlement, or by persons of limited means applying to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding $2.50 per acre; and it is stipulated that "nearly all sales made prior to the year 1894 were of that character and to such persons," but this stipulation is corrected and made more definite by the facts stipulated as to the correctness of Exhibit No. 4, (Vol. II, pp. 971, 986, Transcript of Record) and Exhibit "J", (Vol. I, pp. 260, 270, Transcript of Record, supra,) and by the facts stipulated in subdivision 21, (Vol. IV, pp. 1590, 1623, Transcript of Record) showing by years for the half ending December 31, 1879, to the year ending June 30, 1903, both inclusive, the average price per acre for all sales to date of each report, average price per acre for all

sales during the half year or year, average price for all purchases to date, maximum price per acre from sales, minimum price per acre from sales, maximum and minimum price then asked, and the average price then asked, and which shows, as set out in Exhibit "A" to the Joint and Several Answer, of defendants, (Vol. II, pp. 922, 923, Transcript of Record) approximate price received per acre during second half of 1879 was $15.00; during 1880 was $5.00; during first half of 1881, $10.00; during second half of 1881, $5.00; first half of 1882, $3.50; second half of 1882, and for the years 1883, 1884, 1885, down to and including the year 1890, $15.00; for the years 1892, 1903, both inclusive, with the exception of the year 1897, the maximum price received per acre was $30.00, and that at no time after the commencement of the year 1883, was the average price received per acre under $2.50 per acre, but the average price ranged from $2.56 per acre for the first half of 1885 up to $7.85 per acre during the year 1902.

These facts are shown in the annual reports of the company required to be made to the United States under the Acts of Congress of June 19, 1878, (20 Stat. 169), March 3, 1881, (21 Stat. 385, 413,) April 17, 1900, (31 Stat. 86, 134), March 3, 1901, (31 Stat. 960, 1009),

June 28, 1902, (32 Stat. 419, 481), March 3, 1903, (32 Stat. 1083, 1147). The Act of June 19, 1878, (20 Stat. 169) is found in Vol. IV, pp. 1721-1724, Transcript of Record) and repeals Section 20 of an Act entitled, "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1, 1862, (12 Stat. 489) and repeals an Act entitled, "An Act relative to filing reports of railroad companies," approved June 25, 1868, (15 Stat. 80).

During a large part of the time prior to the year 1894, the company maintained an immigrant bureau, engaged in inducing immigration and settlement upon its granted lands, and the greater part of the sales of lands to persons not settlers thereon, or in quantities exceeding 160 acres to one person, or for prices exceeding $2.50 per acre, were made after the year 1894.

Exhibit No. 17 to the stipulation, (Vol. IV, pp. 1730-1731 Transcript of Record) is a correct statement of the facts therein stated, and is appended to the Stipulation as to the Facts for the purpose of correcting "Exhibit No. 9" to the Joint and Several Answer, (Vol. II, pp. 1143, 1148, Transcript of Record.) As

thus corrected, this stipulation is admitted to be true, and shows deeds made by the company, expressly approved by the Interior Department, conveying more than 160 acres of land grant forest reserve lands to a single purchaser, at prices exceeding $2.50 per acre, which deeds were submitted by the direct or mesne grant thereunder as lieu bases for lieu selection of other lands under the Act of Congress approved June 4, 1897, (30 Stat. 11, 30) which deeds, on their face, show the true acreage and purchase price paid, and aggregate 42,068.82 acres, sold to fourteen different purchasers between June 24, 1899, and March 2, 1900. A number of these forest lieu selections were pending in the Interior Department at the time the investigation of the subject matter of this suit was instituted in the year 1907, and upon the recommendation of the Attorney-General, all of these selections, thus pending, were suspended, and are still under suspension. The acreage thus under suspension aggregates 22,212.77 acres.

Exhibit No. 10 to the Joint and Several Answer, (Vol. II, pp. 1149, 1151, Transcript of Record), is correct, omitting the words "A few." It is stipulated that this exhibit shows "institution of suits brought by the United States against the Oregon and California Railroad Company, in the United States Cir-

cuit Court for the District of Oregon, to quiet title to or cancel patent for lands of the said company's East Side land grant, in which the pleadings or proofs showed sales in quantities exceeding 160 acres to single purchasers, or at prices exceeding $2.50 per acre, without objection made by the United States to any such sale because of land quantity sold to one purchaser or sale price."

The first of these suits thus instanced was begun February 3, 1892, and the last February 27, 1901. (The first suit involved 240 acres of lands sold to John A. Hurlburt for $720.00, and the issues were finally determined by the Supreme Court of the United States in United States v. Oregon and California Railroad Company, et al., in 176 U. S. 28.)

Exhibit "L" to the Bill of Complaint, (Vol. I, pp. 520, 521, Transcript of Record) is a correct copy of the memorial of the Legislature of Oregon to the President and Congress, adopted February 14, 1907, and communicated to Congress immediately thereafter. A substantial copy of the Joint Resolution of Congress of April 30, 1908, (35 Stat. 571) in so far as it relates to these land grants, is set out in the Bill of Complaint, (Vol. I, pp. 67, 68, Transcript of Record) and this suit was instituted pursuant thereto.

Since the beginning of this suit, forty-five other and separate suits have been brought in the name of the United States, each against the defendants herein, and another person or other persons, praying for the enforcement of the claimed rights and equitable remedies pertaining to certain granted lands therein described, sold and conveyed by the company to such other persons in alleged violation of alleged provisions or conditions of these land grants.

Defendants' Exhibit 294, (Vol. XIII, pp. 6932, 6999, Transcript of Record,) is a statement concerning lands involved in these suits, giving the suit number, the purchaser under the contract and grantee in deed, made defendant, the date of the contract, acreage, price per acre, consideration and number and date of deed, and all this information is given as to each suit, of which there are forty-five in number, known in this record as "Innocent Purchaser Suits."

The facts stated in defendants' Exhibit 294 were verified by the witness B. A. McAllaster, Land Commissioner, (Vol. IV, p. 1993-4, Transcript of Record.)

Defendants' Exhibit 295 is a large map prepared to show, in colors, the location of the

lands involved in the so-called "Innocent Purchaser Suits," giving the number of each suit, and acreage involved, (Vol. XIII, p. 7000, Transcript of Record) and the facts stated therein are verified by the witness B. A. McAllaster, Land Commissioner, (Vol. IV, pp. 1993-4, Transcript of Record.) It appears therefrom that the total acreage involved in these suits is 381,395.77 acres, and total purchase price paid the company was $2,851,092.33. It was stipulated between the United States and the defendants-appellants, (Vol. V, pp. 2528, 2529, Transcript of Record) "that the court, in any stage of this case, until and including a final hearing in the Supreme Court of the United States, if the case shall reach that court, shall take judicial notice of all proceedings had in and final disposition of the forty-five suits against purchasers referred to in the 'Stipulation as to the Facts,' including issuance of patents to the lands therein described when issued, if any shall be issued, which stipulation, it was agreed, was subject to the objection, on the part of complainant that the evidence is immaterial and irrelevant."

Under this stipulation, the court may now take judicial notice of the fact that up to the 27th day of April 1914, decrees of forfeiture had been entered as against the purchaser,

grantee defendant, in twenty-eight suits of these forty-five suits, and an order of dismissal entered against the defendants-appellants herein in each of these suits, the defendants, now appellants herein, neither objecting to nor consenting to such orders of dismissal, as shown thereby.

Under these decrees thus entered, the different purchasers have paid to the United States, under Act of August 20, 1912, (37 Stat. 320) under which these forty-five suits are in process of adjustment, and which it is safe to say was enacted for that purpose, $852,219.95, at the rate of $2.50 per acre, and patents have been issued, or will issue, therefor. There remain on the 27th day of April, 1914, seventeen suits awaiting like decrees, excepting that in suit No. 3464 involving 6463.72 acres, the Southern Pacific Company was the grantee purchaser of the lands involved therein, and in view of that fact, these suits stand upon demurrer to the Bill of Complaint, awaiting final determination of this appeal, although there is no express stipulation to that effect. (The Southern Pacific Company paid therefor $248,126.86 (Vol. XIII, p. 6699, Transcript.)

Defendants' Exhibit 295 will show the location of these lands involved in these so-

called "Innocent Purchaser Suits," and that the lands are all timber lands chiefly and in the main only valuable for the timber thereon, and are not claimed, so far as is known, by any of the so-called "actual settlers" who are cross-complainants-appellants herein, or applied for by any of the interveners-appellants herein. If it should turn out that any of these lands have been thus applied for by these so-called potential or possible settlers, or have been "actually settled" upon by any of the so-called "actual settlers" or cross-complainants herein, the patents issued under the Act of August 20, 1912, would no doubt deprive these parties of their alleged right to purchase any of these lands as such actual or potential settlers under the proviso of April 10, 1869, or Section 4 of the Act of May 4, 1870, and to that extent the Act of August 20, 1912, would be a repeal of the actual settler clause of these two acts, and a waiver of the breach, if any, caused by the sales made by the company to these forty-five purchasers, as to those lands, if not as to the entire unsold lands.

For convenient reference, the facts stated in defendants' Exhibits 294 and 295, relating to these Innocent Purchaser Suits, showing the number of each suit, acreage involved, and purchase price paid to the company for

the lands involved in each suit, are shown by the following table:

Suit No.		Acres
3416	$ 4160.00	1040.00
3417	16631.56	4118.14
3418	107356.00	9759.64
3419	9353.35	3733.36
3420	6091.83	2020.73
3421	4706.55	1880.62
3422	3760.00	1160.00
3423	116269.93	14533.74
3424	502753.40	67559.72
3425	6610.82	2674.02
3426	21011.40	3115.79
3427	43653.10	7042.36
3428	26668.84	4848.88
3429	4328.76	1442.92
3430	16960.00	2560.00
3431	96966.48	20491.62
3432	21140.00	3160.00
3433	16567.58	3479.96
3434	3827.00	1042.00
3435	110497.00	14216.91
3436	13277.77	2463.79
3437	38304.06	7366.86
3439	29263.40	4893.64
3440	85949.17	13222.95
3441	4998.55	1999.42
3442	293281.10	34921.85
3443	16725.12	5973.26

3444	$ 9229.19	1476.67
3444	9229.19	1476.67
3445	95477.69	15861.74
3446	6560.00	1440.00
3447	188123.43	29567.34
3448	4070.36	1252.42
3449	321807.00	45972.43
3452	180888.56	15730.44
3453	36123.00	4816.40
3454	19258.30	1925.83
3455	4594.22	1364.64
3456	7109.36	2523.76
3457	21632.40	1720.39
3458	5900.00	2360.00
3459	4866.85	1219.65
3460	6143.55	1481.09
3463	70073.80	5497.17
3464	248126.86	6463.72

In this connection, the attention of the court is drawn to Senate Report No. 402, Sixty-third Congress, Second Session, of date April 4, 1914, made by Mr. Chamberlain, from the Committee on Public Lands, in which, and as a part of such report, a letter from First Assistant Secretary of the Interior, A. A. Jones, of date January 17, 1914, appears. From the letter of the Assistant Secretary we quote: "For information it may here be stated that twenty-seven of these suits, involving in the aggregate 339,412 acres

of land, have been compromised by stipulation, under said Act of August 20, 1912, supra, the decrees of forfeiture entered, moneys paid, and the lands patented to the purchasers." At this date, April 24, 1914, decrees of forfeiture have been entered, under the act of August 20, 1912, in twenty-eight of these cases, and testimony taken on behalf of the defendant purchasers therein, to be submitted to the Attorney-General in order that he may, under the Act, recommend the issuance of patents therefor, upon payment of $2.50 per acre. We are advised that upon April 27, 1914, the Department of Justice has recommended that 1475.07 acres involved in one of these suits be patented under the act, and 339,412 acres have heretofore been patented. There has been paid to the United States for these lands $852,219.95.

The parties were unable to stipulate as to the value of the property described in the mortgage deed of July 1, 1887, not including any of the granted lands, and proof of the value of the railroad lines and their appurtenances, was left open.

RICHARD KOEHLER, called as a witness on behalf of complainant, testified, (Vol. IV, pp. 1902-1908, Transcript of Record) that "in his judgment the railroad of the Oregon

and California Railroad Company, including all equipment and rolling stock, and the other property mentioned in the mortgage of July 1, 1887, with the exception of the land grant lands, was of the value, at that time, of about $50,000 per mile;" that at the time the company owned 451 miles of railroad in Oregon. Upon cross examination he testified that "he estimated the value of the road, at the time of the Union Trust Company mortgage, at $50,000 a mile, and based that figure upon his remembrance of the value of the railroad property generally, the cost of construction of railroads, and its profits and earning power. * * * * He figured that if the connection was made with the California and Oregon line, in California, there would be a future, probably, for the road; if connection had been absolutely impossible, for whatever reason it may have been, the value would have been less, how much less he is not prepared to say; cost of construction from Ashland, south, was very great, it was an expensive piece of road to build, that is, to connection with the California and Oregon line, over the Siskiyou Mountains; the road was only once in the hands of a Receiver, but it was near bankruptcy often; it was not bankrupt in 1884, it never came to actual bankruptcy until January, 1885." This estimate would

place the value of all the property covered by the mortgage of July 1, 1887, other than the land grant lands, at $22,550,000, or $255,000 in excess of the principal of the bonds to be secured thereby. This value, as shown by his testimony, was more or less speculative, in that it rested upon "future probability for the road."

Pursuant to the rules and regulations of the Department of the Interior, all patents issued to these lands were issued based upon applications in writing therefor, filed from time to time, in the appropriate United States Land Office, by the company as the "successor and assignee" of the East Side Company and West Side Company, respectively. These applications contained description lists, and each application was supported by an affidavit signed and sworn to by the Land Agent of the company, thereto duly authorized, alleging, among other things, that "the said lands are vacant, unappropriated, are not interdicted mineral, nor reserved lands, and are of the character contemplated by the granting Act" under which patents were applied for and issued, as stated.

The contracts and deeds executed by the company prior to about the year 1894, contain (substantially) these words:

> "Reserving, however, a strip of land one hundred feet wide, to be used by the Oregon and California Railroad Company for right of way or other railroad purposes, when the railroad of said Oregon and California Railroad Company or any of its branches is or shall be located upon the premises, and the right to use all water needed for the operating and repair of said railroad, and also reserving all claim of the United States to the same as mineral lands."

The words "and also reserving all claim of the United States to same as mineral lands" were stricken from the reservation clause in the contracts and deeds executed by the company from about 1894 until about 1902, and in contracts and deeds executed by the company during and at all times after about the year 1902, the words, "and also reserving and excepting from said described premises so much thereof as may be mineral lands", were substituted therefor.

The company claims to be the owner of all rights, lands and interest in lands, at any time excepted or reserved thereby.

The defendants-appellants claim that the Oregon and California Railroad Company is and claims to be the owner of the lands grant-

ed, which have not heretofore been sold and transferred, together with all right of way and other rights and property in Oregon, described as granted by Section 3 in the Act of July 25, 1866, and Section 1 of the Act of May 4, 1870, and all the rights and property reserved, as stated, for any and all railroad purposes, and the improvements upon the said lands and property, and that the same is subject to the mortgage of July 1, 1887.

A correct statement of all maps of survey and location filed in the office of the Secretary of the Interior by the East Side Company, and the Oregon and California Railroad Company, and the dates thereof, under and pursuant to the provisos of the East Side Grant; also a correct statement of the map filed in the same office by the West Side Company, under and in pursuance of the West Side Grant, with the dates thereof, is set out in Vol. IV, at pages 1713-1716 Transcript of Record. The map of the first section of the East Side line, from East Portland to Jefferson, was filed October 29, 1869. A map of the twelfth section, extending from Sec. 30, T. 40 S., R. 2 E. to the southern boundary of the State of Oregon, was filed August 18, 1884. A map of the first section of the West Side line, extending sixty miles from Portland, by way of Forest Grove and McMinn-

ville, towards Corvallis, was received by the Interior Department July 1, 1868, returned July 6, 1868, for verification, and received by the Department of the Interior September 16, 1868, but no action taken thereon. A second map of the first sixty miles was returned to the Interior Department, received September 22, 1868, and a third map September 24, 1868, which was sent to the Commissioner of the General Land Office November 22, 1871. A map of the section extending from Portland to McMinnville, and from Forest Grove to Caster Creek, was filed May 17, 1871, and the map of the remainder of the line, from Caster Creek to Astoria, was filed February 2, 1872.

A correct statement of the dates of construction, completion, approval, and acceptance, of the several sections of the East and West Side railroads, separately stated, is set out in Vol. IV, pp. 1717-1720 Transcript of Record, and shows that the first section of twenty miles of the East Side railroad was completed December 24, 1869, favorably reported upon by Commissioners December 31, 1869, submitted by the Secretary of the Interior to the President January 26, 1870, and its acceptance recommended, and such recommendation approved by the President January 29, 1870. The second, third and fourth

sections of twenty miles each, extending to a point about one-half mile beyond the station of the City of Albany, were completed during the year 1870, reports of Commissioners transmitted by the Secretary of the Interior to the President February 28, 1871, with recommendations that the road be accepted, and such recommendations approved by the President February 28, 1871. The fifth and sixth sections of twenty miles each were completed, and Commissioners' reports thereon submitted by the Secretary of the Interior to the President March 7, 1872, with recommendations that the line be accepted, which recommendations were approved by the President March 11, 1872. The seventh, eighth and ninth sections, beginning at a point two and one-half miles northwest of Eugene City, and ending near Roseburg, were completed in 1872, report of the Commissioners was submitted by the Secretary of the Interior to the President July 10, 1878, with recommendations that the line be accepted, and such recommendations were approved by the President July 11, 1878. The tenth section of 45 miles was completed and wholly in operation from May, 1883, and 28 miles thereof, from Roseburg to Riddle, had been in operation since about November, 1882. The report of the Commissioners was sub-

mitted by the Secretary of the Interior to the President August 20, 1883, with recommendations that the line be accepted, and such recommendations were approved by the President August 29, 1883. The eleventh section of 100 miles in length, extending from a point 45 miles south of Roseburg, to a point about 1¼ miles south of Ashland, was open for public use from the north end to Glendale, 20 miles, May 14, 1883; to Grants Pass, 55 miles, December 4, 1883; to Phoenix, 91 miles, February 25, 1884; to Ashland, 99 miles, May 5, 1884. The report of the Commissioners was submitted by the Secretary of the Interior to the President January 13, 1887, with recommendations that the section be accepted, and such recommendations were approved by the President January 29, 1887. The twelfth section, extending from the point 1½ miles south of Ashland, to the boundary line between Oregon and California, a distance of 24.135 miles, was completed prior to June 20, 1888, the report of the Commissioners thereon was transmitted by the Secretary of the Interior to the President October 23, 1889, with recommendations that the railroad be accepted, and such recommendations were approved by the President November 8, 1889.

The acceptance of the construction of the road, the reports of the Commissioners, the

recommendations by the Secretary of the Interior to the President that the railroad be accepted, and the approval by the President thereof, should be considered in connection with the way and manner in which the grant of July 25, 1866, had been administered, from the beginning, and the knowledge thereof brought to the attention of the Secretary of the Interior, and to the Department of Justice, by the correspondence between the European & Oregon Land Company, Attorney General Geo. H. Williams, Willis Drummond, Commissioner of the General Land Office, and C. Delano, Secretary of the Interior, (Defendants' Exhibits 373 to 378, both inclusive, Vol. XIV, pp. 7371-7502 Transcript of Record; Governments' Exhibit 109, Vol. X, pp. 5322-5373 Transcript of Record) also in connection with subdivision XXI, "Stipulation as to the Facts," (Vol. IV, pp. 1584-1623 Transcript of Record) and Exhibit No. 15 to Stipulation, (Vol. IV, pp. 1721-1724 Transcript of Record) and other facts imputing notice to the United States as to the way and manner in which these land grants have been administered, and the lands sold, from the beginning, without regard to the "actual settler" clause in the proviso of the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870.

EXHIBIT No. 11, (Vol. II, pp. 1152-1155 Transcript of Record) correctly shows the quantity of land patented to the company, compiled by years, separately stated as to each grant, giving the dates of all Acts of Congress recited or referred to in such patents, and shows that patents issued continuously from 1871 to 1909, as to the East Side Grant, and from 1895 to 1903, both inclusive, as to the West Side Grant, and that a total acreage of 2,894,566.98 acres has been patented under these grants. The West Side Grant patents were issued to the Oregon and California Railroad Company, "as successor to the Oregon Central Railroad Company," but no patent issued for lands of the East Side Grant contains a recitation that it was issued to the Oregon and California Railroad Company "as successor to" any company.

The schedule of suits brought by various parties known as cross-complainants in this record, is set out as Exhibit P, to the bill of complaint, (Vol. I, pp. 528-537 Transcript of Record) showing 66 suits in all, of which 38 affect lands of the East Side Grant, (Act of July 25, 1866) and 28 affect lands of the West Side Grant, (Act of May 4, 1870). During the month of December, 1908, all of these suits other than the one brought by Roy W.

Minkler, were consolidated with the main suit, and thereafter all of the plaintiffs in said suits, other than Roy W. Minkler, on or about January 15, 1909, filed their cross-complaints, and on April 24, 1911, the demurrers of the defendants to said cross-complaints were sustained by the court. On June 9, 1910, the suit brought by Roy W. Minkler was dismissed, by mutual consent of all parties thereto.

On June 19, 1878, Congress passed an act (20 Stat. 169) entitled, "An Act to create an Auditor of Railroad Accounts and other purposes," a copy of which act is set out in Vol. IV, pages 1721-1724. Subsequent acts of Congress relating to the same, under which the Oregon and California Railroad Company, from 1879 to 1903, made its reports contemplated thereby, as set out in subdivision XXI of "Stipulation as to the Facts," (Vol. IV, pp. 1590-1623) which reports show the average price per acre for all sales to date of each report, maximum price per acre from sales, received, and maximum price per acre, asked, and showing continuous disregard of the "actual settler" clause in the proviso of the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870,—are as follows:

Act of Congress of March 3, 1881, 21 Stat. 385-413, (on pages 409-410)

Act of Congress of April 17, 1900, 31 Stat. 86-134, (on pages 124-125)

Act of Congress of March 3, 1901, 31 Stat. 906-1009, (on page 1000)

Act of Congress of June 28, 1902, 32 Stat. Part 1, pp. 419-481, (on pages 455-456)

Act of Congress of March 3, 1903, 32 Stat. Part 1, pp. 1083-1147 (on page 1119)

In this connection it should be noticed that the Act of Congress of June 19, 1878, (20 Stat. 169) purports to repeal Section 20 of the Act of Congress of July 1, 1862, (12 Stat. 489), and the Act of Congress approved June 25, 1868, (15 Stat. 80), relating to the administration of the railroads, and reports thereby known as the "Pacific Railroads."

It is stipulated that all Committee Reports and debates in Congress, as appearing in the official printed copies of the Congressional Globe or Congressional Record, and other proceedings in Congress which appear in any recognized Official Reports, relating to the enactments of the Acts of Congress approved

July 25, 1866, June 25, 1868, April 10, 1869, May 4, 1870, January 31, 1885, and September 29, 1890, shall be treated as offered and received in evidence, subject to the defendants' right to object to all or any part thereof as incompetent, irrelevant, and immaterial. There is a like stipulation as to the decision of the Supreme Court in Holliday vs. Elliott, 8 Ore. 81.

EXHIBIT No. 16 to Stipulation, (Vol. IV, pp. 1725-1729) is admitted to contain a correct statement of the stock quotations therein set forth, and shows the stock quotations of the Central Pacific Railroad Company, from October 1, 1886, to December 1, 1888.

In addition to such testimony as is thus stipulated, the United States called witnesses who testified substantially as follows:

W. W. COTTON: to the effect that on December 8, 1911, he was Secretary of the Oregon and California Railroad Company, and had been such since September 15, 1904; that his predecessor was Geo. H. Andrews; as Secretary he had custody of the corporate records of the company, and that these records consisted of six volumes, Volume I commencing March 17, 1870, and Volume VI ending with the meeting of April 10, 1906. These

volumes were identified by the witness, and delivered to his clerk for use of counsel for the Government, in this case, it being stipulated that no question would be raised as to the identification thereof. Mr. Cotton also testified that he had in his custody the corporate records of the Oregon Central Railroad Company, West Side, and Oregon Central Railroad Company, East Side, and that he would deliver all these records to his clerk, L. F. Steel, who had personal charge thereof. The witness identified all these records, and thereupon it was stipulated that no question would be raised as to the identification thereof. (Vol. IV, pp. 1732-1735 Transcript of Record.)

L. F. STEEL: produced all these records, and the complainant offered, and there was received in evidence, as "Government's Exhibit 100-A," the complete records of the Oregon Central Railroad Company, known as the West Side Company, and the complete records of the Oregon Central Railroad Company, of Salem, known as the East Side Company, identified as "Government's Exhibit 100-B," which are hereinafter described. (Vol. IV, pp. 1735-1736 Transcript of Record.)

JOSEPH GASTON: The witness gives an historical statement of the preliminary survey for a railroad from Marysville, in California, to the Columbia River, in Oregon, in 1863, his subsequent connection with Simon G. Elliott, Geo. H. Belden, and A. C. Barry; the incorporation of various railroad companies during 1863 and 1864; the activity of A. C. Barry, at Washington City, in connection with railroad legislation; the work of Gen. Bidwell and Cornelius Cole, of California, which finally led to the passage of the Act of July 25, 1866; the action of the legislature of the State of Oregon in pledging the state to pay interest on $1,000,000 of the company's bonds, in aid of railroad construction; the action of the Legislative Assembly in passing Joint Resolution No. 13, October 10, 1866, designating the Oregon Central Railroad Company of Portland, as the beneficiary of the Act of July 25, 1866; the action of George L. Woods, then Governor of Oregon; Mr. Gaston's part in connection with the incorporation of the West Side Company; what took place in the office of the Secretary of State on October 6, 1866, when he claims these Articles of Incorporation were filed; the controversy that arose between his company and the Oregon Central Railroad Company of Salem, incorporated April 22, 1867, known

as the East Side Company; his activity in promoting the construction of the West Side line; his attempt to secure guaranty of its bonds by the City of Portland, and like guaranty of its bonds by Washington County and Yamhill County; his knowledge of the activity of the East Side Company, and the various promoters of the two companies, and the controversy between them; the literature published and circulated by these companies, and their friends; his knowledge of Ben Holladay and the work done upon both lines; his knowledge of the passage of the resolution of October 20, 1868, by the Legislative Assembly of the State of Oregon, rescinding the Joint Resolution of October 10, 1866, and designating the East Side Company as the beneficiary of the grant of July 25, 1866; the division of the people in respect to this controversy; the conduct of Senator Williams and Senator Corbett in respect to these two companies; the subsequent acquisition of the West Side Company by Ben Holladay and his associates; the support given the West Side Company by John C. Ainsworth, R. R. Thompson, C. H. Lewis, W. S. Ladd, H. W. Corbett and other residents of Portland, at that time, wholly on the West side of the Willamette River; the division in the legislature which convened in September, 1868,

upon geographical and other lines, and other matters of more or less interest from an historical standpoint, relating to the commencement of railroad construction in Oregon, and the efforts of the East Side Company and West Side Company, respectively, to secure the benefits of the Act of July 25, 1866.

As stated, he testified particularly as to the circumstances under which he received back from the Secretary of State, as he claims, on October 6, 1866, the incomplete and unacknowledged Articles of Incorporation of the Oregon Central Railroad Company, West Side, for it appears that at the time these Articles were delivered to the Secretary of State on that date, there was no certificate of acknowledgment, and that he himself was the notary public who certified, as of date November 16, 1866, that the first eight signers to the Articles of Incorporation executed and acknowledged the same before him on September 29, 1866; that M. M. Melvin executed and acknowledged same on October 23, 1866; George L. Woods on November 10, 1866; R. R. Thompson, J. C. Ainsworth, S. G. Reed, John McCracken, and C. H. Lewis, on November 16, 1866, and Seth R. Hammer, a notary public, on November 20, 1866, certified that B. F. Brown and Thomas H. Cox, and

J. Gaston, executed and acknowledged the Articles on November 20, 1866.

It will be recalled that House Joint Resolution No. 13, designating the West Side Company as the beneficiary of the Act of July 25, 1866, was passed on October 10, 1866, and it may well be claimed that the legislature thereby waived the defective incorporation of the Oregon Central Railroad Company, West Side, if such incorporation was defective. The legislation, if properly passed, was an act of legislation which, as to the West Side Company, impliedly repealed the formal requisites of the Incorporation Act of 1862, then in effect, and in any event the United States could not complain, and has never complained, of this irregularity. The corporation was at least a *de facto*, if not a *de jure* corporation, and remained as such until the transfer of all its property to the Oregon and California Railroad Company, on October 6, 1880, by deed sufficiently broad to convey not only the railroad line and its appurtenances, but all rights which that company at any time had in or to any grant made by the Acts of July 25, 1866, or May 4, 1870. The more serious question is whether or not the Legislative Assembly had power to pass Senate Joint Resolution No. 16, on October 20, 1868, attempting to revoke the declaration made

by House Joint Resolution No. 13, passed October 10, 1866, designating the Oregon Central Railroad Company, West Side, and by Senate Joint Resolution No. 16 attempting to designate the Oregon Central Railroad Company, East Side, as the company entitled to the benefits of the Act of July 25, 1866.

Politics figured extensively, during the year 1866, and up to and including the year 1870, in all these matters, as the records show. H. W. Corbett was elected United States senator by the legislature of 1866; George H. Williams was then United States senator, elected in 1864, and was a candidate for re-election at the expiration of his term, which would take place, if at all, in 1870; J. S. Smith, who resided at Portland, Oregon, then located on the west side of the Willamette River, was elected to Congress in June, 1868, and he was one of the incorporators of the West Side Company, and although a Democrat, co-operated with H. W. Corbett, R. R. Thompson, J. C. Ainsworth, S. G. Reed, and C. H. Lewis, as the leading spirits on the west side of the Willamette River, at Portland, desiring to promote the West Side Company. J. H. Mitchell was one of the original incorporators of the West Side Company, in co-operation with George L. Woods, then Governor of the state, but he afterwards

united with J. S. Smith, J. H. Moores, I. R. Moores, and Samuel A. Clark, representing the Salem interests, in the incorporation of the Oregon Central Railroad Company of Salem, (East Side Company) on April 22, 1867. Governor Woods had actively cooperated with Mr. Gaston in the incorporation of the West Side Company, and Mr. Gaston testified, in substance, that H. W. Corbett, W. S. Ladd, and Governor Woods, appeared before the House prior to the passage of House Joint Resolution No. 13, and all made speeches or statements in favor of its passage. Governor Woods wrote a special message in relation to the railroad grant tendered by the Act of July 25, 1866, and a selected committee of the House, as shown by the House Journal of 1866, through its chairman, Mr. Foudray, of Jackson County, made an extended report, (Vol. IV, pp. 1821-1831 Transcript of Record) and reported therewith House Bill No. 78, which was passed October 24, 1866, (Session Laws 1866, pages 3-5) This report presents an interesting picture of the situation in western Oregon at that time, and the need of a railroad such as contemplated by the Act of July 25, 1866. The Committee, among other things, says: (Vol. IV, p. 1827 Transcript of Record)

"We come now to consider a definite proposition. Through the efforts of a few of our citizens, acting in conjunction with some railroad capitalists of California, and aided by the Pacific Coast delegation in Congress, a grant of twenty sections of public land per mile has been secured from Congress to aid in constructing a line of railroad from Portland, Oregon, to the Central Pacific Railroad in California. It is made the duty of this legislature to designate the company which shall receive and manage so much of this land grant as lies within the State of Oregon. In view of these facts the following named gentlemen have incorporated themselves under the general incorporation law of this state, to-wit: J. S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, Edward R. Geary, S. Ellsworth and H. W. Corbett, under the name and style of "The Oregon Central Railroad Company," for the purpose of receiving the said grant of land, and using it so far as it may go, towards the construction of the proposed railroad, passing through the Willamette, Umpqua and Rogue River Valleys. Under present circumstances, the land is not available for the purpose of raising

money, one of the grant conditions being that twenty miles of railroad must be finished and put in operation before the government patent will issue for the land. * * * It is proposed by the Oregon Central Railroad Company, that if the legislature will levy and appropriate whenever a section of twenty miles of railroad is finished and put in operation, a sum of money sufficient to pay the interest on $500,000 of the company's bonds; and whenever one hundred miles is finished and put in operation, the additional sum sufficient to pay the interest on another $500,000 of the company's bonds, and so pay this interest for twenty years, and also loan the company the sum of $10,000 for preliminary contingent expenses, the whole amount to be secured by a mortgage of all the company's property to the State, and to be returned at the expiration of the twenty years, then this Company agrees to proceed at once to the work of constructing the road. After fully considering the matter, your committee are decidedly in favor of the proposition and have reported the accompanying bill to carry the same into effect." (Referring to House Bill No. 78 above mentioned.)

S. S. MARR, a witness on behalf of complainant, testified (Vol. IV, pp. 1848-1860, Transcript of Record), that he was law examiner in the General Land Office and continuously in the Railroad Division thereof since May 1, 1877, and that

> "The work of determining that the land was free from all claims was the work of the Railroad Division, and that Division first determined whether it was within the limits of the grant at all. After witness came into the office it was determined by the office whether the railroad had been constructed opposite the lands claimed, and whether the lands had been earned. Prior to that time this had not been done. It frequently happened that there was land, particularly under the old state grants, which the office certified without knowing whether the road was constructed at all, and that happened so in the other grants, too, sometimes; witness thinks that this was avoided when he came in the office in 1877. The office then determined that the road was constructed opposite the land and it ought always to have been done so. The office determined whether there were conflicting homestead, pre-emption or other claims of record; that is any claim under

the public land laws of the United States, or any other laws of the United States, or any private claim, or anything else that conflicted with that grant. In the examination of those grants, if they found there was a claim existing to that land, either at the date of the grant or at the date of the definite location of the road, then they would cut that tract out of the list. That would defeat the grant, even though the land might have been free at the time of the selection or listing by the company. If it was covered by some claim at the date of the grant or at the date of the definite location, it ought not to pass under the grant. These are what the office calls present grants, and when the line of the road is definitely located, then the grant attaches in the primary limits; and whatever is free and clear and of the character of the lands intended to be granted, passed at the time of the definite location of the road, or did not pass at all. In the indemnity limits, the right accrued on selection, and it did not make any difference what the previous condition of the land might have been if it was clear at the time of the selection; but in the primary location, that land must have been free at the

> date of the grant and at the date of the definite location. Witness does not think that outside of the several things mentioned by him that the Railroad Division determined anything else. When these things were all determined in favor of the Railroad Company, the list was submitted to the Secretary, with recommendations that it be approved. (Vol. IV, pp. 1854-5-6, Transcript of Record).

The witness testified, over the objection of defendants that the same was immaterial and incompetent, that since he had been identified with the Railroad Division in 1877, the Railroad Division had never, in recommending a list or selection for patent, considered or determined whether any of the alleged conditions subsequent annexed to the grant had been violated; that after the decision of the Supreme Court in Schulenberg v. Harriman, the Department of the Interior, and particularly the Railroad Division of the General Land Office, for a short period only along in the early 80's, when there was a question as to looking to the forfeiture of these grants, directed that patents should not be issued under railroad grants where the road had been constructed after the time prescribed in the law when it should have been constructed, but this was afterwards set aside, that is in the

early 80's they were instructed by the Department of the Interior not to issue patents for lands to railroad companies which constructed the railroad after the time prescribed; he recalls that at that time there were many acts pending in Congress for the forfeiture of those grants, some general acts as to all grants, and a great many acts relating to specific grants, and that the order of the secretary in most instances referred to the fact that legislation was pending, and no patent should be issued until Congress had acted,—this was set forth in Donaldson's Public Domain; in fact, the Act of March 3, 1887, was under consideration some time before it was passed, and the General Forfeiture Act of September 29, 1890, was under consideration for some time, but he does not remember how long. He had always attempted to ascertain, since he had been connected with the Railroad Division, whether the roads claiming lands under these land grants had constructed their roads opposite to and coterminous with the lands applied for, and he thinks that this rule has not been departed from since he has been with the Railroad Division. For a time he was instructed not to approve for patents lists applied for where the roads were not constructed within the time, although at the time of the application for patent the road had

been constructed passed or opposite to and coterminous with the lands; and that was particularly from the time these acts introduced in Congress were first introduced up to September 29, 1890, when the General Forfeiture Act was passed, that that practice prevailed.

J. F. CASEY, a witness on behalf of complainant, testified, (Vol. IV, pp. 1861-1887, Transcript of Record), that he had been employed in the Railroad Division of the General Land Office since about March 4, 1911, but had been employed in other divisions of the General Land Office for about four years, between 1889 and 1893, and had been continuously in the General Land Office since 1893. That under the act of July 25, 1866, no lists or selections were made except in the name of the Oregon and California Railroad Company; under that Act lists and selections were made in the general form of List No. 1 (Government's Exhibit 111), dated July 12, 1870. Beginning on or about June 17, 1876, the selections and lists were upon the general form of List No. 8 (Government's Exhibit 111-A). From the year 1885 the selections and lists were upon the general form of List No. 16 (Government's Exhibit 111-B), and that form continued until November 19, 1888, when the lists and selections were in the general form of List No. 17 (Government's Ex-

hibit 111-C). On September 15, 1904, and thereafter, the selections and lists were in the general form of List No. 104 (Government's Exhibit 111-D). On June 15, 1908, the lists and selections were in the general form of List No. 106 (Government's Exhibit 111-E); on September 21, 1908, and since that time, lists and selections have been in the general form of List No. 116 (Government's Exhibit 111-F). All lists and selections upon which patents have been issued under the Act of May 4, 1870, were made in the name of the Oregon and California Railroad Company. The corrective patent issued on June 21, 1909, was issued as "Supplemental Patent No. 3 for 161.75 acres of land covered by selection List No. 2 of September 23, 1871," to the Oregon and California Railroad Company. The records show that this matter was referred to Mr. Lord, an employe of the Railroad Division, who prepared the letter transmitting the patent to the Recorder for signature. Mr. Lord is now dead. Every one knew that this suit, (referring to this suit commenced September 4, 1908), was pending, but witness could not tell whether Mr. Lord knew it. It was Mr. Lord's duty to know about the issuance of patents and to take orders as to refusal to issue further patents, and if there was a suspension of the further issuance of

patents on account of this suit, or for any other reason, Mr. Lord would be apt to have knowledge of it; he would get that knowledge just like the rest of the other employes in the office; that is, unless he was told unofficially, there would be an order issued. The original letter of Secretary Delano to the Commissioner of the General Land Office dated June 5, 1872, is not in the files in the General Land Office, and he cannot tell where the original is. It would probably be in these files. He could not tell why the original letter of Secretary Delano addressed to Commissioner Drummond should be in the Secretary's office and not in the Commissioners' office (referring to Government's Exhibits 109, 109-A, 109-B, 109-C, 109-D, Vol. X, pp. 5322-5373). In the jacket he found an original autograph letter of George H. Williams, written on stationery "Department of Justice, Washington, April 20, 1872," addressed to Hon. Willis Drummond, Commissioner of General Land Office, Washington, D. C., and that was the only enclosure in Jacket No. 92,880 at that time, and these three jackets were the only ones that he found anywhere in the office or files of the General Land Office, or the files of the office of the Secretary of the Interior, relating to this subject matter.

It was stipulated that if this witness was recalled, he would testify that the records of the General Land Office show that the forest lieu selections referred to in Exhibit No. 9 to the joint and several answer of the defendants, were examined as to the title of the base lieu land tendered to the Government by ten different law clerks in the General Land office during the time that they were pending in the Interior Department, and that, in so far as the titles to any of said base lands were accepted and approved by the Interior Department, as set forth in said Exhibit No. 9 to said joint and several answer, as corrected by Exhibit No. 17 to the "Stipulation as to the Facts" (Vol. II, pp. 1143-1148, Vol. IV, pp. 1730-1731, Transcript of Record), the same were approved and accepted by these law clerks, and it was further stipulated that if they were called each of them would testify that he approved the title to these base lands without actual knowledge of the provisions of the Act of April 10, 1869, or of May 4, 1870; that he passed the title after an examination of an abstract of title showing patent by the United States to the Oregon and California Railroad Company, conveyance by the latter to a certain grantee and conveyance by the latter or some subsequent grantee to the United States; the patent record of the General Land Office was examined

to verify the statement in the abstract as to the issuance of patent, all of which patents were recorded and of record at length in the General Land Office; the tract books were then examined to ascertain that the lands tendered as base had not been used before for the same purpose, and to ascertain generally whether the lands tendered were proper base for the selections tendered; each of said law clerks passing upon these titles then approved the title, assuming that the patent created an unconditional and unrestricted title, and without examining the granting acts, and without actual personal knowledge of the provisions of the Act of April 10, 1869, or the Act of May 4, 1870; after the title to the base lands tendered had been examined in this manner, the selection was referred to the several divisions of the General Land Office to ascertain if the selected lands were subject to any prior adverse right; after the selection had been approved by each division, it was referred to the Chief of the Forest Lieu Division, with the certificates of all of the law clerks and other employes who had examined and approved the selection; the Chief of the Forest Lieu Division then approved the selection without special examination of any of the subjects investigated by the law clerks and chiefs of the several divisions; in reliance

upon the approval of the latter, the selection was then approved by the Commissioner of the General Land Office, and in like manner approved and patent ordered issued by the Secretary of the Interior.

All this testimony, excepting as to the approval by the Secretary of the Interior, was received under the objection of the defendants that the same was incompetent, irrelevant and immaterial and upon the ground particularly that such testimony cannot be considered to impeach, qualify or limit the action of the Secretary of the Interior, or of the United States acting by and through him as such Secretary.

FRANK GRIFFITH, called as a witness on behalf of complainant, testified, (Vol. IV, pp. 1879-1902, Transcript of Record), that he had been in the employ of the Government since 1899 in the Interior Department, under assignment to the attorneys for the Government in connection with public land cases, and that he had examined the files of the office of the Secretary of the Interior and the General Land Office with reference to all correspondence and documents relating to land grants of the Oregon and California Railroad Company involved in this suit, and that he found among the files of the General Land

Office and the office of the Secretary of the Interior the correspondence which has been introduced in evidence in this case as Government's Exhibit 109, and this exhibit, together with the other documents that have been introduced in evidence by the defendants in connection therewith, constitute all of the letters, files and other records relating to that question which are on file in the office of the Secretary of the Interior and the General Land Office; that during the early administration of the Oregon and California Railroad Company land grants, George H. Williams, both while he was in the Senate and was Attorney General of the United States, acted as the medium of communication between the railroad company or its officers on the one hand, and the Interior Department, or the Commissioner of the General Land Office on the other part, and that he would say that he found about forty-five communications which were presented to the Commissioner of the General Land Office or the Secretary of the Interior by George H. Williams which emanated from the Oregon and California Railroad Company, or its officers, relating to these grants, and they related to every subject connected with the road, including filing maps of location, etc., of lands, issuance of patents, and subjects of that kind.

It was stipulated that Richard Koehler if called as a witness by the complainant, would testify (Vol. IV, pp. 1908-09, Transcript of Record), that the Southern Pacific Company is solvent and financially responsible and able to pay all outstanding bonds of the Oregon and California Railroad Company, guaranteed by Southern Pacific Company, as set forth in the pleadings and shown by the evidence in this case.

All of the exhibits on behalf of the Government are printed in full in the record beginning with Government's Exhibit 100-A, Vol. IX, page 4285, Transcript of Record, and ending with Government's Exhibit 130, Vol. XI, page 5766, Transcript of Record. The letter contained in the exhibit last named being set out in full in Volume IV, pages 1910-1920, Transcript of Record.

Government's Exhibit 100-A consists of the minute books of the Oregon Central Railroad Company of Portland, Oregon, (West Side), Volumes I, II, III and IV, commencing with the first meeting of the stockholders May 24, 1867, and ending with the last meeting of the Board of Directors May 27, 1895, and being the whole of Volume IX, Transcript of Record. A complete index of this volume is found in Volume XVII, pages

8721-8738, Transcript of Record. The record constitutes an interesting narrative of the corporate action of the West Side Company, containing among other things, a record of a communication of date August 15, 1870, from Ben. Holladay as President of the Willamette Valley Railway Company, proposing to purchase all the right, title and interest of the Oregon Central Railroad Company in and to the Act of May 4, 1870; the resolution accepting this proposition (Vol. IX, pp. 4425-4427, Transcript of Record); the action of the directors on April 17, 1871, accepting transfer from Willamette Valley Railway Company on that date to the Oregon Central Railroad Company of the properties granted by the Act of May 4, 1870, (Vol. IX, p. 4439, Transcript of Record); a copy of deed of date April 17, 1871, from Willamette Valley Railway Company to Oregon Central Railroad Company, (Vol. IX, p. 4457, Transcript of Record); copy of mortgage of July 15, 1871, executed by Oregon Central Railroad Company (West Side) to Milton S. Latham and Faxon D. Atherton, (Vol. IX, p. 4477, Transcript of Record); the recorded fact that a copy of the resolutions authorizing the sale and conveyance of the property of the Oregon Central Railroad Company (West Side), including all lands granted under the Act

of May 4, 1870, was forwarded to the Secretary of the Department of the Interior at Washington, D. C., and mailed presumably on or about August 15, 1870, (Vol. IX, p. 4430, Transcript of Record), and that a like copy of the resolution accepting the transfer and conveyance made by the Willamette Valley Railway Company on April 17, 1871, to the West Side Company was also forwarded to the Secretary of the Interior at Washington, D. C., about that date, (Vol. IX, p. 4456, Transcript of Record). These facts are pertinent as showing that the United States had notice on August 15, 1870, of the sale and conveyance of the granted lands made to the Oregon Central Railroad Company (West Side) under the Act of Congress of May 4, 1870, as early as about August 15, 1870, and had notice of the sale and re-conveyance of the same by the Willamette Valley Railway Company to the West Side Company on or about April 17, 1871, and that the conveyance of the entire grant in each case was *in solido*, and, of course, without any regard to the provisions of the "actual settlers" clause of April 4, 1870.

The minute books also show that on October 6, 1880, the Oregon Central Railroad Company accepted the proposition of the Oregon and California Railroad Company to pur-

chase all the property of the former company, (Vol. IX, p. 4869-4872, Transcript of Record), and that a deed on that date conveying all the property of the West Side Company to the Oregon and California Railroad Company, including the lands granted under the Act of May 4, 1870, was authorized, which deed, it is stipulated, (Vol. IV, p. 1561, Transcript of Record, Item 5) was on that date executed by the West Side Company and delivered to the Oregon and California Railroad Company, a correct copy of which is attached to the bill of complaint as Exhibit "C" (Vol. I, pp. 126-131, Transcript of Record), and a certified copy of which was filed with the Secretary of the Interior of the United States on or about August 20, 1880, and from which deed and the resolution authorizing its execution, it appears that all the property of the West Side Company was for a valuable consideration sold, together with the lands granted under the act of May 4, 1870, to the Oregon and California Railroad Company, and that these lands were sold *in solido,* and of course without any regard to the "actual settlers" clause of section 4 of the Act of May 4, 1870.

Government's Exhibit 100-B (Vol. X, pp. 4893-5129, Transcript of Record), consists of the minutes of the Oregon Central Railroad

Company of Salem, (East Side), beginning with the first meeting of the incorporators on April 22, 1867, and ending with the meeting of the stockholders on March 28, 1870.

A part of Government's Exhibit 100-B consists of the stock book from the records of minutes of the Company, (Vol. X, pp. 5122-5145, Transcript of Record). These minutes constitute all of the records of the Oregon Central Railroad Company (East Side), and is an interesting narrative of the corporate action of that company, and shows the adoption of resolution authorizing the construction contract of April 23, 1867, with Albert J. Cook, (Vol. X, pp. 4906-07, supra); form of bond adopted same day, and resolution authorizing execution of first mortgage on first 150 miles adopted April 23, 1867 (Vol. X, p. 4918, Transcript of Record); the Supplemental Agreement to the construction contract with A. J. Cook & Co. on November 27, 1867, (Vol. X, p. 4922, Transcript of Record); modified construction agreement of May 12, 1868, with A. J. Cook & Co. (Vol. X, p. 4989, Transcript of Record), and supplemental construction contract with A. J. Cook & Co. of June 10, 1868, (Vol. X, p. 5004, Transcript of Record); committee report recommending transfer of the contracts of A. J. Cook & Co. to Ben Holladay September 16,

1868, (Vol. X, p. 5016, Transcript of Record); resolution assenting to the Act of Congress of July 25, 1866, adopted November 25, 1868, (Vol. X, pp. 5026-27, Transcript of Record), which resolution is as follows:

> "Whereas the Legislature of the State of Oregon, at its late session in Oct. 1868, by Joint Resolution designated "The Oregon Central Railroad Company", of Salem, Oregon, Incorporated April 22d, 1867, under the laws of Oregon, as the Company to take, manage & control the Land Grant given in aid of the construction of a railroad & telegraph line from Portland, Oregon, Southerly through the Willamette, Umpqua & Rogue River Valleys, by Act of Congress of date July 25th, 1866;
>
> "And Whereas such Legislature failed to designate any company until after the expiration of one year from the date of the passage of said Act of Congress,
>
> "Therefore, RESOLVED, that this Company—The Oregon Central Railroad Company of Salem, Oregon,—Organized April 22d, 1867, does hereby accept such grant, and does assent thereto, upon the terms and conditions specified in said

Act of Congress of July 25th, 1866, granting aid as aforesaid.

"AND RESOLVED FURTHER

"That the Secretary of this Company be & he is hereby instructed to prepare a true & certified copy of this preamble & resolution, together with a certified copy of such Joint Resolution, being known as Senate Joint Resolution No. 16, under the seal of this company, & forward the some forthwith to the office of the Secretary of the Interior, and have the same filed in such office as the assent of this Company to the grant aforesaid."

The minutes also show communication from Ben Holladay & Company of September 7, 1869 (Vol. X, pp. 5059-61, Transcript of Record) as to purchase of the properties of the Oregon Central Railroad Company (East Side); the action of the Board of Directors upon the proposition of Ben Holladay & Co. of date March 28, 1870 (Vol. X, p. 5072, Transcript of Record), as to settlement with the Oregon Central Railroad Company; the offer of the Oregon and California Railroad Company of date March 28, 1870, to purchase the properties of the Oregon Central Railroad Company, including its land grant (Vol. X, p. 5083, Transcript of Record); the agree-

ment between the Oregon Central Railroad Company and the Oregon and California Railroad Company dated March 28, 1870, (Vol. X, p. 5095, Transcript of Record), and resolution of that date authorizing the sale and transfer of the property of the Oregon Central Railroad Company (East Side) to the Oregon and California Railroad Company, (Vol. X, p. 5107, Transcript of Record); the stock book of the East Side Company (Vol. X, p. 5122, Transcript of Record), and the registered bonds of that company, Series "A," (Vol. X, p. 5129, Transcript of Record).

It appears that on March 28, 1870, the board of directors of the Oregon Central Railroad Company (East Side), (Vol. X, p. 5120-21, Transcript of Record) adopted the following resolution:

> "RESOLVED, that the President and Secretary of this Company be and they are hereby instructed to communicate to the Secretary of the Interior, the fact that this Company has sold, assigned, transferred and conveyed to the "OREGON AND CALIFORNIA RAIL ROAD COMPANY", of Portland, Oregon, all its right, title and interest, in and to the lands, franchises and benefits granted to

> the "Oregon Company by the Act of Congress of July 25th, 1866, and amendments thereto, granting lands to aid in the construction of a rail road and telegraph line from the Central Pacific Rail Road in California to Portland in Oregon."

The conveyance executed by the Oregon Central Railroad Company (East Side) of date March 29th, 1870, to the Oregon and California Railroad Company is referred to in the bill of complaint, and made a part thereof, as Exhibit "B" (Vol. 1, pp. 93-125, Transcript of Record), and it is stipulated (Item 17, Vol. IV, p. 1558, Transcript of Record) that this deed was on that date delivered to the Oregon and California Railroad Company and recorded in the office of the County Recorder of the several counties in which was situated any part of the lands intended to be granted by the said Act of Congress of July 25th, 1866, and, (Item 18, supra,) that on April 4, 1870, the Oregon and California Railroad Company adopted a resolution, reciting the purchase under this deed of all the property of the East Side Company, including the lands granted under the Act of July 25th, 1866, and amendments thereto, accepting the grant conferred thereby, directing its president and secretary to file the assent of

the company thereto in the office of the Secretary of the Interior by filing a copy of the resolutions certified under the seal of the company and signed by the president and secretary respectively, and therewith a copy of the deed, and that on April 28, 1870, the Oregon and California Railroad Company filed in the offiice of the Secretary of the Interior an authenticated copy of this resolution and a certified copy of the deed of March 29, 1870 (Vol. I, pp. 26-28, Transcript of Record). This deed on its face purports to be a sale of all of the property of the East Side Company, including its land grant, to the Oregon and California Railroad Company, and the land grant is conveyed *in solido,* and of course without regard to the so-called "actual settlers" clause of the proviso of the Act of April 10, 1869, and the filing of certified copy of this deed in the office of the Secretary of the Interior of the United States is undoubted notice to the United States of the disposition and sale of this land grant in the manner indicated.

Governor Woods, in his special message to the Legislative Assembly on October 6, 1866, (Government's Exhibit No. 101, Vol. X, pp. 5146-5150 Transcript of Record), says:

"With a railroad running through the Willamette Valley, and via Oakland, Roseburg, Jacksonville and Yreka, to and connecting with the Central Pacific Railroad in California—thus putting ourselves in direct and speedy communication with the City of San Francisco, and the demands of our sister State, in which we have a community of interest — we should reap a benefit which cannot well be estimated. * * * In his biennial message for the year 1864, my predecessor called the attention of the Legislature to the route first above named, and forcibly enumerated the advantages to be derived from such an enterprise; and, in accordance with the suggestions, an Act was passed, the effect of which was to aid in its construction. (Session Laws 1865 page) But the amount provided for was so meager as to offer no inducement to capitalists for investment. * * * Your attention is called to an Act of Congress of July 25, 1866, donating twenty sections of the public lands for each mile of Railroad and Telegraph to be constructed from the City of Portland, Oregon, to, and connected with the Central Pacific Railroad, in California, which lands are to be selected within thirty miles

on either side of said road. *This grant, though quite liberal is wholly inadequate and will not, of itself, afford sufficient security to insure investment. Capital for the completion of this great work must come from abroad, and good policy requires that we should hold out inducements for investment.* I am happy to be able to communicate to you that capitalists controlling ample means for the construction of the entire road proposed, are now ready, and have signified their willingness to invest in the great enterprise as soon as the legislation necessary for such an investment can be had. * * * Under the General Incorporation Act, a corporation is about to be organized to be known as "The Oregon Central Railroad Company," composed of some of the most responsible and energetic business men of the state, whose purpose it is, if they can meet with proper encouragement, to immediately begin this great work. And I take the liberty to suggest that it would be well to make provision, by immediate enactment, by which through the above named corporation the State shall be able to reap the benefits of the liberal donations by Congress, and also to make provision for the payment of the interest on

> the bonds of the Company, necessary to construct and put into operation, the first section of twenty miles of the road. * * * A railroad is a public necessity. The farmers need it; the mechanics need it; the merchants need it; the manufacturers need it; all classes need it."

On January 1, 1868, (Government Exhibit No. 102, Vol. X, pp. 5151-2 Transcript of Record) the Oregon Central Railroad Company, West Side, issued a circular in the name of its officers, J. Gaston, President, and A. C. Whitson, Secretary, giving notice to the public, among other things stating:

> "1st.—The Oregon Central Railroad Company was incorporated and organized at the session of the Legislature held in September, 1866, *and received valuable grants of U. S. land,* and interest on bonds from the State of Oregon. Since that time it has duly filed its papers in the office of the Secretary of the Interior at Washington, D. C., and is now engaged in the location and construction of its railroad, having large subscriptions of home means."

On May 1, 1868, (Government's Exhibit No. 103, Vol. X, pp. 5153-7 Transcript of Record, Mr. Gaston, as President, and T. R.

Cornelius, W. T. Newby, J. C. Ainsworth, W. C. Whitson, and J. Gaston, as Directors of the West Side Company, issued another circular which it is stated was sent everywhere, stating, among other things,

> "1st.—The original "Oregon Central Railroad Company" was the only corporation in this state entitled to use this name, was incorporated under the General Incorporation Act of this state, at the session of our legislature for the year 1866; and at that time went before the legislature then in Salem, and procured the passage of House Joint Resolution No. 13, which designates this company to receive all the lands, and all the benefits of an Act of Congress, entitled, "An Act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California, to Portland, Oregon," so far as the land grant is located in Oregon. (This Act of Congress gives the Company about three million acres of land) Our Company has filed the necessary papers in the Department of the Interior at Washington, and has been officially recognized by the Secretary of the Interior. The legislature of our state, at the same session named, passed an Act pledging the state to pay

interest on one million dollars of our bonds for twenty years. After receiving these grants from the state, and the recognition of our rights to the land grant, by the Secretary of the Interior, we commenced surveying our line of road upon the west side of the Willamette River, and solicited subscriptions to the capital stock of the Company, and we now have subscriptions and donations of land, cash and other valuable property in aid of the road, amounting in value to near $300,000. In February last, the City Council of the City of Portland, upon the petition of nine-tenths of the voters of the City, passed an Ordinance binding the City to pay interest on $250,000 of our bonds, for twenty years, all deliverable on the first twenty miles of road. In March last, the County Commissioners of Washington County, upon the petition of four-fifths of the farmers, entered into a contract, obligating the County to pay interest on $50,000 of our bonds. On the 15th ult. we "broke ground" in the commencement of our work, and a force is rapidly pushing the work. We submit that these facts, showing our standing at home, should give us a fair name abroad."

Government's Exhibits Nos. 104 and 105, (Vol. X, pp. 5158-5227 Transcript of Record) appear to be copies of published pamphlets issued by the Directors of the Oregon Central Railroad Company, East Side, between May 1, 1868, and November 25, 1868, respectively, stating the contentions of the East Side Company in respect to the controversy with the West Side Company. These pamphlets were apparently issued in reply to the circular of January 1, 1868, (Government's Exhibit No. 102) and of May 1, 1868, (Government's Exhibit No. 103) issued by the West Side Company, under the dominance of Joseph Gaston, and which circulars were presumably written by him. The pamphlet of date May 1, 1868, (Government's Exhibit No. 104) was probably written by John H. Mitchell, then the attorney for the East Side Company, who probably wrote the pamphlet marked Government's Exhibit No. 105, which was published on or about November 25, 1868, as appears from the resolution of the Board of Directors of the East Side Company, of that date, adopting the statement of facts therein. In this "Statement of Facts," (Government's Exhibit No. 105) the East Side Company claimed "to be entitled to the control and management of the land grant given in aid of a railroad and telegraph line in Oregon,

by virtue of being designated as such corporation by joint resolution adopted by the Legislature of the State of Oregon, in October, 1868." In the course of this "Statement of Facts" this language appears:

> "Now we freely admit that if the Gaston or West Side corporation was organized, or in being at the date of the adoption of the joint resolution of October 10th, A. D. 1866, and such resolution referred to such corporation, then in existence, that then the claim of that company, as to vested rights, might be good; provided, it was free from fraud; and, provided further, such company had adopted a route in accordance with the requirements of the Act of Congress, which they did not, as we shall subsequently show."

The charge of fraud is predicated upon an alleged "secret fraudulent agreement" of date November 16, 1866, between Gaston and five of the ten persons whose signatures he obtained to the Articles of Incorporation of the West Side Company, prior thereto. (Vol. X, pp. 5196-5198 Transcript of Record.) It is claimed that this secret agreement was thus signed after the legislature of 1866 had adjourned, and that this agreement was before

the Senate in September, 1868. At the time there was under consideration the passage of Senate Joint Resolution No. 16, attempting to repeal House Joint Resolution No. 13, passed October 10, 1866. It is claimed that on November 16, 1866, two of the eight original incorporators, then residing at Salem,—J. S. Smith and I. R. Moores—upon discovery of the alleged fraudulent agreement filed new Articles of Incorporation under the name of "Oregon Central Railroad Company," four days prior to the filing of the articles of the West Side, or Gaston, Company. These Articles of Incorporation are set out in Vol. X, pp. 5199-5201 Transcript of Record. Nothing further was done under the same, and thereupon the East Side Company, on April 22, 1867, was organized.

> "We do, therefore, feeling implicit confidence in the enterprise in which we are engaged, and in the justness of our claim to the Congressional land grant, most respectfully submit this statement of facts, and reasons why "The Oregon Central Railroad Company," of Salem, Oregon is entitled to the grant referred to, to the exclusion of all others, to all persons, and to all officers and Departments of Government, that may be interested in rela-

tion to the same, in having justice and right prevail."

Thereafter, on January 9, 1869, the West Side Company pursuant to the action of its Board of Directors taken December 28, 1868, authorized the publication of reply to the pamphlet issued by the East Side Company, last mentioned, and the same is known in this record as Government's Exhibit No. 106. (Vol. X, pp. 5228-5291 Transcript of Record) This pamphlet purports to answer the contention made by the East Side Company in its pamphlet of November 25, 1868, known in this record as Government's Exhibit 105. (Vol. X, pp. 5176-5227) It bears inherent evidence that it is the joint production of Joseph Gaston and W. Lair Hill, who apparently represented the West Side Company in the suit brought by that company against the East Side Company, before R. P. Boise, Judge of the Circuit Court for the Third Judicial District. Judge Boise, who was for more than forty years one of the ablest *nisi prius* judges of the State of Oregon, and during that time for many years a Justice of the Supreme Court of the state, in the case mentioned overruled the demurrer of the East Side Company to the

complaint of the West Side Company, in a brief opinion, as follows:

> "At the time the Act of Congress was passed, neither of the rival companies was in existence, and the objection made to the Resolution of the Legislature could be made with equal force to the Act of Congress; but I think the language of both the Act and the Resolution may as well refer to a company yet to be incorporated as to one already organized. * * The plaintiff says in its bill that the defendant, through its agents and officers, has represented that it, and not the plaintiff, is entitled to the benefit to be derived from a compliance with the Act of Congress, to the injury and depreciation of plaintiff's credit. The defendant must be required to answer whether these things be true."

(Vol. X, p. 5240 Transcript of Record)

We quote further from this pamphlet:

> "But we not only claim the benefits of the land granted by Congress, upon the basis of a perfect de facto corporation to receive a grant under the Statutes of Oregon, at the date of the passage of the

Joint Resolution by the Legislature of 1866; but we claim that the East Side Company is totally mistaken, when they assert that it was necessary to the reception of the grant, at that time, that the company be perfectly organized."

We quote the language of W. Lair Hill, set out in this statement, as follows:

"This Land Grant act of Congress was not like the Oregon Donation Law of 1850, a grant of land to this company. It was merely an agreement to grant to such corporation as the legislature should "designate", upon compliance with certain specified conditions, namely, filing an "assent" prior to July 25th, 1867, and building twenty miles of railroad and telegraph line; and upon certain other terms directly beneficial to the United States. Neither was it in the power of the legislature of this state to grant the lands to any corporation; that body could only say what company should have the right to accept the terms, perform the conditions, and afterwards receive the grant proposed by Congress. This is not an artificial construction of the language of the Act of Congress, but its plain import and in-

tention—an interpretation which would always be given to it by a court—and the only interpretation of which it will admit.

"There is then nothing in the wording of the law, nor in the subject matter, inconsistent with the idea that Congress intended to include and did include in the provisions of the Act, as well a corporation not in esse, as one already organized, provided the State Legislature should "designate" such corporation, and it should afterwards organize and perform the required conditions. If this is not the meaning of the Act of Congress, then neither of the companies can take the benefit of the grant, for neither of them was in existence when the Act was passed. * * * The West Side Company, and they alone, having accepted the terms proposed by the Act of Congress, as required, having been designated, identified, pointed out, by the Legislature of 1866—having filed their "assent" within the year—having gone on in the performance, on their part, of these terms—will be entitled to the grant whenever they have performed the conditions annexed; and any attempt by Congress to confer

the benefits of the Act of 1866 upon any other company would be, in law as well as in fact, a denial and repudiation of its own agreement."

From this same pamphlet we quote:

"The West Side Company, and they alone, solicited of Congress an extension of the time limited in the grant for the construction of the road; and if it had not been for this extension (thanks to the Oregon delegation in Congress) the land would all have been forfeited. As witness Senators Williams and Corbett and Representative Mallory, of Oregon, and Representative Hubbard, of West Va."

(Vol. X, p. 5247 Transcript of Record)

An argument supporting the feasibility of the located line of the West Side Company, is set out in Vol. X, pp. 5253-5255 Transcript of Record. A succinct history of the organization of the Oregon Central Railroad Company, West Side, is set out in the record at Vol. X, pp. 5272-5285.

The pamphlet also attempts to set out the "Origin and History of the Holladay Company," as the East Side Company is desig-

nated in this pamphlet. (Vol. X, pp. 5283-5288, Transcript of Record.)

S. G. Reed, apparently representing himself, but really representing the West Side Company, wrote an address and remonstrance to the Congress of the United States, entitled, "Remonstrance against extending the time for filing assent to the act granting lands to the Oregon Central Railroad Company," and therewith proposed a substitute for the bill pending. (Government's Exhibit No. 107, Vol. X, pp. 5292-5297 Transcript of Record) The proposed substitute for the pending bill, which accompanied this remonstrance, was intended to validate the action of the Legislative Assembly of the State of Oregon in passing House Joint Resolution No. 13, October 10, 1866, designating the Oregon Central Railroad Company as the Company entitled to the benefits of the Act of July 25, 1866, and ratifying its Act of July 6, 1867, whereby the West Side Company filed its assent to that Act. Thereafter S. G. Reed, representing the West Side Company, prepared certain written objections to the passage of Senate Bill No. 94 (which was intended to amend the Act of July 25, 1866. (Government's Exhibit No. 108, Vol. X, pp. 5298-5321 Transcript of Record) This bill was introduced by Senator

Williams, and was in harmony with the opinion of O. H. Browning, then Secretary of the Interior. Both Senator Williams and Secretary Browning apparently entertained a mistaken view of the nature and effect of the Act of July 25, 1866, the attempted designation by the Oregon legislature, by the Resolutions of October 10, 1866, and October 20, 1868, supra, and the legal effect of the action of the two companies under the Act of Congress and these respective resolutions. It was an apparent attempt upon the part of Senator Williams and Secretary Browning to do a wholly unnecessary thing,—pass some legislation to review a grant which had vested in one or the other of these companies, and, under the so-called Reviving Statute, compel the contending companies to submit their claims to be the beneficiary of the land granted, to judicial determination. The report of the committee, (Vol. X, pp. 5319-5321 Transcript of Record) among other things says:

> "Congress ought not to decide between the two companies, because the questions involved are judicial in their nature, and the object of the accompanying bill is to provide so that both companies may have a standing in the courts of Oregon, and there have their legal rights and equities

fully examined and adjudicated. To declare by Act of Congress that the east-side company shall have the grant would be unfair, for it may turn out upon investigation before the courts that the west-side company was legally designated in 1866, in which event that company, for aught that can now be seen, would be entitled to the land. To declare by Act of Congress that the west-side company shall have the grant would be equally unfair, for it appears that the east-side company was organized and made large expenditures upon the ground that the other company was never legally designated, and it ought to have the benefits and advantages of the law in accordance with which it was organized and invested its money. * * * If the west-side company was legally designated in 1866, and it has since done what the Act of Congress requires, it has a vested right to the grant, which the bill, if it becomes a law, will not and cannot disturb; but it is unreasonable to insist that because that company has failed to secure the grant, the state ought therefore to lose it. Both companies claim, and and it may be that both have been designated by the Legislature, and if both are allowed to file their assent, as required by

> the sixth section of the Act of Congress, it is made certain not only that one of the companies will get the grant, but that it will be used for railroad purposes, in which the state has more interest than in the fortunes of either company."

The proceedings in Congress with reference to this bill may be considered in evidence under the Stipulation, Vol. V, page 2531, Transcript of Record) This report is within the judicial knowledge of the court, as though formally introduced in evidence. Besides, it appears in Government's Exhibit 108. It is competent as tending to show that it was the intention of Congress not to disturb any vested right by any legislation then proposed, or subsequently to be enacted, and that the primary purpose of the proposed legislation was that the grant should take effect so that it might "be used for railroad purposes, in which the state has more interest than in the fortunes of either company." It is also found in the report of the Committee on Public Lands, to whom was referred the proposed bill, and is within the judicial knowledge of the court, even if it had not been offered in evidence in the case. "Objections to the passage of Senate Bill No. 94, urged by Mr. S. G. Reed, Agent, were objections urged by the West Side Company, and

this negatives the allegation and contention made by the Government in Paragraph IV of the bill of complaint, (Vol. I, pp. 28-29 Transcript of Record) that the West Side Company never at any time abandoned or waived its claim to the grants, franchises, and benefits of the Act of Congress of July 25, 1866, but that it "did importune the Congress of the United States to extend to it, in lieu thereof, a similar grant of land, etc.," as alleged in this paragraph. The testimony is clearly to the effect that the West Side Company at all times protested against any further legislation in respect to the grant made by the Act of July 25, 1866, and never at any time waived or abandoned its legal claim to that grant. The Act of May 4, 1870, was passed at a subsequent session of Congress, which convened in December, 1869, long after the transactions referred to in Government's Exhibit No. 108. True it is, that Mr. Reed, acting for the West Side Company, at or about March, 1869, as shown by Government's Exhibit No. 107, (Vol. X, pp. 5292-5297 Transcript of Record) urged a substitute for Senate Bill No. 94, but this substitute was merely a ratification of what had been previously done in behalf of and by the West Side Company. Not content with urging the remonstrance mentioned, Mr. Reed submitted, on behalf of the West Side

Company, the formal objections to the passage of Senate Bill No. 94 set out in Government's Exhibit No. 108. It will be noted that on March 10, 1869, Senator Williams asked and by unanimous consent obtained leave to introduce Senate Bill No. 94, and the same was read twice, and referred to the Committee on Public Lands, of which he was a member. That bill contained no proviso such as is found in the Act of April 10, 1869. In the Senate, on March 22, 1869, Mr. Williams made the report to accompany Senate Bill No. 94, which was the report from the Committee on Public Lands, to whom the bill had been referred.

We further quote from this report, (Vol. X, p. 5315 Transcript of Record) as follows:

> "The West Side Company filed its assent within the required time; and if it was designated according to the Act of Congress, there seems to be no necessity for any further legislation upon the subject."

Secretary Browning, in his letter of January 20, 1869, was of the opinion that so far as the portion of road in Oregon was concerned, the grant had lapsed, while the grant for that portion of the road in California, was still in

force, and that some legislation by Congress was necessary to revive the grant for the Oregon portion of the road. Secretary Browning, referring to the proposed measure, says: "The proposed bill, if it becomes a law, will, in my opinion, accomplish that purpose." It was under these circumstances that the Senate, influenced by the opinion of Secretary Browning, passed Senate Bill No. 94, in the form in which it was reported by the Committee on Public Lands of the Senate. The proviso found in the Act of April 10, 1869, was added in the House. The court in construing the Act as passed, necessarily must consider the primary purpose for which any legislation was deemed advisable or necessary. If the Secretary of the Interior, as a matter of law, was mistaken as to the need of further legislation, there would seem to be no question but that the West Side Company, by filing its assent within the required time, if it was designated according to the Act of Congress, had a vested right in the grant, which could not be impaired, and if, as a matter of law, the East Side Company was legally designated by the legislature of the State of Oregon, on October 20, 1868, and Congress did not void the grant for failure to file assent within the time, or for any other reason, then that company had

a vested right which could not be impaired by the Act of April 10, 1869.

On June 27, 1872, Joseph S. Wilson former Commissioner of the General Land Office, and then President of the European and Oregon Land Company, wrote a letter to Attorney General Williams, formerly United States Senator from Oregon, calling the attention of the Attorney General to the Act of July 25, 1866, and the amendatory act of April 10, 1869, and enclosed with this letter the opinion of S. M. Wilson, of date November 11, 1871, addressed to Jos. S. Wilson, as President of the European and Oregon Land Company, copy of which was therewith enclosed. (Government's Exhibit No. 109, Vol. X, pp. 5322-5363 Transcript of Record) There was also enclosed therewith Document A, which was a certified copy of the deed to be executed by Milton S. Latham, Faxon D. Atherton, and William Norris, Trustees, to the European and Oregon Land Company, to be joined in by the Oregon and California Railroad Company, purporting to convey to the European and Oregon Land Company the lands granted under the Act of Congress of July 25, 1866, subject to the terms and provisions of that certain trust deed executed by the Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton, and William

Norris, as Trustees, recorded at pages 727 to 734 both inclusive, of Book K, of the Records of Deeds of Multnomah County, Oregon, which trust deed was of date April 15, 1870. This proposed conveyance was authorized by the Board of Trustees of the European and Oregon Land Company on March 27, 1871, and Document A, which accompanied the letter of Mr. Wilson to Attorney General Williams, is a copy of the minutes of the European and Oregon Land Company, conveying full notice to the Department of Justice of the status of the grant, and of the contention of the European and Oregon Land Company as to the proviso in the Act of April 10, 1869, known as the "actual settler" clause. These documents were transmitted by Mr. Wilson, in his letter of June 27, 1872, to Ben Holladay, and in that letter Mr. Wilson says:

> "The Company have adopted the opinion (transcript herewith) — which has been given by the Counsel: — regarding the principles therein enunciated as just and proper, and as realizing the purposes of the Grant. In order, however, that there may be a full understanding with the Executive Department of the Government, so that proceedings in disposal of the lands, may in all respects be harmonious and concurrent, it is requested that

you will bring the matter to the attention of Attorney General Williams, who is thoroughly conversant with the subject; to the end that he may request the Secretary of the Interior, to dispatch an affirmation of the principles referred to, which the company would be gratified to have in the form suggested, by the draft of a letter, which I enclose herein, addressed to myself."

This draft of affirmatory letter requested is set out in Vol. X, page 5346 Transcript of Record, as a part of Government's Exhibit No. 109, and the Secretary of the Interior was asked to advise as follows:

"The Department has considered the papers you referred from the European and Oregon Land Company, in right of the Oregon and California Railroad Company, under the grant in Western Oregon, by Act of Congress approved 25th July, 1866, (Statutes Vol. 14, page 239) —and the Amendatory Act of 10th April, 1869, (Stat. 1869, page 47)—and is satisfied that the construction given by the said Company is just and proper, to the effect that all actual settlers on the odd sections from 25th July, 1866, the date of the Original Grant, and all those who

went on the odd sections from that date to the passage of the Act of 10th April, 1869 —and all others who are found on such odd sections when the line of the railroad is surveyed and established, are protected; and have the right to purchase, each one, not exceeding One hundred sixty acres, at Two Dollars and fifty cents per acre—but that in regard to all other persons, the Original Absolute Grant, by Act of 25th July, 1866, is in full force and effect, and authorizes the Company to sell on such terms as may be reasonable and just to all parties without any restriction."

Attorney General Williams, on April 20, 1872, transmitted these papers to the Commissioner of the General Land Office, who, under date of June 14, 1872, advised the Attorney General that the papers were submitted to the Secretary of the Interior, as advised in the letter of the Commissioner of date April 20, 1872, to the Attorney General, and the Commissioner enclosed with his letter of June 14th, a copy of the opinion of the Secretary of the Interior, of date June 5, 1872. Secretary Delano, in his short opinion of date June 5, 1872, stated that he was of the opinion that

"the proviso means just what it says. 'That the lands granted by the act afore-

said shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.' The legislative intention was plainly to prevent the lands from being held for speculative prices and disposed of in larger quantities to other than actual settlers; and to limit the proviso's operation to those on the lands granted at or before the survey of the road would, in my judgment, utterly defeat such intention."

The letter of Mr. S. M. Wilson accompanying this correspondence, justifies the affirmatory letter requested of the Secretary of the Interior.

Government's Exhibit No. 109-D, is a certified copy of the letter of Commissioner Drummond of date July 16, 1872, addressed to Attorney General Williams, in his official capacity, (Vol. X, pp. 5370-5373 Transcript of Record) in reply to a letter of June 27, 1872, written by Attorney General Williams to the Commissioner. This letter is not in the record, and the testimony of the witness S. S. Marr was to the effect that diligent search had been made for this letter of the

Attorney General, but it could not be found in the files of the Commissioner of the General Land Office, the Secretary of the Interior, or in the records of either office. The contents of that letter can, however, be inferred from statement made by Mr. Drummond, wherein he says:

> "It is stated in your letter that the papers contain no communication to me or to the Secretary of the Interior, asking any action or decision in reference to the subject which they discussed. That they were not filed with the view of eliciting any opinion, and that you did not suppose any would be given until some questions were presented which it would be necessary for the Department to decide, etc. You, therefore, ask that the papers may be filed until some question arises, or the parties bring them before me for consideration, or ask for opinion upon the question which they present, and that the opinion which the Secretary has given upon the subject may be withdrawn until some question is raised, making it necessary to pass upon the construction of the Act mentioned, or until the parties interested desire an opinion on the subject. * * * It was

not understood that you desired the opinion, but the letter was addressed to you because I viewed you as the medium of communication adopted by the Company. Your request for a recall of the opinion expressed was presented to the Secretary who desires me to state that while he must respectfully decline to formally withdraw his opinion, yet, in view of your letter, he will be willing at any time, on application, to reopen the case and to have all arguments the Company may desire to present upon the matter."

This evidence disclosed by Government's Exhibits Nos. 109-A, 109-B, 109-C, and 109-D, (Vol. X, pp. 5322-5373 Transcript of Record) should be read in connection with Defendants' Exhibit 373, (Vol. XIV, pp. 7371-7375 Transcript of Record) which submits the exhibits offered and admitted in evidence on behalf of the Government, just referred to, all as showing full knowledge upon the part of the United States of the contention of the Oregon and California Railroad Company, as made through the European and Oregon Land Company, as to the proper construction of the Act of April 10, 1869, and as to the definite purpose of the Act, in the administration of the grant, and also as showing

the form of deed to be executed by the European and Oregon Land Company, joined in by the Trustees, with notice of the trust deed of April 15, 1870, which purchasers would be expected to receive; and also showing, as early as January 23, 1874, that the grant was being administered by the Oregon and California Railroad Company in the way and manner indicated; and as tending to show that the United States, with full notice of the proposed action of the company, took no steps to enforce the so-called "actual settler" clause, from the date of this correspondence, in 1872, up to the passage of the Joint Resolution by Congress, of date April 30, 1908, a period of about thirty-six years.

The record shows, (Government's Exhibit No. 110, Vol. X, pp. 5374-5452 Transcript of Record) that the Oregon and California Railroad Company filed its Selection Lists beginning July 28, 1870, and ending February 9, 1903, and that these lists, numbered 1 to 161 both inclusive, include lands patented to the company under the Acts of July 25, 1866, and May 4, 1870; that the date of approval of these lists by the Secretary of the Interior ranges from November 23, 1870, up to November 28, 1906, and that patents issued beginning May 9, 1871, up to December 7, 1906, covering a period of approval of Se-

lection Lists by the Secretary of the Interior, and formal issuance of patents, from November 23, 1870, up to December 7, 1906, a period of thirty-six years, and that all of the Selection Lists were approved, and all patents were issued, after the correspondence shown by Government's Exhibit No. 109, and after June 5, 1872, the date of the letter of Secretary Delano declining to concur in the construction placed upon the proviso of the Act of April 10, 1869, by the Oregon and California Railroad Company, and the European and Oregon Land Company, and their counsel, excepting four Selection Lists approved, respectively, November 23, 1870, June 26, 1871, May 9, 1872, and three patents, issued, respectively, May 9, 1871, July 12, 1871, and May 29, 1872, and covering, in the aggregate, 229,996.76 acres. All succeeding Selection Lists were approved, and all succeeding patents were issued, after June 22, 1876, and prior to the construction of the road south of Roseburg. The road was constructed to Roseburg in 1872, a distance of about 198 miles (Vol. IV. pp. 1588, and 1717-1720 Transcript of Record.)

Government's Exhibit No. 111, (Vol. X, pp. 5406-5409 Transcript of Record) shows that the application made by the Oregon and California Railroad Company under date of

July 12, 1870, accompanying the Selection Lists, refers specifically to the Act of July 25, 1866, and the Amendatory Acts of July 25, 1868, and April 10, 1869, and that the company asked to have the Selection Lists approved, and the same passed to patent, as earned under these Acts of Congress, on account of construction of particular sections of road, and that these applications were supported by the affidavit of the Land Agent of the company, to the effect that the list was a correct one of a portion of the lands claimed by the company under the Act of Congress mentioned. Therewith was a certificate of the Register and Receiver of the local Land Office, to the effect that they had examined the list, attested the accuracy of the same by the plats and records of the local Land Office, and that the list was found to be correct; that the filing thereof was allowed and approved, and that the whole of the lands were surveyed, public lands, within the limits of the grant, as required thereby, and that the lands were of the class contemplated by the Act, and that the fees required by the Act of Congress approved July 1, 1864, and the Circular of Instructions from the Commissioner of the General Land Office, to the amount stated, had been paid. This form was substantially followed from that date, at

all times, as shown by Government's Exhibits Nos. 111-A, 111-B, 111-C, 111-D, 111-E, 111-F, and 111-G (Vol. X, pp. 5405-5452 Transcript of Record). The date of the last Selection List is August 29, 1895, certified by the local United States Land Office, September 3, 1895, thirteen years prior to the filing of the bill of complaint in this cause, on September 4, 1908.

Government's Exhibit No. 112, (Vol. 11, p. 5477) consisting of "Letter-head, form 3311," apparently issued by

Southern Pacific Company,
Land Department."

showing thereon, and as covered thereby, the constituent companies

(a) Southern Pacific Land Co.

(b) Southern Pacific Railroad Co.

(c) Central Pacific Railway Co.

(d) Oregon & California Railroad Co.

(e) Oregon & California Land Co.

with B. A. McAllaster, Land Commissioner, and F. W. Houtz, Assistant Land Commissioner, indicating that at the time this letterhead form was adopted, there was a Southern

Pacific Company Land Department, as the Government claims, to operate the lands of the five subsidiary companies mentioned, including that of the Oregon and California Railroad Company. This, if true, is wholly immaterial to any issue involved in this case.

Government's Exhibit 113, (Vol. XI, p. 5493) consists of letters from real estate agents and others, commencing with date May 13, 1905, and ending with date September 15, 1905, addressed to Acting Land Agent Charles W. Eberlein, with his replies thereto, each of which letters from these various real estate agents is designated by Government's counsel as an "application to purchase" but which really are usual letters from real estate agents, promoters, immigration bureaus, and the like, who were seeking business. One of these so-called applications to purchase is from Chicago, Illinois, of date February 20, 1905, (p. 5483) and says "we kindly ask you to let us know at once what sort of homes, lots, farms, timber and mineral lands on your list;" also "we ask big land syndicates, associations and R. R. corporations, owners of lands, timber and minerals, to furnish our representatives accompanying homeseekers excursion with free round-trip tickets. These so-called applications to purchase are as follows:

(1) From Vernon, Texas, from J. E. Lutz, Real Estate, Abstracts, and Fire Insurance, H. & T. C. R. R. Co. Land Agent. Farming and Ranch Lands a Specialty.

(2) From Muscatine, Iowa. H. M. Bartlett, Attorney at Law.

(3) From Chicago, Ill. J. Lucos, Manager, Immigrant's Information Bureau.

(4) From Duluth, Minn. Finnish American Land Co.

(5) From Mt. Pleasant, Michigan, Hoban & Taggart, Oregon State Managers, Field Department, The Gold Reserve Life Association, Mt. Pleasant, Michigan, advertising that they deal in farms, fruit land, wheat land, hop land, irrigated land, acre homes, timber lands, etc. Therewith there was enclosed their card showing a Portland office, Room 4, 109½ 6th St., near Washington, advertising themselves as agents for "farm land" and "timber lands." (p. 5488)

(6) From Rock Falls, Ill. R. L. Leitch; seeking information with a view of bringing out a party of land seekers and inquiring as to terms to agents and rates of transportation.

(7) From Portland, Oregon, W. T. Smith; claiming to have been sent to Portland rep-

resenting fifty families or more, who wish to come West from Oklahoma to Oregon, and who had in their minds when they left home, government land.

Government's Exhibit 114, (Vol. XI, pp. 5493, 5502) is correspondence between W. H. Mills, Land Agent, George H. Andrews, Acting Land Agent, Charles W. Eberlein, W. D. Cornish, and Wm. F. Herrin, relating to a new item appearing in a Marshfield, Oregon, paper, with reference to an alleged discovery by a local law firm of a defect in the title to the lands of the Southern Oregon Company, which had caused the filing of 200 applications for quarter sections "on that tract, which is one of the most valuable pieces of timber lands in the Northwest. It is claimed that this immensely valuable tract of timber is held in trust by the Southern Oregon Company for the people, the clause in the original grant to the State of Oregon from the Federal Government being operative, in which it recites that the land shall not be sold to individuals other than citizens of the United States, and in tracts not larger than 160 acres and at a price not to exceed $2.50 * * * Intense excitement prevails as a result of the disclosures regarding the title. This company has persistently refused

to sell a foot of land to settlers at any price. The applicants have subscribed $3000 for the purpose of fighting the suit which is to be instituted by the Southern Oregon Company."

A suit is now pending in the District Court of the United States for the District of Oregon, brought by the United States against the Southern Oregon Company to forfeit the lands owned by that company, and is prosecuted under the authority of the Joint Resolution of Congress passed April 30, 1908, (35 Stat. 571). This newspaper clipping, as a part of this Exhibit 114, introduced in evidence by the Government, is fairly illustrative of the motive which caused the "intense excitement" resulting in the filing of "200 applications for quarter sections on that tract, which is one of the most valuable pieces of timber lands in the Northwest." The suit to forfeit the grant is presumably grounded upon the claim that "this immensely valuable tract of timber is held in trust by the Southern Oregon Company for the people," and is analogous to the suit now on appeal in its purpose and effect, and is in part illustrated by the action of the United States in the 45 suits brought against the so-called "innocent purchasers" and settled under the Act of August 20, 1912, whereby approximately 340,000 acres of timber lands sold in alleged

violation of the actual settler clause, have been patented to the purchasers as timber lands, at the rate of $2.50 per acre.

Government's Exhibit 115, (Vol. XI, pp. 5502, 5509, Transcript of Record) is the correspondence between Acting Land Agent Charles W. Eberlein, and D. A. Chambers, and Land Commissioner B. A. McAllaster and Mr. P. F. Dunne, between August 11, 1905, and August 16, 1905, relating to the practice in the Land Department of the United States as to transfer of grants made by Congress for railroad purposes, and to the effect that land grants may be transferred by filing evidence thereof in the General Land Office satisfactory to the Land Department, and that no act of Congress is required or necessary therefor.

Government's Exhibit 116, (Vol. XI, pp. 5509, 5523, Transcript of Record) purports to be a copy of written statement of August 23, 1907, prepared by Government's counsel from information given to him by David Loring, who was called, and testified as a witness on behalf of the defendants, (Vol. V, pp. 2187, 2228, Transcript of Record) and which was offered in evidence by the Government for the purpose of impeaching the testimony of Mr. Loring. Defendants moved to strike out this exhibit as incompetent, ir-

relevant and immaterial, and as hearsay, and as shown to be a narrative of a past transaction, and a good deal of such narrative hearsay.

Government's Exhibit 117, (Vol. XI, p. 5523, Transcript of Record) is a copy of an affidavit of Irvine P. Gardner, offered in evidence by the Government (Vol. VI, pp. 3025, 3058, Transcript of Record) for the purpose of impeaching Mr. Gardner, who testified as a witness on behalf of the defendants, (p. 3050, supra.) This exhibit was received over the objection of the defendants that the same was incompetent, irrelevant and immaterial, and upon the further ground that the definitions of grazing and agricultural were given to the witness by the special inspector, Mr. Underwood, and that the answer given shows that it was the answer of the special inspector and not that of the witness.

Government's Exhibit 118, (Vol. XI, p. 5525, Transcript of Record) is a portion of newspaper "Coos Bay Times," printed and published at Marshfield, Oregon, containing purported photographs of lands, industries, etc., of Coos County, Oregon.

Government's Exhibit 119, (Vol. XI, pp. 5525, 5526, Transcript of Record) purports to be a copy of an affidavit made by W. B.

Fuller, a witness who testified on behalf of defendants, (Vol. VI, pp. 3127, 3138, Transcript of Record) and which exhibit was offered by the Government for the purpose of impeaching the witness, which was received over the objection of the defendants that the same was not impeaching evidence, was incompetent, irrelevant and immaterial, and was prepared by the Government, written out by Mr. Foley, as a special agent of the General Land Office, in his own language, detailing some conversation which the special agent may have had with the witness. (p. 3133 supra.)

Government's Exhibit 120, (Vol. XI, pp. 5526, 5528, Transcript of Record) purports to be a copy of an affidavit made by W. T. Grieve, County Assessor of Jackson County, Oregon. The Government offered, and the same was received, in evidence for the purpose of impeaching W. T. Grieve, who testified as a witness on behalf of the defendants, (Vol. VI, pp. 3199, 3228, Transcript of Record.)

Government's Exhibit 121, (Vol. XI, p. 5529, Transcript of Record) is a booklet purporting to have been issued under the cooperative plan of the Southern Pacific Lines in Oregon, William McMurray, General

Passenger Agent, and to have been planned and executed by the Sunset Magazine, Homeseekers' Bureau, Portland, Oregon, and purports to describe the agricultural and other resources of Lincoln County, Oregon, especially tributary to Toledo, in that county.

Government's Exhibit 122, (Vol. XI, p. 5529, Transcript of Record) is a purported statement made by F. A. Elliott to B. D. Townsend prior to the institution of this suit, and was offered in evidence by Government's counsel for the purpose of impeaching the testimony of Mr. Elliott, who testified as a witness on behalf of the defendants, (vol. VI, pp. 2714, 2787, Transcript of Record.) This exhibit was received over the objection of defendants that the same was narrative or purported narrative, based upon an alleged conversation between the witness and Mr. Townsend, Government's counsel, and contains admitted or purported conclusions of Mr. Townsend from the conversation with the witness, and is hearsay, and not impeaching testimony, and is an unsigned document, not a statement of the witness but the statement of counsel based upon his understanding of what witness may have said.

Government's Exhibit 123, (Vol. XI, p. 5529, Transcript of Record) is a purported copy of an affidavit of H. S. Maloney, executed before Harry E. Laughlin, special agent of the General Land Office, February 29, 1912, (Vol. VIII, pp. 4037, 4053, Transcript of Record) and was offered in evidence by the Government "for the purpose of showing that the Government has been taken by surprise with the testimony of this witness, as reliance was made by the Government upon this statement made over the signature of Mr. Maloney, and has called him as a witness basing it upon that statement." (p. 4047). Mr. Maloney testified as a witness on behalf of the Government and the exhibit was received over the objection of the defendants that the same was an attempt by the Government to impeach its own witness and to place in the record "a statement made by this witness at the instance of the Government's inspector upon a conversation that may have been loosely had in his office and written out by the Government's inspector for the purpose of this case."

Government's Exhibit 124, (Vol. XI, pp. 5529-5530, Transcript of Record) is a photograph purporting to show improvements of E. J. Mahan, a witness for complainant, on

Section 17, Township 39 South, Range 1 East, Jackson County, Oregon. E. J. Mahan, testified as a witness on behalf of complainant, (Vol. VIII, pp. 4132, 4152, Transcript of Record). This exhibit is printed in Volume XVIII, Transcript of Record.

Government's Exhibit 125, (Vol. XI, p. 5530, Transcript of Record) is a booklet purported to have been issued under the cooperative plan of the Southern Pacific Lines in Oregon, and to have been planned and executed by the Sunset Magazine, Homeseekers' Bureau, Portland, Oregon, and purports to describe agricultural and other industries in Grants Pass, Josephine County, and the Rogue River Valley, all in Oregon.

Government's Exhibit 126-a (Vol. XI, pp. 5530, 5548, Transcript of Record) is a copy of "Deed of Trust of Congressional Land Grant from the Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton and Wm. Norris," bearing date April 15, 1870. This trust deed is signed by the Oregon and California Railroad Company and was recorded April 18, 1870, in Records of Deeds for Multnomah County, Oregon. It purports to convey the whole of the lands and franchises granted or intended to be granted by the Act of July 26, 1866, and acts

supplemental thereto and amendatory thereof, for the purpose of securing the holders of 18,450 bonds of the company of the par value of $10,950,000.00. This trust deed recites the conveyance made March 29, 1870, by the Oregon Central Railroad Company (East Side) to the Oregon and California Railroad Company of all the property of the former company, including the lands granted by the Act of July 25, 1866, and acts amendatory thereof and supplemental thereto.

Government's Exhibit 126-b, (Vol. XI, pp. 5548, 5573) is a copy of "Railroad Mortgages or Deed of Trust, Oregon Central Railroad Company to Milton S. Latham and Faxon D. Atherton," bearing date July 15, 1871, recorded October 14, 1871, in Records of Mortgages for Multnomah County, Oregon, and purports to secure 5860 bonds of the par value of $4,395,000.00, and to convey, as security therefor, the railroad of the West Side Company and the lands granted by the Act of May 4, 1870. This instrument was executed by the Oregon Central Railroad Company and also by Milton S. Latham and F. D. Atherton, Trustees.

Government's Exhibit 126-c, (Vol. XI, pp. 5573, 5602, Transcript of Record) is a "Second Mortgage to secure $300,000, Oregon Cen-

tral Railroad Company to W. D. Shipman and S. L. M. Barlow," March 1, 1876, West Side, and recites the execution of the deed of trust or mortgage of July 15, 1871, executed by that company to Milton S. Latham and Faxon D. Atherton, to secure bonds amounting to $4,300,000.00, and that said mortgage or deed of trust is duly recorded in the Records of Mortgages for Multnomah, Washington and Yamhill Counties, in the State of Oregon, all of which bonds were pledged to Milton S. Latham of San Francisco, California, in trust for certain creditors of the company as security for a loan of $1,000,000.00, gold, and accrued interest, which mortgage to W. D. Shipman and S. L. M. Barlow purports to convey the railroad of the company, then or to be thereafter constructed, together with the lands granted by the Act of May 4, 1870, and purports to convey the same *in solido* and without reference to the actual settler clause, so-called, of Section 4 of that act. It is recited also that this mortgage or trust deed was recorded October 14, 1876, in the Records of Mortgages for Multnomah County, Oregon.

Government's Exhibit 126-d, (Vol. XI, pp. 5603, 5618, Transcript of Record) is a copy of the contract between Ben Holladay and

the Frankfort Committee, of date February 29, 1876, by the terms of which Holladay sold and transferred, and agreed to sell and transfer to the Frankfort Committee $19,000,000.00 of the stock of the Oregon and California Railroad Company, all then lawfully issued excepting $1,000,000.00 held by Milton S. Latham, and a majority of the stock of the Oregon Central Railroad Company (West Side) that is—over 75,000 shares thereof, the remainder being held by Milton S. Latham and others, and by which Holladay in like manner sold and transferred, and agreed to sell and transfer to the Frankfort Committee, all of the stock of the Oregon Steamship Company and Portland Warehouse & Dock Company, to the Frankfort Committee for certain consideration therein stated, and upon the performance of certain covenants and conditions by Holladay, the Frankfort Committee agreed to pay him $200,000.00 in gold coin, less certain sums, and in one year the further sum of $50,000.00 and by which Holladay was to receive, also, bonds of the par value of $300,000.00 to be issued by the West Side Company and secured as therein stated.

Government's Exhibit 126-e, (Vol. XI, pp. 5619, 5623, Transcript of Record) is a "Modification of Agreement between Holladay and

the Frankfort Committee," made April 19, 1876. It is therein recited that the Frankfort Committee owned or held, and represented, of the First Mortgage Bonds of the Oregon and California Railroad Company, approximately ten millions of dollars.

Government's Exhibit 126-f, (Vol. XI. pp. 5623, 5639, Transcript of Record) is the "Definite Agreement between the Frankfort Committee, the European Creditors and the Three Companies," meaning thereby the Oregon Steamship Company, the Oregon and California Railroad Company and the Oregon Central Railroad Company, and is dated about August 20, 1877. This agreement recites the financial condition of the three companies, the compromise agreement of February 29, 1876, with Ben Holladay, and provides that upon its execution, the agreement of April 6, 1876, and May 26, 1876, shall be cancelled and be deemed to be superseded by a preliminary agreement of September 6, 1876, and by which the parties were to make certain payments and to do certain things in liquidation of the indebtedness of the companies and in repayment of the same.

Government's Exhibit 126-g, (Vol. XI, pp. 5639, 5669, Transcript of Record) is a copy of the "General Contract between the Oregon

and California Railroad Company and the Bondholders for Funding Interest," and bears date July 25, 1874, and recites the financial condition of the companies involved, and that the Frankfort Committee was the owner and holder of 11,147 bonds of the Oregon and California Railroad Company of the par value of $6,468,600.00 secured by the first mortgage executed to Faxon D. Atherton and Milton S. Latham, Trustees; and further recites that the Oregon and California Railroad Company was unable to pay the coupons due October 1, 1873, and April 1, 1874, on its debt of $10,950,000.00 issued and secured by said first mortgage, the interest thereon running at the rate of seven per cent per annum. The agreement gave to the bondholders power to control the affairs of the Oregon and California Railroad Company upon the terms stated, and to control its operation, receipts and disbursements. It recites the existence of the deed of trust relating to the land grant of the company, executed to Milton S. Latham, Faxon D. Atherton and Wm. Norris, Trustees, April 15, 1870, by the European and Oregon Land Company, and recites other details looking towards the protection of the bondholders in the administration of the land grant and the operation of the railroad.

In Government's Exhibit No. 126-G, (Vol. XI, pp. 5669, 5768) is included an "Agreement as to appointment of Financial Agent," between the bondholders and the company, by which Richard Koehler was to be appointed Financial Agent with plenary power, as such, in respect to the operation of the properties of the company and the control of its funds. In addition to being the Financial Agent of the company, he was to be its Auditor.

Government's Exhibit No. 126-G, also includes (Vol. XI, pp. 5679-5688, Transcript of Record) copy of "Contract between Milton S. Latham, Faxon D. Atherton and Wm. Norris, Trustees, Ben Holladay, the Oregon and California Railroad Company, and the bondholders, as to the management of the land grant. This contract bears date July 25, 1874, and was executed by the parties mentioned. It recites the indebtedness of the Oregon and California Railroad Company in the sum of $10,950,000.00, secured by First Mortgage Bonds upon all of the property of the company except its land grant of date April 15, 1870, and a deed of the same date executed by the company, conveying its land grant to Milton S. Latham, Faxon D. Atherton and Wm. Norris, as Trustees, for the purpose of establishing a sinking fund

for the redemption of these bonds, and recites that these two instruments were each referred to in the other and were a part of one and the same transaction. It further recites that the sinking fund trustees had sold and conveyed the land grant and certain rights and interest in the land and property included in the land grant, to the European and Oregon Land Company, by deed of date March 28, 1871, on certain conditions therein stated. It further recited that the company failed to pay its interest upon these bonds, falling due in October, 1873, and in April, 1874, and would probably be unable to pay any interest thereon for a considerable time to come, and that the property of the company named in the mortgage was then subject to sale under foreclosure. It further recited that a majority in interest and number of the holders of these mortgage bonds proposed to foreclose this mortgage forthwith, and to endeavor by all suitable means to obtain a reconveyance of the rights and property sold to the European and Oregon Land Company. It further recited that there has been an agreement for the settlement of all disputes between the railroad company and its bondholders, which was referred to and made a part of this contract, the terms of which are set out. It also recited that the European and Oregon Land

Company had spent certain sums of money, "caused plans, written descriptions and maps of said land named in said land grant to be made and circulated, and in advertising the said land and in maintaining agencies for the sale thereof, and in other ways which will be of great benefit to all parties interested in the sale thereof." The agreement recited that the European and Oregon Land Company had reconveyed the property to the trustees and that the proceeds of the sale of the lands thus reconveyed, should be invested in a trust fund, as provided by the trust deed; that this trust fund might be invested in the purchase of these First Mortgage Bonds at any time, on the terms stated, and that "all the business relating to the selling and due advertising of said lands, or other property, the maintaining and establishing of agencies and appointment of agent, and the entire management thereof, shall be carried on under the direction of said parties of the second part," (known as the Frankfort Committee) "as a part of the business of the Oregon and California Railroad Company, and through a bureau to be known as the Land Department of said company."

Government's Exhibit No. 126-G, also contains therein a copy of an "Agreement between the European and Oregon Land Com-

pany and Milton S. Latham, Faxon D. Atherton and Wm. Norris, Trustees, and others," (Vol. XI, pp. 5688-5705, Transcript of Record) of date July 25, 1874. The Frankfort Committee was party of the third part; the Oregon and California Railroad Company party of the fourth part, and Ben Holladay, who was then the owner of a majority of the capital stock of the Oregon and California Railroad Company, was party of the fifth part. It recites the execution of the mortgage of April 15, 1870, to Milton S. Latham and Faxon D. Atherton to secure the payment of certain bonds, and the record of this mortgage in the Records of Mortgages for Multnomah County, Oregon, and that on April 15, 1870, the Oregon and California Railroad Company, for the purpose of creating a sinking fund for the payment of these bonds, conveyed, by deed of that date, to the trustees named, the lands granted by the Act of July 25, 1866, and acts supplemental thereto and amendatory thereof; and recited the record of that deed in the Records of Deeds for Multnomah County, Oregon. It further recited that on March 28, 1871, the trustees executed a deed to the European and Oregon Land Company, which contained certain terms and conditions as to sale and conveyance of the property, and which covered the

lands granted aforesaid, and that this deed was likewise recorded in the Records of Deeds for Multnomah County, Oregon. It further recited that "comparatively but a small portion of said lands have been sold by said parties of the first part (meaning the European and Oregon Land Company) and that the Frankfort Committee were the owners and possessors of a majority of the bonds secured," as stated. The agreement further recited that it was to the best interest of the Frankfort Committee, representing the bondholders, that the sale to the European and Oregon Land Company should be cancelled and the land reconveyed upon the terms stated in the agreement; and it further recited that the European and Oregon Land Company "has spent large sums of money in causing plans, written descriptions and maps of the land in said land grant to be made and circulated, and in advertising said lands, and in maintaining agencies for the sale thereof, and in other ways which would be of great benefit to all parties interested in the sale thereof." The agreement further recited that all parties thereto were interested in adjusting the matters, in securing to the bondholders the fullest security "to be obtained from said lands so conveyed in trust to" the trustees. The agreement amounted to a rescission of the

contract of sale and conveyance to the European and Oregon Land Company upon the terms stated, and a conveyance by the European and Oregon Land Company to the trustees of all the lands and franchises granted or intended to be granted to the Oregon and California Railroad Company by the Act of July 25, 1866, and acts supplemental thereto and amendatory thereof, with the exception of certain sales or executory contracts for sales made by the European and Oregon Land Company under the deed of March 28, 1871, a particular description of which excepted premises belonging to the land grant are set out in the agreement. These descriptions show tracts sold or contracted to be sold by the European and Oregon Land Company, presumably to a single purchaser, in excess of 160 acres. The other parcels cover small tracts ranging from 5.69 acres up to 160 acres to single purchasers.

There is also included in Government's Exhibit No. 126-G, copy of "Contract as to the Oregon Steamship Company (Vol. XI, pp. 5706-5715, Transcript of Record) and copy of "Contract as to Oregon Central Railroad Company," (Vol. XI, pp. 5715-5724). The first mentioned contract is between the Oregon Steamship Company, the Oregon and California Railroad Company, the Frankfort

Committee and Milton S. Latham, trustee, for the creditors of the Oregon Steamship Company, and provides for the liquidation of the indebtedness of the Oregon Steamship Company, and the payment of interest upon the bonds issued and unredeemed by the Oregon and California Railroad Company, and interest upon the indebtedness of the Oregon Central Railroad Company. The last mentioned contract recites a default of the Oregon and California Railroad Company in payment of interest upon its First Mortgage Bonds; the agreements with Holladay and the Frankfort Committee and other agreements; the default of the Oregon Central Railroad Company in payment of its interest upon its First Mortgage Bonds of $4,395,000.00 outstanding and held as collateral to secure an indebtedness of $1,000,000.00, and otherwise provides for the settlement of all matters between the parties upon the terms therein stated.

Government's Exhibit No. 126-H, (Vol. XI, pp. 5725-5734) is a copy of "Agreement as to disposition of earnings of Oregon Steamship Company and Oregon Central Railroad Company, referred to in contract just mentioned.

Government's Exhibit No. 126-I, (Vol. XI, pp. 5734-5750) is a copy of "Original Conveyance of Oregon and California Land Grant to European and Oregon Land Company," of date March 28, 1871, executed by Milton S. Latham, Faxon D. Atherton and Wm. Norris, Trustees, and joined in by the Oregon and California Railroad Company. This deed recites the execution of the trust deed of April 15, 1870, executed by the Oregon and California Railroad Company to Milton S. Latham, Faxon D. Atherton and Wm. Norris, by which that company conveyed to the trustees named the lands granted by the Act of July 25, 1866, and all acts supplemental thereto and amendatory thereof, and recites that this deed was recorded in the Records of Deeds for Multnomah County, Oregon, and thereupon purports to convey the lands so granted to the European and Oregon Land Company, subject to the terms and provisions of the trust deed of April 15, 1870. By this sale the European and Oregon Land Company agreed to pay to the Oregon and California Railroad Company for this land at the rate of $1.25 per acre, with interest at the rate of six per cent per annum upon the purchase price so computed. This conveyance, as well as the conveyance of April 15, 1870, was a conveyance of the

land granted *in solido* for a valuable consideration, in each case, and, of course, without any regard to the so-called Actual Settler Clause in the proviso of April 10, 1869.

Government's Exhibit No. 127, (Vol. XI, pp. 5751-5756, Transcript of Record) is a copy of the agreement between the Central Pacific Railroad Company and the Oregon and California Railroad Company, as first parties, and the Pokegama Sugar Pine Lumber Co. as second party, for the sale of certain lands in California and Oregon described as "timber lands," consisting of 27,800 acres, of which 14,800 acres were in California and 13,000 acres were in Oregon, and sold at the rate of $9.00 per acre for 8000 acres; $5.00 per acre for 5000 acres of land in Oregon, and the lands in California at the rate of $7.00 per acre, or a total sum of $200,600.00 for the total 27,800 acres. That portion of the lands granted by the Act of July 25, 1866, situated in California, and described in this contract, would not be subject, if conveyed under the contract, to any alleged actual settler clause, while the lands in Oregon covered by the contract would be subject to the proviso of the Act of April 10, 1869, although the grant in each instance was made by the same Act of Congress to aid in the

construction of a continuous line from Roseville Junction, in California, to Portland, in Oregon.

Government's Exhibit No. 128, (Vol. XI, pp. 5757-5765, Transcript of Record) is a quitclaim deed executed by the Northern Pacific Railroad Company to the City of Portland, August 7, 1886, and purports to quitclaim to the City of Portland a strip of land fifty feet in width for a water pipe line across certain odd sections of land in Township 1 South, Ranges 4, 5 and 6 East of the Willamette Meridian, and the Central Trust Company of New York joins in this deed. These were lands within the limits of what is called the Northern Pacific Overlap but within the indemnity limits of the grant of July 25, 1866.

Government's Exhibit No. 129, (Vol. XI, pp. 5765-5766, Transcript of Record) consists of the record of the minutes of all meetings of the directors and stockholders of the Oregon and California Railroad Company from date of the organization of that company until September 4, 1908, the date of the institution of this suit. By stipulation this exhibit was withdrawn upon the understanding that either party might designate any portion thereof to be included in the printed

record, and that verified copy of this exhibit should be substituted for the original, if requested, and considered a part of the record in this cause.

Government's Exhibit No. 130, (Vol. XI, p. 5766, Transcript of Record) consists of certified copies of certain letters between the Secretary of the Interior and the General Land Office and Senator George H. Williams, J. H. Mitchell, attorney for the East Side Company, I. R. Moores and George H. Cole, President and Secretary of the East Side Company, all printed in full, (Vol. IV, pp. 1910-1920, Transcript of Record) and which relate to a discussion of the rights of the Oregon Central Railroad Company (East Side) and the Oregon Central Railroad Company (West Side) under the action of the respective companies in reference to the grant made by the Act of Congress of July 25, 1866.

SUMMARY OF THE CASE MADE BY THE EVIDENCE UPON BEHALF OF THE OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE. DEFENDANTS-APPELLANTS.

To assist the court in consideration of the case made by Defendants-Appellants, it is believed to be advisable to summarize the testimony upon the special subjects to be considered, as follows:

Early History of the Oregon Central Railroad Company, West Side, Oregon Central Railroad Company, East Side, and Oregon and California Railroad Company.

I-II

The summary of "STIPULATION AS TO THE FACTS," hereinbefore made, need not be repeated. No summary of the evidence is required, under Points I and II of Points and authorities hereinafter set out in the brief of the law herewith filed on behalf of these appellants.

III

Under Point III of POINTS AND AUTHORITIES, set out in the brief of the law filed herewith on behalf of these appellants, the relation of the California and Oregon Railroad Company and the Oregon companies, is discussed, also the contention made that Congress was without lawful authority on April 10, 1869, (16 Stat. 47) to annex a condition by amendment, or otherwise, to the land grant made by the Act of July 25, 1866, (14 Stat. 239) as amended by the Act of June 25, 1868, (15 Stat. 80).

The evidence to be considered in connection with what was done under these various statutes may be summarized as follows:

(a) Copy of Act of July 25, 1866. (Vol. I, pp. 6-13 Transcript of Record)

(b) Copy of amendatory Act of Congress of June 25, 1868. (Vol. I, pp. 13-14 Transcript of Record)

(c) Copy of Amendatory Act of Congress of April 10, 1869. (Vol. I, pp. 20-21 Transcript of Record)

(d) Copy of Articles of Incorporation of the Oregon Central Railroad Com-

pany of Portland, (West Side). (Vol. IV, pp. 1625-1628 Transcript of Record)

(e) Copy of House Joint Resolution No. 13 of the Legislature of Oregon, adopted October 10, 1866. (Vol. I, pp. 15-16 Transcript of Record)

(f) Certified copy of resolution of the West Side Company assenting to the Act of Congress approved July 25, 1866, adopted May 25, 1867, certified copy of which was filed on July 6, 1867, with the Secretary of the Interior, together with a certified copy of its Articles of Incorporation, and House Joint Resolution No. 13, adopted October 10, 1866, and a correct copy of its map of survey of its projected line of road, filed in the Department of the Interior August 20, 1868. (Vol. IV, pp. 1555 and 1629; Vol. IX, pp. 4286-4288 Transcript of Record)

(g) Copy of Articles of Incorporation of the Oregon Central Railroad Company of Salem, (East Side), filed in the office of the Secretary of State April 22, 1867. (Vol. IV, pp. 1555 and 1630-1632 Transcript of Record)

(h) Copy of Senate Joint Resolution No. 16, of the Legislature of Oregon,

adopted October 20, 1868, rescinding House Joint Resolution No. 13, and designating the East Side Company the beneficiary of the Act of July 25, 1866. (Vol. IV, p. 1556; Vol. I, pp. 17-18 Transcript of Record)

(i) Adoption November 25, 1868, by East Side Company, of resolution accepting the grant of July 25, 1866, and directing that the Secretary of the East Side Company be instructed to prepare a true and certified copy of the preamble and resolution, together with a certified copy of such Joint Resolution known as Senate Joint Resolution No. 16, and forward same to the Secretary of the Interior, to be filed as the assent of the East Side Company to the grant aforesaid. (Vol. X, pp. 5026-5027 Transcript of Record)

(j) Copy of the resolution of the East Side Company, adopted June 8, 1869, filed June 30, 1869, with the Secretary of the Interior, assenting to the Act of July 25, 1866, and all acts amendatory thereof. (Vol. IV, p. 1557; Vol. I, pp. 21-23 Transcript of Record)

(k) Filing by East Side Company, on October 29, 1869, in the office of the Sec-

retary of the Interior, of a map of the survey and location of the first sixty miles of its projected line of railroad, extending Southerly from Portland; completion on or about December 24, 1869, by that company of the first twenty miles of its said line of railroad, commencing at Portland, and acceptance and approval thereof on December 31, 1869, by Commissioners appointed pursuant to Section 4 of the Act of July 25, 1866, who had theretofore examined the same. (Vol. IV, pp. 1557-1558 Transcript of Record)

(l) Copy of Articles of Incorporation of the Oregon and California Railroad Company, filed in the office of the Secretary of State, March 17, 1870. (Vol. IV, p. 1558; Vol. I, pp. 89-92 Transcript of Record.)

(m) Copy of deed of date March 29, 1870, executed by the East Side Company to the Oregon and California Railroad Company, recorded in the office of the County Recorder of the several counties in which was situate any part of the lands intended to be granted by the Act of July 25, 1866, (Vol. IV, p. 1558; Vol. I, pp. 93-125 Transcript of Record) by

which deed the East Side Company conveyed to the defendant Oregon and California Railroad Company, its railroad and all its rights under the Act of July 25, 1866, and acts amendatory thereof, *in solido.*

(n) Copy of resolution of Board of Directors of Oregon and California Railroad Company adopted April 4, 1870, certified copy of which, with certified copy of deed of March 29, 1870, was filed in the office of the Secretary of the Interior, on April 28, 1870. (Vol. IV, pp. 1558-1559; Vol. I, pp. 26-28 Transcript of Record)

(o) Copy of Act of May 4, 1870. (Vol. I, pp. 28-32 Transcript of Record)

(p) Adoption by the West Side Company on July 2, 1870, of a resolution in terms assenting to and accepting all of the provisions of the Act of May 4, 1870, and filing of same on July 20, 1870, in the office of the Secretary of the Interior. (Vol. IV, p. 1559; Vol. IX, pp. 4414-4415 Transcript of Record. Government's Exhibit No. 100-A)

(q) An Act of the Legislature of the State of Oregon of October 14, 1862, entitled, "An Act providing for private

incorporations, and the appropriation of private property therefor," approved October 14, 1862, (Code of 1862, pp. 3-15 both inclusive) the material part of which act is now Lord's Oregon Laws, Sections 6679-6699-6838-46, 6653. In connection with this statute, should be considered the incorporation of the Oregon Central Railroad Company of Portland, (West Side Company), the incorporation of the Oregon Central Railroad Company of Salem, (East Side Company), and the Oregon and California Railroad Company.

(r) Adoption of resolution of the Board of Directors of the East Side Company, April 29, 1868, accepting the grant of July 25, 1866, empowering A. M. Loryea to present a duly certified copy thereof to the proper authorities, as provided by law, to be filed as certified by S. A. Clark, Secretary of the East Side Company, under date of April 30, 1868, (Vol. XIV, pp. 7454-5 Transcript of Record) and in connection therewith, adoption of resolution by the East Side Company, appointing A. M. Loryea, Agent and representative of that company, April 15, 1868; (Vol. X, pp. 4934-8 Transcript of Record) letter of A. M.

Loryea of date July 16, 1868, addressed to O. H. Browning, Secretary of the Interior, enclosing same to Secretary of the Interior, so that it might be filed as an acceptance of the lands granted by Congress; (Vol. XIV, p. 7454 Transcript of Record) letter of O. H. Browning, Secretary of the Interior, to A. M. Loryea, of date July 17, 1868, (Vol. XIV, pp. 7440-1 Transcript of Record) acknowledging receipt of such certified copy of said resolution called "An Acceptance by the Oregon Central Railroad Company of the grant made by the Act of July 25, 1866."

(s) Commencement of construction by West Side Company, April 15, 1868, (Vol. IV, p. 1760 Transcript of Record) and continuation of such construction up to and after April 10, 1869.

(t) Commencement of construction by East Side Company, April 16, 1868, (Vol. X, pp. 4939-4975 Transcript of Record)

(u) Letter of George H. Williams, Government's Exhibit No. 108, Objections to passage of Senate Bill No. 94, (Vol. X, pp. 5298-5321 Transcript of Record) and particularly the report of

the Committee on Public Lands of the Senate, reporting said Act of April 10, 1869, in the form in which it passed the Senate, showing that it was the intention of Congress not to impair any vested rights arising out of the Act of July 25, 1866, which may have been created in favor of either of the Oregon companies, or of the California and Oregon Railroad Company, specifically named in the Act of July 25, 1866; and that the primary purpose of the Act of April 10, 1869, was to provide that one of the Oregon companies should obtain the grant, and that the grant might be used for railroad purposes, and that there might be a judicial settlement of the controversy between the two companies, not intending, however, to make the filing of assent obligatory, but permissive, and not intending to impair any right vested in the California and Oregon Railroad Company to construct a continuous line from Roseville Junction, in California, to Portland, in Oregon, under the Act of July 25, 1866, in the event no Oregon company was designated, or such company designated failed to construct the road and thereby earn the grant, in Oregon.

(v) Filing by the company of Selection Lists, approval of sale by the Secretary of the Interior, and issuance of patents to the lands described therein, in recognition of the fact that the East Side Company had constructed the road, and thereby earned the lands granted, as shown by Government's Exhibit No. 110, from July 8, 1870, down to and inclusive of December 7, 1906, (Vol. X, pp. 5374-5404 Transcript of Record) and Government's Exhibit No. 111, (Vol. X, pp. 5405-5452 Transcript of Record)

(w) Statement of maps of survey and location, filed in the Interior Department of the United States, by the East Side Company, and the Oregon and California Railroad Company, under the East Side grant, commencing with that filed October 29, 1869, and ending with the filing of the map of the twelfth section, August 18, 1884, Exhibit 13 to Stipulation, (Vol. IV, pp. 1713-1715 Transcript of Record) and statement of the dates of construction, completion, approval and acceptance of the several sections of East Side railroad, by the East Side Company, and the Oregon and California Railroad Company, Exhibit 14 to Stipulation, (Vol.

IV, pp. 1717-1720 Transcript of Record), showing construction of first section of twenty miles completed December 24, 1869, examined by Commissioners and favorably reported upon December 31, 1869, reports submitted by the Secretary of the Interior January 26, 1870, to the President of the United States, and its acceptance recommended, and such recommendation approved by the President, January 29, 1870, and the twelfth section, extending to the boundary line between Oregon and California, completed prior to June 20, 1888, and report of the Commissioners transmitted by the Secretary of the Interior to the President, October 23, 1889, with recommendation that the railroad be accepted, and approval of such recommendation by the President, November 8, 1889.

(x) Exhibit "O" to the bill of complaint, (Vol. I, p. 527 Transcript of Record) showing amount of land patented, compiled by years, separately stated as to East Side Grant, Act of July 25, 1866, as amended, beginning in 1871, down to and including 1906, showing patents issued for 2,765,597.13 acres, as earned by construction of road.

(y) Summary of patents issued to Oregon and California Railroad Company, as shown by Defendants' Exhibit 382, (Vol. XIV, pp. 7514-7557 Transcript of Record), a form of which patent is set out in Vol. IV, pages 2045-6, Transcript of Record.

(z) Opinion of Assistant Attorney General Smith, to Secretary Delano, of date May 5, 1871; letter of Secretary Delano of May 8, 1871, to Attorney General Ackerman, and opinion of Attorney General Ackerman of date May 9, 1871, to Secretary Delano, as shown in Defendants' Exhibit 376, (Vol. XIV, pp. 7439-7474 Transcript of Record) advising that this grant could be transferred and sold *in solido* to the Oregon and California Railroad Company, and that the latter company was entitled to patents from the United States, therefor, for lands earned by construction of road, and showing that such construction was possible by reason of funds obtained from sale of bonds, secured by mortgage upon the property of the company, including this land grant, conveyed *in solido,* thereby placing construction upon the meaning and effect of the proviso of the Act of April 10, 1869, and by implication hold-

ing that such proviso did not create a condition subsequent, or did not affect the rights acquired under the Act of July 25, 1866, or the title granted to the company in fee simple, to aid in construction of road.

(aa) Correspondence between the European and Oregon Land Company and the Department of Justice, and the Department of the Interior, in 1872, showing construction of the proviso of April 10, 1869, as contended for by the European and Oregon Land Company, and notice imputed to the United States thereby, of the sale of this land grant *in solido* to the European and Oregon Land Company, and to Trustees, to secure bonds to be sold to procure funds for construction of road, and acquiescence of the United States, until April 30, 1908, in the construction of the grant as conveying the title in fee simple to the company, and as being unaffected by the proviso of April 10, 1869, (Government's Exhibit No. 109, 109-A, 109-B, 109-C, and 109-D, Vol. X, pp. 5322-5374 Transcript of Record; Defendants' Exhibit 373, Vol. XIV, pp. 7371-7375; Defendants' Exhibit 374, Vol. XIV, pp. 7375-7383; Defendants' Exhibit 375, Vol. XIV, pp.

7383-7438 Transcript of Record) all relating to the administration of this grant under the Act of July 25, 1866, from December 19, 1870, down to November 9, 1905, in recognition of the right of the East Side Company, the Oregon and California Railroad Company, and the European and Oregon Land Company, their respective trustees and mortgagees, to convey the title in fee simple to the lands granted under the Act of July 25, 1866, without regard to the so-called "actual settler" clause in the proviso of the Act of April 10, 1869, thereby recognizing, for a period of thirty-five years, that that proviso in the Act of April 10, 1869, did not affect the title of the companies in any respect, and did not amount to a condition subsequent, for breach of which there could be forfeiture of the lands granted.

(bb) The facts stated in the argument under Point III set out in the brief of the law filed herewith on behalf of these appellants show that the California and Oregon Railroad Company complied with the Act of July 25, 1866, and had the right, in default of the Oregon company, to continue construction of road from the Oregon and California state line, to Port-

land, Oregon, and earn the grant without regard to the Act of April 10, 1869.

IV.

Under point IV of Points and Authorities set out in the brief of the law filed herewith, the contention is made that the so-called "actual settler" clause in the act of April 10, 1869, and Section 4 of the act of May 4, 1870, construed so as to give effect to the primary policy of Congress and to carry out the purposes of the granting acts in the light of long-continued, contemporaneous, and permitted construction of these acts as evidenced by the record and subsequent legislation of Congress relating to land grants and public lands, did not create a *condition subsequent*. The evidentiary record in that respect, read in connection with the original act of July 25, 1866, the amendatory act of June 25, 1868, the amendatory act of April 10, 1869, and the act of May 4, 1870, may be summarized as follows:

(a) Presumed knowledge of Congress when it passed the act of June 25, 1868, of the actual work of construction by the West Side company begun April 15, 1868, (Vol. IV, page 1760), and the East Side company begun April 16, 1868, (Volume X, pages

4939-4975), and continued by both companies as rapidly, under the circumstances, as was reasonably possible.

(b) The report of the Committee on Public Lands of the Senate, of date March 22, 1869, accompanying Senate bill No. 94, introduced by Senator Williams March 10, 1869, (Volume X, pages 5310-5321) showing the reasons why the Senate Committee on Public Lands reported favorably upon the bill as it passed the Senate, and showing that the primary object and purpose of this legislation was to save the land grant for the benefit of the railroad company entitled to become the beneficiary thereof, in order that the grant might take effect "to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California to Portland in Oregon". The main object of Secretary Browning, as shown by his letter of January 13, 1869, made a part of this report, was to relieve him of embarrassment in declining to act upon maps filed by the West Side company in the absence of a judicial decision as to the rights of the claimants or some action by Congress upon the subject, and also for the reason stated by him in his letter to Senator Williams, wherein he says:

"In reply, I have to say that as there are two companies of the same name claiming, under the laws of the State of Oregon, the benefit of the grant made by said act of 1866, I must decline, in the absence of a judicial decision as to the rights of the claimants, or some action by Congress upon the subject, to comply with your request."

The Senate Committee on Public Lands, commenting upon this correspondence referred to in its report, says:

"Looking at the above decision of the Secretary of the Interior, and the action of the Oregon Legislature in 1868, taken upon evidence submitted and arguments made by the respective companies, it is evident that the *State of Oregon* is in great danger, at least, of losing the grant altogether, without some legislation in effect reviving it.

Congress ought not to decide between the two companies, because the questions involved are judicial in their nature, and the object of the accompanying bill is to provide so that both companies may have a standing in the courts of Oregon, and there have their legal rights and

equities fully examined and adjudicated. * * *

Both companies claim, and it may be that both have been designated by the Legislature, and if both are allowed to file their assent, as required by the sixth section of the act of Congress, it is made certain not only that one of the companies will get the grant, but that it will be used for railroad purposes, in which the State has more interest than in the fortunes of either company."

(c) Correspondence between Secretary Browning, George H. Williams and others, Government's Exhibit No. 130, Volume XI, page 5766, Volume IV, pages 1910-1920, with reference to the rights of the East Side company and West Side company respectively, and the letter of Secretary Browning of date January 20, 1869, advising that on January 13, 1869, he had declined to act upon maps filed by the West Side company in the absence of a judicial decision as to the rights of the claimants or some action by Congress upon the subject.

(d) Correspondence between Joseph S. Wilson, President of European and Oregon Land Company, Ben Holladay, George H.

Williams as Attorney General, C. Delano as Secretary of the Interior, and Willis Drummond as Commissioner of the General Land Office, relating to the construction of the act of April 10, 1869, Government's Exhibit No. 109, Volume X, page 5322, and therewith copy of deed executed by the Oregon and California Railroad Company and its trustees, to the European and Oregon Land Company, by which the land granted under the act of July 25, 1866, and acts amendatory thereof, were conveyed in solido to the European and Oregon Land Company, to the knowledge of the Department of Justice and the Secretary of the Interior, and by which correspondence it is shown that the Oregon and California Railroad Company and European & Oregon Land Company contended that the proviso of the act of April 10, 1869, known as the "actual settler" clause, should be construed as contended by each company, in accordance with the opinion of their counsel, S. M. Wilson, copy of whose letter is in the correspondence; and that the proviso should be construed to the effect that "all actual settlers on the odd sections from 25th July, 1866, the date of the original grant, and all those who went on the odd sections from that date to the passage of the act of 10th April 1869, and all others who are found on such odd

sections when the line of railroad is surveyed and established, are protected and have the right to purchase, each one, not exceeding 160 acres at $2.50 per acre; but that in regard to all other persons, the original absolute grant by act of 25th July 1866 is in full force and effect, and authorizes the company to sell on such terms as may be reasonable and just to all parties, without any restriction." This evidence, brought to the attention of the Department of Justice and the Secretary of the Interior a distinct and definite breach of the alleged "actual settler" clause by the conveyance mentioned and the contention made, and indicated a policy of the European and Oregon Land Company and the Oregon and California Railroad Company to insist upon the administration of the grant along these lines. The record shows that no action of any kind, other than a dissent to these views expressed by Secretary Browning, was ever taken by the United States and that it continually, from that date until April 30, 1908, when the joint resolution under which this suit is prosecuted was passed by Congress, during that entire time had proper and appropriate actual, as well as constructive, notice of the way and manner in which the grant was being administered; and that as so administered, it was during all that time in al-

leged violation of the so-called "actual settler" clause. See also

Government's Exhibit No. 109-A, Volume X, page 5363,

Government's Exhibit No. 109-B, Volume X, page 5365,

Government's Exhibit No. 109-C, Volume X, page 5368, and

Government's Exhibit No. 109-D, Volume X, page 5370, of Transcript of Record,

all relating to this same subject, and being separate certified copies of the respective letters contained in Government's Exhibit 109 and referred to therein. See also Defendants' Exhibit 373, Volume XIV, pages 7371-7375 of Transcript of Record, being correspondence between Secretary of the Interior J. D. Cox, of date May 7, 1870, and Joseph S. Wilson, Commissioner of the General Land Office; letter of Joseph S. Wilson, Commissioner of the General Land Office, of date May 23, 1870, to George H. Williams, United States Senate; letter of Joseph S. Wilson, Commissioner, of date May 23, 1870, addressed to the Register and Receiver, Oregon City, Oregon, relating to the evidence of sale of the Oregon Central Railroad (East Side)

to the Oregon and California Railroad Company; letter of May 20, 1872, from Willis Drummond, Commissioner, to Honorable C. Delano, Secretary of the Interior, referring to certain papers filed in his office by George H. Williams, Attorney General, for the purpose of obtaining a construction by the Department of the act of April 10, 1869. Also Defendants' Exhibit 374, Volume XIV, pages 7375-7383, consisting of certified copies of form of deed of European & Oregon Land Company; letter from I. R. Moores, Land Agent, to Willis Drummond, Commissioner of the General Land Office, of date January 23, 1874; and letter from Willis Drummond of date March 13, 1874, to I. R. Moores, in reference to lands said to have been erroneously patented to the Oregon and California Railroad Company; thus recognizing the administration of the land grant under the deed made by the Oregon and California Railroad Company and its trustees, to the European & Oregon Land Company, thus imputing notice to the United States, through its Land Department, having exclusive jurisdiction and authority under the act of July 25, 1866. to see that this grant was properly administered, and to report to the President, and he, in turn, to the Congress of the United States, any failure to administer the same in accord-

ance with the act of July 25, 1866, and acts amendatory thereof. Defendants' Exhibit 375, Volume XIV, pages 7383-7439, of Transcript of Record, consisting of certified copies of correspondence, letters and telegrams from June 20, 1876, up to and including November 9, 1905, between the Land Department of the Oregon and California Railroad Company and the Land Department of the United States, and enclosing to the Commissioner of the General Land Office certified copies of the following:

(1) Deed of grant, bargain, release, convey and quit-claim, dated June 22, 1876, executed by Milton S. Latham, Faxon D. Atherton and William Norris to Jeremiah Criss and Starke, to 243.18 acres;

(2) Like deed dated June 22, 1876, executed by same parties to Rogers Pepiot, conveying 80 acres;

(3) Like deed dated June 22, 1876, executed by same parties to Cornelius Hackshaw, for 100 acres;

(4) Like deed dated June 22, 1876, from same parties to Reuben Draper, for 40 acres;

(5) Like deed dated June 22, 1876, executed by same parties to William L. Lucky, for 105 acres;

(6) Like deed dated June 22, 1876, from same parties to George W. Caton, for 80 acres;

(7) Like deed dated June 22, 1876, from same parties to Henry K. King, for 36.90 acres;

each of which deeds recites that these lands were patented by the United States to the Oregon and California Railroad Company, and embraced in the trust deed of that company to said trustees of date April 15, 1870, and that the Commissioner of the General Land Office had requested that company to cause the premises to be conveyed to the various parties named. Therewith was a letter of transmittal dated June 28, 1876, from P. Schulze, Land Agent Oregon and California Railroad Company, advising the Commissioner of the General Land Office of the transmittal, and that he did not send a deed for a certain other tract requested by the Commissioner in his letter of March 13, 1874. There is also in this exhibit a copy of letter from J. J. Williamson, Commissioner of the General Land Office, dated July 14, 1876, addressed to P. Schulze as Land Agent of the Oregon and California Railroad Company, acknowledging receipt of these seven quitclaim deeds executed June 22, 1876, in com-

pliance with his letter of April 22, 1873, to these lands which were inadvertently patented to the company May 29, 1872; there is therewith also a letter of P. Schulze to the Commissioner of the General Land Office, dated July 9, 1877, advising that the company would furnish a quit-claim deed for the tracts described in the letter of the Commissioner June 19th,—which last named letter is also in the correspondence and requests one quit-claim deed for 160.20 acres erroneously patented to the company May 9, 1871, and a like deed to Willis Osborn for 58.80 acres erroneously patented to the company July 12, 1871; also a like letter from the Commissioner to Land Agent Schulze dated April 27, 1877, requesting a deed from the company to John W. Cleaver for 19.45 acres erroneously patented to the company July 12, 1871; also letter of the Commissioner dated April 30, 1877, addressed to Land Agent Schulze, requesting a deed to Green B. Savery for 68.44 acres erroneously patented to the company July 10, 1871; also letter of Land Agent Schulze, dated August 10, 1877, to the Commissioner, acknowledging delayed receipt of letters of the Commissioner of April 27th and April 30th, and advising that quit-claim deeds to the United States for these tracts would be issued *"as soon as a mortgage trustee will*

have been appointed by the Court in place of F. D. Atherton, deceased"; also letter of Land Agent Schulze to the Commissioner, dated August 10, 1877, enclosing deed to James Waldrup for 42.21 acres; also letter of Commissioner Williamson, dated September 5, 1877, to Land Agent Schulze, acknowledging receipt of deed last mentioned in accordance with the request of Commissioner of the General Land Office of date March 13, 1873, which deed is of the same form as the seven deeds hereinbefore mentioned; also letter from Commissioner Williamson, dated September 6, 1877, to the Register and Receiver at Oregon City, Oregon, advising that the selection of this 42.21 acres by the company, *"under the acts of July 25, 1866, and June 25, 1868"*, patented May 7, 1871, were duly relinquished by the company June 22, 1876, upon showing that the selection was in direct conflict with the donation claim of James Waldrup. Also letter from Land Agent Schulze to the Commissioner, dated June 28, 1878, in reply to his letters of April 27, April 30 and June 19, 1877, enclosing a relinquishment of the company to certain lands, also letter from the Commissioner to Land Agent Schulze, dated February 16, 1878, acknowledging receipt of letter of January 28, 1878, and relinquishment of Company to lands described, con-

sisting of 160.20 acres, 19.45 acres, 68.44 acres, and 50.80 acres,—a copy of which relinquishment is also in the record and recites that the lands are part of the lands conveyed by the company to the trustees mentioned by deed of April 15, 1870,—that Faxon D. Atherton died July 18, 1877, and the surviving trustees are Milton S. Latham and William Norris. The relinquishment is in the form of a deed of release and quit-claim, duly acknowledged. While the record is silent as to whether these deeds were transmitted to the grantees for record, the presumption is that they were so transmitted and duly recorded in the Records of Deeds of the counties where the tracts respectively are located. There is also in said exhibit, letter of Commissioner N. C. M'Farland, dated August 4, 1881, to Land Agent Schulze, requesting reconveyance of lands erroneously patented to the company, advising that "the Company would be entitled to select other lands in lieu thereof, according to the provisions of the second section of the act of July 25, 1866", and further advising that "the proofs show compliance with the law, and the land absolutely vested in said claimants prior to the *act of July 25, 1866*, granting lands to said railroad company (see case of *Hall vs. Russell*, 11 Otto, 503)." Also letter of Land Agent Schulze, dated August

25, 1881, addressed to the Commissioner of the General Land Office, acknowledging receipt of letter of August 4, 1887, and advising that the company would comply with the request, but that "there will be, however, some delay in the issuance of such deed as it will require some time to obtain the signatures of the *mortgage trustees of this company*". Also letter of June 11, 1887, from Land Agent George H. Andrews, while the property was in the hands of R. Koehler, Receiver, addressed to Commissioner of the General Land Office, enclosing deed of the company requested by the Commissioner of the General Land Office in his letters of January 12th and 31st, 1885, and letter to R. Koehler of April 25, 1877, and advising that the first two pieces described were included in patent dated May 29, 1872, and the last in patent dated July 12, 1871; Commissioner Sparks, in his letter of July 2, 1887, addressed to Land Agent Andrews, acknowledged receipt of letter of June 11, 1887, enclosing deed reconveying to the United States the premises described. Copy of this deed is printed in the record, Volume XIV, pages 7420-7425, Transcript of Record. This deed is executed by Oregon and California Railroad Company, and *The Farmers' Loan & Trust Company,* which company is recited as "being the trustee or mortgagee of

said lands so granted to said railroad company by said act of Congress", and recites also that the lands were erroneously patented to the company *"under the act of Congress of July 25, 1866, granting lands to said company to aid in the construction of its railroad and telegraph line therein mentioned."* This deed bears date May 9, 1887, and is duly witnessed and acknowledged, and the United States is the immediate grantee therein and thereby became a party to the conveyance. This deed was, on July 2, 1887, transmitted by the Commissioner of the General Land Office to the United States Land Office at Roseburg, Oregon, and A. C. Jones, Receiver of that Land Office, under date of October 21, 1887, by letter advised the Commissioner of the General Land Office that he therewith returned the deed, "the same having been recorded in all the counties in which the land is situated (Linn and Lane), and being returned to this office by the Register and Receiver of Oregon City Land Office." There is in this record as a part of this exhibit (Volume XIV, pages 7426-7433) a certificate of Commissioner Sparks under date of June, 1887, certifying that the enclosed copy of deed executed by the Oregon and California Railroad Company and The Farmers Loan &

Trust Company on May 9, 1887, to the lands mentioned, is a true and literal exemplification from the files of his office, and which deed is a duplicate of the deed set out in Volume XIV, pages 7420-7425 Transcript of Record; which deed bears the certificate of R. Koehler, Receiver, dated June 8, 1887, that he approved the execution thereof upon the consideration and terms therein expressed, "pursuant to an order of the Circuit Court of the United States for the District of Oregon, bearing date February 9th, 1885, in the case of Lawrence Harrison et al. vs. the Oregon and California Railroad Company et al. of record in said Court and Cause". There is in this exhibit and record a letter of D. A. Chambers, attorney for the company, addressed to the Commissioner of the General Land Office, dated October 19, 1905, and a letter acknowledging receipt thereof of date November 9, 1905, from Acting Commissioner J. H. Fimple, with copy of deed No. 88-B, of date August 1, 1905, executed by the company as requested by the Commissioner of the General Land Office February 6, 1905, which deed is executed by the Oregon and California Railroad Company and the Union Trust Company to the United States, and recites that the lands thereby relinquished and reconveyed to the United States were,

through inadvertence and mistake, patented by the United States to the company June 14, 1904. This deed is duly acknowledged, certified and witnessed so as to be entitled to record, and presumably was forwarded to the local United States Land Office in Oregon for record in Lane County, Oregon, where the land is situated.

Defendants' Exhibit 376, Volume XIV, pages 7439-7457 Transcript of Record, consists of certified copies:

(a) Letter of July 17, 1868, from O. H. Browning, Secretary of the Interior, to A. M. Loryea, in regard to filing assent;

(b) Letter of May 5, 1871, from Walter H. Smith, Assistant Attorney General, to C. Delano, Secretary of the Interior, expressing favorable opinion as to validity of assignment by the Oregon Central Railroad Company to the Oregon and California Railroad Company, and that patents should be issued to the Oregon and California Railroad Company;

(c) Letter of May 8, 1871, from C. Delano, Secretary of the Interior, to A. T. Akerman, Attorney General, in reference to claims of W. E. Chandler;

(d) Letter of July 16, 1868, from A. M. Loryea to O. H. Browning, Secretary of the

Interior, advising that Gaston's organization is illegal;

(e) Certificate of S. A. Clarke, Secretary of the East Side company, dated April 30, 1868, certifying that the Board of Directors of the East Side company on April 29, 1868, passed a resolution as follows:

> "Resolved, that the Oregon Central Railroad Company hereby accepts any grant of land which may have been made, or may be extended to said Company, and our Agent, A. M. Loryea, is hereby fully empowered to present a duly certified copy of this Resolution to the proper authorities as provided by law to be filed."

(Volume XIV, pages 7454-7455).

(f) Letter of May 9, 1871, of Attorney General A. T. Akerman, to C. Delano, Secretary of the Interior, in answer to his letter of May 8, 1871.

Defendants' Exhibit 376 is certified under date of March 16, 1912, to be a true copy of the originals as they appear on the records and files of the Department, and is so certified by the Assistant Secretary of the Interior. (Volume XIV, page 7440).

The letter of July 17, 1868, above mentioned, acknowledged receipt of letter of A. M. Loryea of July 16, *1868*, (Volume XIV, page 7454) printed as July 16, *1869*, and the accompanying paper "purporting to be an acceptance by the Oregon Central Railroad Company of the grant made by the Act of July 25, 1866." Secretary Browning further says:

> "By law the Company was required to file an 'assent' to its terms and conditions, within one year. That time expired July 25, 1867, and this paper, if sufficient for that purpose, could not now be received. I state for your information that J. Gaston, President of the Oregon Central Railroad Company, within the time prescribed in that act filed an assent which was received."

The letter of Mr. Loryea of July 16, 1868, to Secretary Browning, reads:

> "I desire to notify you that the Oregon Central Railroad of which J. Gaston represents himself as President, is an illegal organization. The organization of the same name of which I. R. Moores is President and myself Vice President was made in conformity to the laws of the

> State of Oregon. In connection herewith I desire to call your attention to the enclosed paper and ask that it may be filed as an acceptance of the lands granted by Congress for such purpose."

The "enclosed paper" therein referred to is evidently the certified copy of the resolution of the Oregon Central Railroad Company (East Side) set out above. It is proper to call the attention of the Court, in this connection, to the fact that Congress on June 25, 1868, (Volume I, pages 13-14, Transcript of Record), had passed an act amendatory to the act of July 25, 1866, by which Section 6 of the original act was displaced and a complete Section 6 enacted in lieu thereof, which substituted section provided that Section 6 of the original act should "be so amended as to provide that instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph shall be completed within eighteen months from the passage of this act, and at least twenty miles in each two years thereafter, and the whole on or before the first day of July, Anno Domini 1880." Under this act of June 25, 1868, the filing of assent was dispensed with and the resolution adopted April 29, 1868, by the East Side company accepting the grant made, and the delivery of a certified copy

thereof on July 16, 1868, to the Secretary of the Interior—while not required—was evidence of the assent of the East Side company to the act, and was notice to the United States of its claim to the land grant to be earned by construction of road commenced April 16, 1868, and continued and completed as to the first section of twenty miles as required by the act of June 25, 1868. On May 5, 1871, the Department of Justice advised the Secretary of the Interior that the title of the Oregon and California Railroad Company, under the conveyance or transfer and assignment made by the East Side company, was a valid assignment of all of the land grant to the Oregon and California Railroad Company, and entitled the latter company to patents. Assistant Attorney General Smith says:

> "The Oregon Central constructed the first section of twenty miles of its road and the President on the 29th day of January, 1870, ordered the patents for that portion to be issued.
>
> On the 28th of April, 1870, the Secretary of the Oregon Central, filed in the Department of the Interior, an assignment by that Company of all its rights and interests to the Oregon and Califor-

nia Railroad Company, and thereupon Secretary Cox recognized the said last named Company as the one entitled to the grant given to its assignor, and gave a certificate to that effect upon the faith of which the road had been able to negotiate a large amount of its bonds, secured by a mortgage upon the lands assigned.

The Oregon and California Company have completed three additional sections, each twenty miles, of the road leading from the City of Portland to the Central Pacific in California. Commissioners have reported favorably thereon, and the President has directed the patents to issue, and the question now is, shall the patents issue or be delayed by reason of anything alleged in the communication of Mr. Chandler.

He argues 1st that the Congressional land grant was a personal trust vested in this Oregon Central Railroad Company for the public purpose of aiding in the construction of an important railroad line and could not legally be sold or transferred to another railroad company without the consent of Congress.

I agree with him in the opinions that this grant could not be assigned to an-

other company without the consent of Congress, but I disagree with him upon the question whether the consent of Congress has not already been given. As I construe the Act of July 25th, 1866, Congress has given such consent. Throughout the entire act it has shown an intent to deal with the assignee of the Oregon Central as well as with that road itself. * * * I am decidedly of opinion that the patents should be issued to the Oregon and California Railroad Company. If I were in doubt upon this point I shall still advise as I have done, in view of the former action of your Department sanctioned by Secretary Cox and Attorney General Stanberry and in view of the large pecuniary interest, that have arisen upon the faith of that action."

It will be remembered that the East Side company conveyed its property to the Oregon and California Railroad Company by formal deed of conveyance, for a valuable and sufficient consideration, and that it is stipulated (Volume IV, page 1558, Transcript of Record) that on March 29, 1870, the East Side company executed and delivered to the defendant Oregon and California Railroad Company the instrument in writing, a correct copy of which is attached to the Bill of Com-

plaint as Exhibit "B" (Volume I, pages 93-126, Transcript of Record), and that it is stipulated that this Exhibit "B" is a correct copy of that deed, and that this deed was recorded in the office of the County Recorders of the several counties in which was situated any part of the lands intended to be granted by the act of Congress of July 25, 1866; and that on April 4, 1870, the Oregon and California Railroad Company adopted a resolution, a correct copy of which is found in Volume I, pages 26-28, Transcript of Record, and that on April 28, 1870, a certified copy thereof—together with a certified copy of the deed of March 29, 1870—was filed in the office of the Secretary of the Interior; and it is stipulated that at all times since March 29, 1870, the Oregon and California Railroad Company has assumed, and still assumes, itself to be the successor of the East Side company in and to all the forfeitures, rights of property granted or intended to be granted by the said acts of Congress. In this situation, there was actual notice to the Department of Justice and to the Department of the Interior, and thereby to the United States, of the sale and conveyance of this land grant *in solido* to the Oregon and California Railroad Company. It also appears that the Secretary of the Interior approved the record

of the Commissioners as to the construction of the first twenty miles, and recommended that patents be issued for the lands opposite to and co-terminous therewith, and the President approved this recommendation and patents were issued. It also appears from the opinion of the Assistant Attorney General, representing the Department of Justice, that Secretary Cox recognized the Oregon and California Railroad Company as entitled to the grant, and gave a certificate to that effect, upon the faith of which the road had been able to negotiate a large amount of its bonds secured by a mortgage upon the lands assigned, and that the Oregon and California Railroad Company had completed sixty additional miles of road; that Commissioners had reported favorably thereon, the President had directed patents to issue, and that Wm. E. Chandler, evidently employed by the West Side company, appeared for that company, in connection with Benjamin F. Butler, and urged that further issuance of patents be suspended upon the ground that the grant could not be assigned to another company without the consent of Congress. The Department of Justice ruled that Congress had consented in advance by the act of July 25, 1866. This construction of the grant by the Department of Justice, upon which the Oregon and Cali-

fornia Railroad Company secured its bonds for construction of road, was adopted May 5, 1871, thirty-seven years prior to the passage of the Joint Resolution of April 30, 1908, and this construction has been continuously followed by the Department of Justice, the Department of the Interior, and the President of the United States from May 5, 1871, down to April 30, 1908, upon the faith of which the road was constructed to the Oregon-California line with funds obtained by sale of bonds secured by mortgage upon this land grant and the constructed portion of road. This construction is inconsistent with the contention now made that the words of the so-called "actual settler" clause created a condition subsequent, or that it was the intention of Congress to burden the title to these lands with the condition as to their sales, which, if broken at any time as to a single sale, would subject the title to the entire grant to forfeiture to the United States. If Congress had intended and expected that the lands could and should be sold to "actual settlers," it did not rely upon a construction of this clause for breach of which there could be forfeiture of title. At most, Congress may have relied upon the good faith and self interest of the company to carry out its policy and direction in that behalf if it could be so done,

and if such contract contemplated that this covenant as to sale should run with the land. And it may be that Congress intended that the company would sell to "actual settlers" who might apply to purchase, in good faith, prior to completion of road and prior to issuance of patents therefor, or to such actual settlers who may have entered upon the lands in good faith and applied to purchase the same as such actual settlers prior to issuance of patent, as contended by the European & Oregon Land Company, as shown by Government's Exhibit No. 109 (Volume X, page 5322), Government's Exhibits Nos. 109-A, 109-B, 109-C, 109-D (Volume X, pages 5363-5373), and Defendants' Exhibit 373 (Volume XIV, pages 7371-7375). Apparently Secretary Delano was not altogether satisfied with the opinion of Assistant Attorney General Smith rendered May 5, 1871, for on May 8, 1871 (Volume XIV, pages 7451-7453), he wrote to Attorney General Akerman, enclosing a letter of W. E. Chandler, together with the opinion of Assistant Attorney General Smith, and requested the opinion of the Attorney General so that he might submit the same to the President. In the course of his letter, Secretary Delano says:

> "However, before announcing to the Counsel a second decision, I again re-

ferred to the subject with you while at Cabinet meeting. I informed you that the parties desired me to refer the question to you, and knowing the pressure upon your time, I desired to know whether you deemed it advisable to have this case formally referred for your consideration.

I understood you to advise against it, and also advise that I follow the rulings of the Department made by Secretary Cox. This being in accord with my own deliberate judgment, I acted accordingly, and so informed Counsel for the parties.

The result has been that W. E. Chandler has sent to the President an extraordinary letter, complaining, among other things that I did not consult you on the subject, and that I have overruled your opinion in a like case. I have concluded, therefore, to ask you to read Mr. Chandler's letter, herewith inclosed, and to give me briefly (to be laid before the President) your recollection in regard to the matters herein referred to. I also submit the opinion of the Assistant Attorney General, Mr. Smith, upon the legal questions involved in the whole case, which opinion I wish you to examine, and

upon which I wish your opinion, that I may also submit it to the President."

To this request, Attorney General Akerman replied May 9, 1871 (Volume XIV, pages 7455-7457), from which we quote as follows:

"In answer to your letter of the 8th inst., I have the honor to state, that my recollection of what passed at the informal conference between us, in regard to the case of the Oregon and California Railroad Company, entirely agrees with your own. I did not, it is true, examine the case with the care and deliberation which I should have exercised if an opinion had been formally called for. But my impressions were, and still are (subject, of course, to be reversed, if they appear incorrect after deliberate consideration), that the case of the Oregon and California Railroad has been properly adjudicated by Mr. Cox, your predecessor, and that a reversal of his decision by you should not be made, unless you should be most clearly satisfied that he was in error, inasmuch as the embarrassment growing out of contrary decisions under such circumstances, would be most serious.

> The opinion of Mr. Smith, Assistant Attorney General, appears to me, from a cursory examination, to be a correct exposition of the law of the case."

Under Point V, of Points and Authorities, set out in the brief of the law filed herewith on behalf of these appellants, the defendants-appellants contend that the United States cannot in equity, as a suitor, enforce the actual settler clause, assuming that its words create a condition subsequent because

(1) The United States has waived its right, by long continued acquiescence and affirmative action, with full knowledge of continued breaches by the company, from the earliest administration of the grants to the passage and enforcement of the Act of August 20, 1912, (so-called Innocent Purchasers Act.);

(2) Because the United States is estopped, in view of all of the facts and circumstances, to attempt to enforce the same.

Evidence in the record in support of this contention may be summarized as follows:

(1) Correspondence between Joseph S. Wilson, President European and Oregon Land Company, Ben Holladay, George H.

Williams, Attorney General, C. Delano, Secretary of the Interior and Willis Drummond, Commissioner the General Land Office, relating to the construction of the Act of April 10, 1869, (Government's Exhibit No. 109, Vol. X, pp. 5322-5366, Transcript of Record) in which notice of the conveyance and sale of the grant of July 25, 1866, by the Oregon and California Railroad Company and its trustees, to the European and Oregon Land Company, by deed of date March 28, 1871, and in which also notice of the deed executed by the Oregon and California Railroad Company of date April 15, 1870, to Milton S. Latham, Faxon D. Atherton and Wm. Norris, conveying the grant, which deed was recorded in the Records of Deeds of Multnomah County, Oregon, on or about that date—both deeds conveying the grant *in solido*—was brought to the attention of the Department of Justice and the Secretary of the Interior, together with notice of the construction then placed upon the grant, and the so-called "actual settler" clause in the proviso of the Act of April 10, 1869, to the effect that, as contended by the European and Oregon Land Company and the Oregon and California Railroad Company, and these trustees, to secure the principal of certain bonds of the Oregon and California Railroad Company then outstanding,

sold to raise construction funds, "all settlers on the odd sections from 25th July, 1866, the date of the original grant, and all those who went on the odd sections from that date to the passage of the Act of 10th April, 1869—and all others who were found on such odd sections when the land of the railroad is surveyed and established, are protected; and have the right to purchase, each one, not exceeding 160 acres at $2.50 per acre, but that in referring to all other persons, the original absolute grant by Act of 25th July, 1866, is in full force and effect and authorized the company to sell on such terms as may be reasonable and just to all parties, without any restriction." See also Government's Exhibits Nos. 109-A-B-C-D; Government's Exhibit No. 110; Government's Exhibits Nos. 111, 111-A-B-C-D-E-F-G, (Vol. X, pp. 5363-5452 Transcript of Record); Government's Exhibits Nos. 109-A-B-C-D, being a part of the correspondence referred to in Government's Exhibit No. 109, and in this connection see also Defendants' Exhibit 373, (Vol. XIV, pp. 7371-7375); Defendants' Exhibit 374, (Vol. XIV, pp. 7375-7439); also Defendants' Exhibit 376, (Vol. XIV, pp. 7439-7457); also Defendants' Exhibit 377, (Vol. XIV, pp. 7457-7463); also Defendants' Exhibit 378, (Vol. XIV, pp. 7463-7502); Defendants' Ex-

hibit 382, (Vol. XIV, pp. 7514-7564); Defendants' Exhibit 383, (Vol. XIV, p. 7564); Defendants' Exhibit 384, (Vol. XIV, pp. 7564-7567); Defendants' Exhibit 385, (Vol. XIV, pp. 7567-7617); Defendants' Exhibit 386, (Vol. XIV, pp. 7617-7628); Defendants' Exhibits 387, 388, 389, 390, 391, 392, (Vol. XIV, pp. 7628-7631); Defendants' Exhibit 393, (Vol. XIV, pp. 7631-7655); Defendants' Exhibit 394, (Vol. XIV, pp. 7655-7680); Defendants' Exhibit 395, (Vol. XIV, pp. 7680-7720); Defendants' Exhibit 396, (Vol. XIV, pp. 7720-7758); Defendants' Exhibit 397, (Vol. XIV, pp. 7758-7792); Defendants' Exhibit 398, (Vol. XIV, p. 7792, Vol. XV, p. 7811); Defendants' Exhibit 399, (Vol. XV, pp. 7844-7858); Defendants' Exhibit 400, (Vol. XV, pp. 7858-7876); Defendants' Exhibit 401, (Vol. XV, pp. 7876-7912); Defendants' Exhibit 452, (Vol. XV, pp. 7912-7918); unnumbered exhibit, being letter from Benjamin Harris Brewster, Attorney General, to Hon. H. M. Teller, Secretary of the Interior, of date June 15, 1882, found at pages 35 to 39, inclusive, of Executive Document No. 29, Forty-seventh Congress, second session, in answer to a letter of January 5th submitting questions arising upon an application of the New Orleans, Pacific Ry. Co. for certain lands claimed under the land grant made

to the New Orleans, Baton Rouge and Vicksburg R. R. Co., by Act of March 3, 1871, which is printed in Vol. V, pp. 2512-2527. Defendants' Exhibit 263, (Vol. XIII, p. 6704); Defendants' Exhibit 264, (Vol. XIII, pp. 6704-6708); Defendants' Exhibit 276, (Vol. XIII, pp. 6721-6776); Defendants' Exhibit 280, (Vol. XIII, pp. 6776-6781); Defendants' Exhibit 283, (Vol. XIII, p. 6783); Defendants' Exhibit 284, (Vol. XIII, p. 6783); Defendants' Exhibit 288, (Vol. XIII, pp. 6835-6836); Defendants' Exhibit 293, (Vol. XIII, p. 6930); Defendants' Exhibit 294, (Vol. XIII, pp. 6932-6999); Defendants' Exhibit 295, (Vol. XIII, p. 7000); Defendants' Exhibit 320, (Vol. XIV, pp. 7167-7199); Defendants' Exhibit 321, (Vol. XIV, p. 7251); Defendants' Exhibit 331, (Vol. XIV, pp. 7263-7268); Defendants' Exhibit 333, (Vol. XIV, pp. 7268-7272); Defendants' Exhibit 334, (Vol. XIV, pp. 7273-7302); Defendants' Exhibit 335, (Vol. XIV, p. 7303); Defendants' Exhibit 336, Vol. XIV, p. 7303); Defendants' Exhibit 337, (Vol. XIV, pp. 7303-7306); Defendants' Exhibit 338, (Vol. XIV, p. 7306); Defendants' Exhibit 339, (Vol. XIV, pp. 7306-7307); Defendants' Exhibit 340, Vol. XIV, p. 7308); Defendants' Exhibit 345, (Vol. XIV, pp. 7310-7341); Defendants' Exhibit 346, (Vol. XIV, p. 7341);

Defendants' Exhibit 347, (Vol. XIV, pp. 7341-7342); Defendants' Exhibit 348, (Vol. XIV, p. 7342); Defendants' Exhibit 349, (Vol. XIV, pp. 7342-7343); Defendants' Exhibit 359, (Vol. XIV, pp. 7346-7347); Defendants' Exhibit 257, (Vol. XI, p. 5789 to p. 6454, Vol. XII.)

(2) In addition to the summary of the testimony set out under Point IV of Points and Authorities contained in the brief of the law filed herewith on behalf of these appellants, which may be relevant and material to the consideration of the questions now under consideration, and without repeating such testimony, it will be helpful to summarize the testimony disclosed by the exhibits above referred to, following and including Defendants Exhibit 377, (Vol. XIV, p. 7457).

(a) We invite special attention to Defendants' Exhibit 377, consisting of Senate Judiciary Committee Report No. 906, of date January 2, 1883; to accompany bill S. 2301, providing for the forfeiture of railroad grants in certain cases, which, although specially introduced in evidence, is within the judicial knowledge of the court under stipulation of counsel, (Vol. V, p. 2531, Transcript of Record).

Mr. Garland, from the Committee on the Judiciary, submitted the report, and it appears therefrom that for some time prior thereto the Committee on the Judiciary of the Senate had under consideration various memorials asking for the forfeiture of certain railroad land grants, with several bills and resolutions on the subject. This report is of date January 2, 1883, is eleven years after the correspondence between the European and Oregon Land Company, and the Department of Justice and the Land Department, and after the United States had notice of the construction placed upon the actual settler clause in the proviso of April 10, 1869, and necessarily the same construction upon Section 4 of the Act of May 4, 1870, and after notice to the United States of the transfer of the land grants to the European and Oregon Land Company and to the trustees to secure construction funds, and after Congress had been informed by the facts disclosed in the reports made by the Oregon and California Railroad Company to the United States, under the Act of Congress of June 19, 1878, (20 Stat. 169) reporting average price per acre for sales, maximum price per acre from sales, received and asked, for the half year ending December 31, 1879, and from that time, up to December 31, 1882, (Vol. IV, pp.

1590, 1623, Transcript of Record) which reports show uniform continuous non-observance of the so-called actual settler clause.

We quote from this report written by Senator Garland, afterwards Attorney General of the United States from March 4, 1884, to March 6, 1889, as follows:

> "Upon full consideration of all these propositions, in connection with the various grants to be reached in this way, the committee found great difficulty in devising any one plan that would be effectual. The grants themselves are different and do not by any means, in all cases, carry the same meaning as to the relative *right and duties of the companies and the government.* * * * * Without undertaking to decide whether in all grants of land by the United States to railroads Congress can declare this forfeiture, the committee considered it best to adopt some measure that would avoid this question, and place the parties in attitude towards each other that would insure to each fair dealing and justice as far as can be done. * * * They propose to direct the Attorney General to institute proper judicial proceedings against any railroad companies that he may have reason to believe are in de-

> fault *as to the conditions of their grants,* to bring about a forfeiture, and secure the rights of the government to the lands. * * * This proceeding, however, is not to interfere in any manner with any right of the executive under his authority to enforce and execute the laws to take possession and dispose of any such lands, without these proceedings where he could have done so if no act as contemplated by the committee had passed."

In this connection, it may be noted that under the Act of July 25, 1866, (Vol. I, pp. 6-13, Transcript of Record) it was expressly provided that Congress might at any time, having due regard for the rights of the company, add to, alter, amend, or repeal the act, and it was clearly within the jurisdiction of the Land Department, and was its duty, to determine in the first instance whether the company would comply with the grant in every particular, or whether the company would fail to keep its contract with the United States and thereby subject the lands to possible forfeiture for breach of any alleged condition subsequent.

Senator Garland, further speaking for the Committee, says:

> "While the committee had no doubt at all that some steps should be taken to declare forfeitures in many of these cases, yet they were of the opinion that in all cases where reasonable and proper diligence and exertions had been used by any of these companies, they should have the benefit of the same in any proceedings against them; and accordingly the committee were of opinion it would be just to allow the companies to show in defense for one year previous to the passage of the act any substantial progress in good faith in the building of the roads, limiting this period to the first day of December, 1882."

While it is true that the primary grounds upon which forfeitures of land grants were then being urged was failure to construct the railroad aided by the grant, it is clear that all causes for forfeiture, whether for breach of alleged condition subsequent or otherwise, were within the purview of the report under consideration by Congress. This intent is illustrated by what Senator Garland further said:

> "Such a law will enable the government to get rid of all these grants of lands to railroads *that are not being used*

for legitimate purposes, or are misused, or in which no efforts are being made to build the proposed roads, and at the same time to have carried out all these grants in which the companies in good faith are trying to finish their roads. In other words, while such a law would be protective of the rights of the government it would not be oppressive to corporations that are working and dealing fairly with the liberality of the government in trying to secure the *objects of those grants.* And to this end they have agreed on the bill herewith proposed, and recommend its passage."

This bill is entitled, "A Bill providing for the forfeiture of railroad grants in certain cases."

It should be read in connection with the Act of Congress of September 29, 1890, (26 Stat. 496, 499) entitled, "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of roads and for other purposes," which last named act is the legislative culmination and end of all congressional action on the subject of forfeiture of railroad grants that had been under consideration before Congress from 1880 down to that date, and which last named act

in its general aspect is by its express terms limited to forfeiture of lands opposite to and co-terminous with the unconstructed portions of the roads that were to be but were not constructed at all, as indicated, with this difference, that in the proposed bill submitted by Senator Garland, for the Committee on the Judiciary, on January 2, 1883, it was expressly provided as follows:

> "Section 3. That nothing in this act shall be construed to be a waiver of any condition or requirement imposed upon any corporation or in respect of any such grant by *the act or acts granting lands to or in aid of it or amendatory thereof.*"

This section in the proposed bill would have expressly saved the right to the United States to declare a forfeiture of grant for breach of condition subsequent as to sale of land and would have saved the right of the United States to assert a breach of the alleged condition subsequent contained in Section 4 of the Act of May 4, 1870, or the proviso of the Act of April 10, 1869. This section should be read also in connection with Section 2 of the proposed bill recommended by the Committee, as stated, for it would seem from Section 2 that the thing which the Committee had in mind was the failure to construct or

build the road, in aid of which the grant was made, for by Section 2 it is expressly provided that

> "This act shall not apply to the case of any railroad (except as mentioned in section three of this act) in which, within one year preceding the passage of this act, any substantial progress *in building* the same has been accomplished in good faith, and shall be continued in the manner hereinafter mentioned, or in which, before the first day of December, 1882, there shall have been made any substantial progress in the building thereof, and which progress shall be continued in good faith, as hereinafter mentioned."

It is apparent that the primary purpose of the proposed act was to forfeit land grants where the grant had not been earned by construction of road, and yet by Section 3 it was expressly declared "that nothing in this act shall be construed to be a waiver of any *condition or requirement* imposed upon any corporation or in respect of any such grant by the act or acts granting lands to or in aid of it or amendatory thereof." These words would apply specifically to any breach of condition subsequent in respect to sale of lands, and if these words of the actual settler clause create a condition subsequent would have had

express and necessary application to any alleged breach of such alleged condition subsequent.

It will be noticed that no such proviso as Section 3 is to be found in the General Forfeiture Act of September 29, 1890, and we shall presently point out why it does not appear in the statute as passed.

Attention at this time should be called to Act of Congress of January 31, 1885, (23 Stat. 296) entitled, "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon." By this statute it is expressly provided

> "That so much of the lands granted (by the act of May 4, 1870) as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, be and the same are hereby declared to be forfeited to the United States and restored to the public domain, and made subject to disposal under the general land laws of the United States as though said grant had never been made."

By Section 2 thereof, it is expressly provided

"That all persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited, and who are otherwise qualified, on making due claim to such lands under the homestead, pre-emption, or other laws, within six months after the same shall have been declared forfeited, shall be entitled to a preference right to enter the same in accordance with the provisions of this act and of the homestead, pre-emption or other laws, as the case may be, and shall be regarded as having legally settled upon and occupied said lands under said pre-emption, homestead, or other laws, as the case may be, from the date of such actual settlement or occupation; and in case any such settler may not be entitled to thus enter or acquire such land under existing laws, he shall be permitted, within one year after the passage of this act, to purchase not to exceed one hundred and sixty acres of the same, at the price of one dollar and twenty-five cents per acre; and the Secretary of the Interior is hereby authorized and directed to make such rules and regulations as will secure to said actual settlers the benefit of these rights; Provided, That the price of the even num-

> bered sections within the limits of said grant and adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, is hereby reduced to one dollar and twenty-five cents per acre.

By Section 3

> "That the act of March third, eighteen hundred and seventy-five, entitled, 'An Act for the relief of settlers within railroad limits,' is hereby repealed." (18 Stat. 519)

It will be observed that this statute was passed thirteen years after the correspondence between the European and Oregon Land Company and Attorney General Williams and Secretary Delano, and after the United States knew of the sale of this grant *in solido* to the European and Oregon Land Company, and to the trustees to secure construction funds, and after official reports of the company, under the Act of June 19, 1878, (20 Stat. 169) had been filed, as required by law, showing average price per acre for all sales to date, maximum price per acre from sales, maximum price per acre asked, commencing with June 30, 1879, down to December 31,

1884, (Vol. XIV, pp. 1590-1599, Transcript of Record). These reports show that maximum price received per acre from June 30, 1879, to December 31, 1884, was $15.00 per acre. It is also to be noticed that Congress did not construe Section 4 of the Act of May 4, 1870, as conferring upon the vendees of the West Side Company, as persons who would be protected by their settlement, or as persons who had, by the payment of $2.50 per acre, entitled themselves to lands even if they were deemed to be such settlers. Furthermore, by Section 2 it is apparent that the provision as to actual settlers that might be upon such lands on January 31, 1885, were such as might be there before the Railroad Company had secured title or earned the grant by construction of road, or before the lands had been surveyed or become identified as within the grant, for they were given a preference right to enter such lands within six months after January 31, 1885, under the Act of January 31, 1885, *not under the Act of May 4, 1870,* and the right to enter the same under the homestead, pre-emption or other laws as the settler might be able to do, upon payment of $1.25 per acre, and he might do this, if thus entitled to enter under the settlement laws, within six months. If, however, such settler was not entitled to enter or acquire the land

under existing laws, he could do so within one year after January 31, 1885, upon payment of $1.25 per acre. The Government, at the same time, reduced the price of even sections to the minimum thus fixed. It is apparent that Congress did not intend to recognize the right of any so-called actual settler under Section 4 of the Act of May 4, 1870, or to treat a person who might be upon the lands as a vendee of the company, or otherwise, as such actual settler, but intended to deal with persons who had no contract relation with the company. This is still further evidenced by the fact that by Section 3 of the Act of January 31, 1885, the Act of March 3, 1875, (18 Stat. 519) entitled, "An Act for the relief of settlers within railroad limits," was repealed.

(b) Defendants' Exhibit 378, (Vol. XIV, pp. 7463-7502, Transcript of Record) consisting of the following:

(1) Letter of Joseph S. Wilson, President of the European and Oregon Land Company, of date April 20, 1871, to Commissioner of the General Land Office;

(2) Letter of I. R. Moores, of same date, to Joseph S. Wilson.

(3) Letter of May 9, 1871, from Acting Commissioner W. W. Curtis in regard to patented lands inuring to the Railroad Company.

(4) Correspondence between Joseph S. Wilson, President of the European and Oregon Land Company and Willis Drummond, Commissioner of the General Land Office, running from March 21, 1871, to February 24, 1872, in regard to the status of lands in the grant,

in none of which is any mention made of the Act of April 10, 1869, except in the most formal way, and then only as to its effect in allowing the company to file its assent within one year from April 10, 1869. No claim is made that such assent was necessary to be filed or that it was upon any condition as to sale of land to actual settlers or otherwise.

In his letter of May 12, 1871, Joseph S. Wilson, then President of the European and Oregon Land Company, and then the owner of the grant under its trust deed from the Oregon and California Railroad Company, joined in by the trustees of the trust deed, under which construction funds were to be realized, says:

"The heavy expenses incurred in realizing the purpose of Congress in regard

to the construction of the railway and telegraph at so distant a point made it a serious concern to the grantees to have the patents so as to make the means available that are allowed by the statute which can only be done after the issuing of the patents." (Vol. XIV, p. 7483)

In his letter of December 30, 1871, written upon the stationery of the European and Oregon Land Company, and signed by him, as President, Mr. Wilson wrote to the Commissioner of the General Land Office, as follows:

> "As I have received no intimation as to what has been done, nor acknowledgment, and as the early approval of the lists is a matter of grave and most pressing importance to the Company in view of very heavy outlays, and the necessity for making immediately available the lands which have been granted, I am constrained again to trouble the Commissioner by asking that the work be pressed to completion, and the requisite list of approval forwarded at the earliest period possible, thereby rendering legitimate service to the Company, and obliging the the undersigned." (Vol. XIV, p. 7497).

In his letter of February 24, 1872, addressed to the Commissioner of the General

Land Office, written upon the stationery of the European and Oregon Land Company, and signed by Mr. Wilson as President, he says:

> "What is not wanted, however, and to which there is no legal interdict, is that the lists shall be taken up, examined and tested and where the selections are found perfectly regular, and correct, and free from interference and the usual list of approval may be furnished at the same time it would be a gratification to the Company to have transcript of the approved list, so as to be certain as to the particular lands enuring under the grant, *on which they can rely as a land fund,* and for which ultimate title as stipulated in said 4th section is to be given by patent, upon meeting the statutory requirements aforesaid. The request is therefore respectfully renewed for prompt transmission of the issued list," (Vol. XIV, pp. 7501, 7502),

thus showing the insistent demand of the European and Oregon Land Company in the interest of construction of road, and the desire of the company that the selection lists should be promptly approved and that the

title to the lands granted might be vested in the company at the earliest date by patent.

(c) Issuance of patents to the Oregon and California Railroad Company under the Act of July 25, 1866, and amendments thereof, and the Act of May 4, 1870, as shown by Defendants' Exhibit 382, (Vol. XIV, pp. 7514-7564, Transcript of Record) beginning with Patent No. 1, issued May 9, 1871, for 32,517.21 acres, reciting in the patent the Acts of July 25, 1866, and June 25, 1868, and issuance of Patent No. 2, July 12, 1871, for 72,417.65 acres within place limits and 47,829.80 acres within indemnity limits, the patent reciting issuance of same under the Acts of July 25, 1866, and June 25, 1868, showing a total acreage included in these patents issued under these two acts of Congress, of 152,764.67 acres, and with no mention of the Act of April 10, 1869. Patents Nos. 3, 4, 5, 6, 7 and 8, dated from May 29, 1872, down to and including March 3, 1893, conveying 462,800.91 acres, conveyed under the Acts of July 25, 1866, June 25, 1868, and April 10, 1869. Patents Nos. 9 to 211, from June 11, 1894, down to December 7, 1906, were issued, reciting that each was issued under the Act of July 25, 1866 only, and conveying lands therein described within primary limits, amounting to 1,559,120.28 acres, and within indemnity

limits 590,419.50 acres, or a total of 2,149,-539.78 acres. Patents issued under the Act of May 4, 1870, were begun to be issued October 9, 1895, and extended to March 20, 1903, covering a total acreage of 128,618.13 acres. These facts show that the Land Department did not regard the title to the lands patented in any wise affected by the Act of April 10, 1869.

(d) It is shown by Defendants' Exhibit 383, (Vol. XIV, p. 7564) and by Exhibit No. 14 to Stipulation, (Vol. IV, pp. 1717-1720) that construction of the first section of the East Side railroad was completed December 4, 1869, examined by Commissioners appointed therefor favorably reported December 31, 1869; such reports submitted by the Secretary of the Interior January 26, 1870, to the President of the United States, and its acceptance recommended, and such recommendation approved by the President January 29, 1870, and thereafter the construction of each subsequent section of road was completed, including the twelfth section, reports of Commissioners transmitted to the Secretary of the Interior, and by him to the President of the United States, with recommendations that each section of road be accepted, and approval of such recommendations by the President,

down to November 8, 1889; and that the first section of the West Side railroad was completed, and the report of the Commissioners, of date January 6, 1872, approved, and the section accepted by the Secretary of the Interior February 16, 1872, and the second section reported on by Commissioners on May 3, 1876, and the report approved and the section accepted by the Secretary of the Interior June 3, 1876; and that pursuant to the official action of these various officers, the lands were approved to be patented, and patents were issued in recognition that the companies, respectively, had earned the lands opposite to and coterminous with the constructed sections of road.

It is shown by Defendants' Exhibit 384, (Vol. XIV, p. 7564) by the affidavit of H. Villard, of date January 8, 1883, that he was President of the Oregon and California Railroad Company, which had succeeded to and become invested with and was at that time possessed of and entitled to all the grants, rights, franchises and privileges conferred by the Act of July 25, 1866, and the Act of May 4, 1870; that there has been already accepted and approved by the United States, as duly constructed under the provisions of these acts, those parts of the Oregon and California Railroad between East Portland and Roseburg,

198 miles in length, and between Portland and St. Joseph and McMinnville, about 50 miles in length, and that in the summer of 1881, and fully one year before December 1, 1882, the work of duly constructing, completing and equipping the remaining parts of said railroad, as defined in these acts, has been prosecuted by the company continuously, actively and in perfect good faith, at an actual expenditure of large sums of money several millions of dollars in amount, and in conformity with the will and desire of Congress, as expressed in these acts, that said lines of railroad should be speedily and thoroughly completed; and that, within the time above mentioned, substantial progress has been made towards the completion of these lines, inasmuch as at least 45 miles of new road have, within that time, been constructed, completed and equipped in a thorough and first-class manner, and said new mileage was at that time in full operation as part of the railroad system of the company; and at least 20 miles additional to the above were then partially constructed, and further construction was continuing; that by reason of the mountainous nature of the country through which said lines were being constructed, and on account of other natural obstructions, only overcome with the greatest difficulty and labor

and at enormous expense, this mileage was all that could be completed, with the utmost diligence, within the time mentioned; that at that time the company was vigorously continuing said construction, in entire good faith; and that it would continue the same without unnecessary delay until its lines were fully completed in the manner specified in the acts above recited.

This affidavit appears to have been filed in the General Land Office on the 15th day of January, 1883, and apparently was considered by the Assistant Attorney General of the United States. At the time it was so filed the company had not complied with the Act of July 25, 1866, or of June 25, 1868, as to construction of road within time, and as shown by the reports made by the company under the Act of June 19, 1878, (20 Stat. 169) had made its official reports to Congress showing sales of these lands from June 30, 1879, for the half year ending June 30, 1903, (Vol. IV, pp. 1590-1598) in which reports the United States was advised that the company, in selling these lands, was uniformly disregarding the so-called actual settler clause, and that notwithstanding this, the Secretary of the Interior recommended approval of the lands for patent and the President of the United States caused patents to be issued

for the lands opposite to and coterminous with the constructed portions of road, and the company has continuously asserted title to these lands under these patents, has sold and conveyed the same, has mortgaged the same, as shown by the record, without any action being taken by Congress looking to an attempt to forfeit the grant for alleged breach of the so-called condition subsequent claimed to be created by the proviso of April 10, 1869, and the words of Section 4 of the Act of May 4, 1870, until the passage of the Joint Resolution of April 30, 1908, under which this suit is being prosecuted by the United States.

(e) Defendants' Exhibit 385, (Vol. XIV, pp. 7567-7617) consists of the following:

(1) H. R. Report No. 1664, 1st Session, 48th Congress, subject—"Unearned Land Grants"; recommitted to the Committee on Public Lands and ordered to be printed May 29, 1884.

(2) Also H. R. Report No. 931, 1st Session, 49th Congress, subject—"Forfeiture of Lands Granted to California and Oregon Railroad," March 8, 1886, refered to the House Calendar and ordered to be printed.

(3) Also H. R. Report No. 930, 1st Session, 49th Congress, subject—"Forfeiture of Lands granted to California and Oregon Railroad," March 8, 1886, referred to the House Calendar and ordered to be printed.

The first report, No. 1664, accompanied H. Res. 253. Mr. Lewis, from the Committee on the Public Lands, submitted the majority report, and Mr. Oates, from the Committee on the Public Lands, presented the minority report.

Mr. Lewis, speaking for the majority committee, says:

> "The Commissioner of the General Land Office, in his annual report for the year 1883, after giving a tabulated statement of the various land grants made to the different States, and to corporations to aid in building railroads, *and in which the conditions of the granting acts had not been complied with,* uses the following language:
>
> 'The question of declaring a forfeiture of the foregoing grants, or any of them, is deemed an appropriate one for legislative consideration.

'The time fixed in the granting acts for the completion of the roads expired, in some instances, in 1866, and, in other cases, at other periods down to 1882.'

* * *

"*The public demand for a definite settlement of the question,* whether a forfeiture is to be enforced in any of these cases is constantly pressed upon my attention. I consider it of very great importance that the earliest possible action should be taken either to revive the grants or to declare them forfeited. If it be the judgment of Congress that the grants should be revived, Congress may unquestionably prescribe the conditions of such revival; and if such action should be taken, I suggest that all actual settlers on the land be saved and secured in their rights and claims to land embraced in their settlements and improvements at the date of any such revival of the railroad grant.

"Your committee have patiently and laboriously investigated the facts and law touching many of these land grants, and have reported many bills to this House forfeiting and restoring the lands to the public domain.

"Many others remain yet to be examined, in regard to which bills have been introduced and referred to your committee, and all of which have for their object the forfeiture of the grant.

"*So far they have failed to find one company* that has complied with either the letter or spirit of the law (at least in the opinion of a majority of the committee), and considering the enormous amount of land involved we deem it of the highest importance to take any and every step possible to protect the rights of the Government, and especially of the people, in and to the public lands which have been lavished upon different railway corporations *to an alarming extent.* * * *

"It is a grave responsibility for an administrative officer to disregard *any of the conditions* the lawmaker has seen proper to attach to a grant of land for public or private purposes, and the fact that it has been done *to any extent, however limited,* warrants the adoption of proper enactments to prevent its recurrence."

The Committee recommended the adoption of a resolution (Vol. XIV, pp. 7573-7574, Transcript of Record) in which it was recited that numerous bills had been introduced in

both branches of Congress to forfeit lands granted to aid in the construction of railroads, and that many of these bills had been favorably reported to the House, and that it was important that something should be done looking to a speedy settlement of the serious and vital questions growing out of the agitation of this subject in and out of Congress; and in the body of the resolution it was provided that the Secretary of the Interior was prohibited from taking any further steps to confirm, certify, or patent any lands granted to any corporation, State, or person by Congress in any case where reports, favoring the forfeiture of such land grants, had been made to either branch of this Congress, until after final action shall be taken upon such bills in Congress, or until the Supreme Court of the United States, in a proper case shall decide upon the validity of the grant.

By Section 2 of the resolution it was proposed to prohibit the Secretary of the Interior from certifying or patenting to any corporation any land grant *except where such corporation has complied strictly with all the conditions of the granting act*, and that in all cases of doubt in construing these conditions, the benefit of the doubt shall be given to the Government.

It is thus seen that this resolution reported by a majority of the Committee on Public

Lands, is convincing evidence of the land grant situation at that time in Congress and of the desire to forfeit grants for failure to comply with the granting acts, and meantime to prohibit the Land Department from recognizing the right of any land grant company to enter evidence of title by way of certificate, patent or other muniment of title. The Secretary was to be expressly prohibited from certifying or patenting to any corporation any land grant except where such corporation has complied strictly with all the conditions of the granting act, and in all cases of doubt in construing these conditions, the benefit of the doubt was required to be given to the Government. This was on May 29, 1884, twelve years after the correspondence between the European and Oregon Land Company, Attorney General Williams and Secretary Delano, as shown in Government's Exhibit No. 109, (Vol. X, p. 5322) and other documentary evidence in connection therewith, showing notice brought directly to the United States, through its Department of Justice and Land Department, of the claim of the European and Oregon Land Company of its right to be the owner of these land grants and to administer them by sale of lands without particular regard to the actual settler clause, except in the limited way suggested by the corre-

spondence, and showing that the company had conveyed the land grants to trustees as security for construction of road, and that this conveyance purported to convey the lands in both instances *in solido* without any regard to the so-called actual settler clause. This report No. 1664 was thus under consideration by the Committee on Public Lands and Congress, at a time nearly five years after this company, as required by the Act of June 19, 1878, (20 Stat. 169) was making and had made its official reports which were required to be submitted to Congress, commencing June 30, 1879, and ending June 30, 1883, by which reports, as we have seen, it is shown that the company received an average maximum price per acre from sales of its lands of $15.00, for a period of four and one-half years. (Vol. IV, pp. 1590-1623 Transcript of Record) It also appears from this report that the pressure for forfeiture of land grants where the companies had failed to comply with the conditions of the grants in any particular, was from settlers who had, in some instances, entered upon these lands and were anxious to know what was to be done. In this situation there was a duty upon Congress to act, if it be true, as now contended, that the company was at that time and had been during all the time, violating the so-called condition subse-

quent by refusing to sell these lands to actual settlers in quantities and at the price stipulated, or had been selling these lands in excess prices in violation of the alleged condition subsequent. This is clear and substantial evidence, of contemporaneous construction, in harmony with the right of the company to sell the land without regard to the so-called actual settler clause or to sell the land in the way and manner in which the European and Oregon Land Company proposed to sell the same as to such actual settlers and is evidence of acquiescence and resulting estoppel upon the part of the United States in permitting the lands to be so sold and patents to issue for the lands as earned, thereby evidencing that the lands had been earned by compliance with the provisions of the granting acts.

Mr. Oates, from the Committee on Public Lands, expressing the views of the minority committee, and having clear reference, as it seems to us, to the bill reported by Senator Garland, supra, says:

> "In the Senate there has been a general law proposed, and every lawyer in the United States knows, or ought to know, that not one of 'these wealthy corporations,' as they are called in the report, can sue the United States, because the

> courts of the United States have no jurisdiction until there is a statute conferring jurisdiction touching these matters. The resolutions barricade every avenue of escape from the citadel and then set fire to it to force the garrison to come out and fight fairly."

These reports, majority and minority, are persuasive evidence that Congress was then considering *not only forfeiture of land grants for failure to construct the road but forfeiture of land grants where the company had not complied strictly with all the conditions of the granting act.* The minority offered as a substitute for joint resolution No. 253, Senate Bill No. 1445, (Vol. XIV, pp. 7579-7582). Senator Garland's bill was reported from the Committee on the Judiciary January 2, 1883, and was Senate Bill No. 2301, (Vol. XIV, pp. 7461, 7457-7463). The bills are not the same but similar in purpose. Senator Garland's bill was "A Bill providing for the forfeiture of railroad grants in certain cases," and *contained the important Section* 3, *finally omitted from the General Forfeiture Act of September 29, 1890,* (26 Stat. 296). Senate Bill No. 1445 proposed to confer jurisdiction upon the Circuit Courts of the United States to hear and determine all questions and controversies that might arise between the United States

and any person or corporation upon the declaration to be thereafter made by act of Congress that any grant of public lands, in aid of the construction of road, had been forfeited, and to determine whether any such declaration of forfeiture had been so made as to impair the vested rights of the grantee, person, company or corporation. It was further made the duty of the Attorney General, when the law had been passed attempting to forfeit a particular grant, that he should prosecute a suit in equity against the grantee company for the purpose of determining the rights of the parties under the forfeiture act. The bill, if passed, would have given a statute containing the essential terms of the Joint Resolution of April 30, 1908, under which this suit was brought, excepting that the proposed Senate Bill No. 1445 and the proposed bill reported by Senator Garland, from the Judiciary Committee, each was general in its character, *and not, as here, limited to two vendees of two land grant companies,* and excepting also that the Joint Resolution of April 30, 1908, merely authorized the court to ascertain the fact as to whether a cause for forfeiture existed, but forfeiture was not declared by the resolution and could not *be declared by the court,* until the passage of the so-called

Innocent Purchaser Act of August 19, 1912, (37 Stat. 320)

Report No. 931 on the subject of "Forfeiture of lands granted to the California and Oregon Railroad Company," was on March 8, 1886, referred to the House Calendar and ordered to be printed. Mr. Henley, from the Committee on Public Lands, submitted the report to accompany Bill H. R. 6659. Mr. Henley was then a member of Congress from the State of California, and from a district in which the lands granted to the California and Oregon Railroad Company were situated. There was a majority and minority report. The majority report recites that the Committee on Public Lands, to whom were referred sundry bills for the forfeiture of the lands heretofore granted to the California and Oregon Railroad Company to aid in the construction of a railroad over the route prescribed in the granting act, had had the same under consideration and thereupon made their report. *The very grant now under consideration,*—that made by the Act of July 25, 1866, was the subject matter of the report, and this act is analyzed (Vol. XIV, p. 7585) and the report attempts to narrate what was done by the California and Oregon Railroad Company and its successor by way of construction of the railroad required to be con-

structed under this act. *Strange as it may seem,* no reference is made to the Act of April 10, 1869, although express reference is made to the Act of June 25, 1868. The report recites the fact that the *"Oregon portion had in the meanwhile been pushed southward from the northward terminus at Portland to Roseburg, a point 197 miles distant, leaving at the above stoppage a gap of about 275 miles to be built, of which nearly equal parts belonged to each of the undertaking companies."* The *financial embarrassment of the Oregon Company* is recited. Mr. Henley, speaking for the Committee, says:

> "The lands alone, it was alleged, were not a sufficient inducement, as they were chiefly broken and mountainous or infertile in character, and the work would be very costly and difficult, while the local traffic would be insignificant. The contention was that the principal value of the work remaining to be built lay in the formation of the through line; *that one of the co-operating parties was insolvent, and the other, though financially able, would require the consent of the State of Oregon to build within that State, which consent, it was apprehended, there might be some difficulty in obtaining.* * * * It is claimed by both of these companies,

and with some show of reason, that the construction of this railroad is of very great importance, both as respects its necessity to the military defense of our west coast and its benefits to the mining and agriculture of that great Northwest region. * * * Against the forfeiture of this act the railroad companies above named have made the following points in their argument: Their contention is, that the grant of land was made by Congress to these companies and to their assigns, *for the purpose of affording a great public highway that would be available to the United States Government in time of war and for the transportation* of freight and passengers, and thus develop and open up a section that now stands greatly in need of this character of communication; and they have laid great stress upon the title of the act, which is 'An act granting land *to aid in the construction of a railroad* and telegraph line from the Central Pacific Railroad, in California, to *Portland, in Oregon.*' Against the policy of forfeiture these companies have contended that section 5 of the act prescribing the conditions of *the grant is definitive of the intention of the Government to bestow the grant upon these companies as a compen-*

sation for the construction of the road. They urge, since *that was the purpose of Congress in granting these lands, that nothing has occurred since then which could reasonably or should reasonably, induce the Government to withdraw its grant, even though it were authorized to do so by the technical terms and provisions of the act.* * * * It was further claimed that it would be grossly unfair and unjust to cut off the opportunity to receive these lands now that the whole work is on the eve of completion and the ground is covered with workmen, no faster progress in the situation being practicable. They urge that cost and difficulty are of the essence of the grant and not time.

"In this connection they have stated to your committee, *and it is undoubtedly true,* that very few railroads in the country present anything like the topographical difficulties that lie upon this route. *They allege that three successive high mountain ranges are to be crossed; some twenty tunnels in the whole gap, with as many important bridges, and much inevitable delay from snows,* etc. *These things were* urged in support of the *equitable* plea for *indulgence.* The all-sufficient

answer to this plea, aside from what has been urged hereinbefore, is that the Government *cannot afford* at this particular time to be indulgent or *waive any advantage it may possess in the letter of its contract. These grants of lands were maae upon the theory above adverted to.* The law was plain that the road must be completed within a certain specified time. *If this has not been done, then there has been a breach of the condition subsequent of which the other party will take advantage."*

Not one word is said by Mr. Henley or the Committee with reference to the fact that the Oregon end of this grant could have been forfeited for alleged violation of the alleged condition subsequent contained in the proviso of the Act of April 10, 1869, and likewise the grant of May 4, 1870 for breach of Section 4 thereof, although he was at great pains to discuss the financial embarrassment of the Oregon Company *and the right to forfeit that portion of the grant.* It will be remembered that Congress did not undertake, by the Act of April 10, 1869, to impose the actual settler clause upon the lands granted to the California and Oregon Railroad Company in California, *so that the anomaly exists of a "public land policy" commented upon by the learned*

judge of the court below, which was applicable to this very grant in the State of Oregon, but not applicable to the very same grant and the very same class of lands in the State of California; although less than three years intervened between July 25, 1866, and April 10, 1869. It is also important to note that the court below interpolated or read into the Act of April 10, 1869, words of forfeiture which are not in the act and which the court would not have read into the act but for this so-called "public land policy." The minority of the committee on Public Lands, three in number, reported a substitute for the bill proposed by the committee. The substitute was entitled, "A Bill to resume the title to a portion of the lands granted to aid in the construction of a railroad from the Central Pacific, in California, to Portland, in Oregon, (Vol. XIV, p. 7599). *It was exceedingly short and proposed to repeal so much of all acts and parts of acts making grants of land in aid of the construction of a railroad from the Central Pacific, in California, to Portland, in Oregon, as applies to lands coterminous with such portions of said road as were uncompleted on the first day of January, 1886, and that all such lands were to be resumed as part of the public domain. Nothing was stated as to forfeiture of the grant or any portion thereof, which had*

been earned by construction of road, as far as constructed, or forfeiture of the unearned portion for or because of any breach of the alleged condition subsequent in the "actual settler" clause of April 10, 1869. *On January 1, 1886, the Oregon road was constructed and in operation from Portland to Ashland,* (Vol. IV, pp. 1717-1720) and there remained only *the unconstructed portion of the road from a point one and one-half miles south of Ashland to the boundary line between Oregon and California, a distance of 24.125 miles.*

Under Point VI of Points and Authorities, set out in the brief of the law filed herewith for these appellants, the defendants-appellants contend that a condition subsequent must be not only express or implied, but legal, definite, and certain, and reasonably possible of performance, and not repugnant to the nature of the estate to which it is annexed. In the absence of express limitation, a condition subsequent must be capable of performance within a reasonable time, and continually and regularly kept thereafter. If, therefore, within a reasonable time after the title vested in the company to any part of these lands, it could not sell these lands to "actual settlers," for the price named, in the quantities specified, the condition became impossible of performance, and was thereby dis-

charged. The same result would follow where performance of the condition was rendered impossible, or its performance by the company made practically impossible, by legislation enacted by the United States. The proof shows that there was at no time since the title vested in the company, practical ability, or possibility, to sell these lands to "actual settlers" for the price named, in the quantities specified. The character of the granted lands, their situation and location, rendered them unfit for disposition under the settlement laws, in accordance with the terms of the condition. Proof of these facts, to the satisfaction of the court, by the voluminous record, is competent and convincing to show that even though the language used shall be construed as a condition subsequent, such condition was impossible of performance. The proof also shows that the even sections within the limits of the grants, were of the same character, and that they were unfit for disposition under the settlement laws in effect on April 10, 1869, and on May 4, 1870, and in recognition of this, Congress, on June 3, 1878, (20 Stat. 81) passed the Timber and Stone Act, and on March 3, 1891, (26 Stat. 1097) repealed the Pre-emption Law of 1891, and all other laws allowing appropriation of the public lands, and on September 29, 1890, (26 Stat.

496) passed the General Forfeiture Act, and on August 20, 1912, enacted the so-called Innocent Purchasers Act, (37 Stat. 320), based upon the report of the House Committee on Public Lands, to the effect that these lands sold in alleged violation of the "actual settler" clause, were chiefly valuable for timber, and were not adapted to appropriation under the settlement laws. The proof also shows that the even sections within the limits of these grants, have been mainly appropriated by entrymen under the Timber and Stone Act, or in fraudulent evasion of the Homestead Act, and as soon as title had been obtained, the entrymen conveyed the lands to timber investors.

The evidence in the record in support of this contention may be summarized as follows:

The testimony of B. A. McALLASTER, Land Commissioner, (Vol. IV, pp. 1938-1977 Transcript of Record) is explanatory of the maps admitted in evidence, of the character of the lands granted, the relation of the land grant to the Willamette Valley, Umpqua Valley, and Rogue River Valley, which were lost to the grant because of prior settlement, and explains the map adopted, by which the character of the lands unsold, involved in this

suit, was ascertained as to their timber character. It is unnecessary to repeat this testimony, but the attention of the court is specifically called to the same, to show that the testimony produced on behalf of the defendants upon this subject, is necessarily accurate and conclusive. (See also his testimony Vol. IV, pp. 2008-2010, 2013-2016 Transcript of Record) We cannot refrain, however, from quoting from his testimony, as follows:

> "About 10,000 applications to purchase quarter sections of timber land belonging to the company at $2.50 per acre have been made to the company and refused since the commencement of the first Lafferty suit, about that time, up to July 30, 1912. These applications are made usually in this way. Some person comes into the office with a bunch of applications, anywhere from 5 to 10, up to 50 or 100, and presents one application and tenders the sum of $400.00 with it, and that being rejected, this person follows by presenting another application, and tendering the same $400.00, and that being rejected, the process is gone through with the entire bunch that the party brings in. This party is attorney or agent for the applicant, or at least claims so to be, and in nearly all cases the blanks used by these so-called

applicants are printed forms. He has prepared a memorandum showing the number of applications of that class, up to a certain time and whether or not several persons have made application for the same quarter section. This memorandum was prepared about March 1, 1909, and shows the applications that were in his hands at that time. There were 7991 applications in his hands on March 1, 1909, covering 6168 quarter sections, or in some cases less. Occasionally an eighty acres. The entire number of applications up to July 30, 1912, would, he thinks, approximate 10,000. When this table was made up on March 1, 1909, there were 4749 tracts of land each covered by one application; there were 1097 tracts each covered by two applications; 256 tracts each covered by three applications; 54 tracts each covered by four applications; 8 tracts each covered by five applications, and four tracts each covered by six applications."

(Vol. IV, pp. 1958-1960 Transcript of Record)

One of the advertisements identified by the witness, and which appeared in an Eastern paper, is as follows:

"OREGON

OREGON TIMBER

United States government gave 6,000,000 acres choice timber land in Oregon to railroad company forty years ago, to be sold at $2.50 an acre; 1,300,000 acres remain unsold; now worth $50 an acre; male and female American citizens only can now apply for 160 acres of this land at $2.50 per acre; only $75 payable now. For full particulars address J. M. Krieder, 806-7 New Bank Com. Bldg., St. Louis, Mo."

(Vol. IV, p. 1964, Transcript of Record)

There appeared also in the Evening Telegram, published at Portland, Oregon, under date July 18, 1907, the following:

"FOR SALE—TIMBER LANDS
TIMBER—

Parties wishing to make application for some choice railroad lands, heavily timbered, cannot do better than to call at our office and get full particulars. We are prepared to locate several at this time, and our fees, including making all

the papers and location, are within the reach of all.

HOWSE & MILLER,
66 Sixth St."

There also appeared in the Portland Journal of July 19, 1907, a notice as follows:

"TIMBER

WE ARE STILL IN A POSITION to locate several parties on railroad lands in southern Oregon, cruising better than 4,000,000 feet per quarter section; for making tender to the company and filing papers in the clerk's office afterward, location, including all attorney's fees, we charge the sum of $25. Now come and look into this proposition, if you have never bought any lands from the company heretofore, remember this does not interfere with any of your other rights, call and get full particulars.

HOWSE & MILLER,
66 Sixth St.

Open evenings. Phone Main 6188."

also:

"TIMBER LANDS

Intending purchasers desiring to be located upon lands with heavy timber in

the land grant of the Oregon & California railroad in southern Oregon can secure same by acting quickly. Location fees, including all necessary attorney's fees, are reasonable. Address J. E. Verdin, Grants Pass, Or."

also the following:

"TIMBER CLAIMS. The present time now affords you the opportunity to locate yourself upon a splendid timber claim, accessible to both railroad and driving streams; cruise ranges from 4,000,000 to 9,000,000 feet. Price $2.50 per acre. We locate and you purchase. Address P. O. Box 1206, Tacoma, Wash."

also the following circular headed:

"Land Grant is Basis of Suit,"

appearing in the Evening Telegram of Portland, Oregon, September 16, 1907, as follows:

C. H. COATES J. H. HORSMAN

"COATES & HORSMAN.

Railroad Timber Lands $2.50 per acre, ranging from 3,000,000 to 6,000,000 ft. to quarter section. Direct purchase. No

rights required. Telephone Main 7245. Office 415-416 Mohawk Block.

Spokane, Wash."

also the following:

"OREGON TIMBER LANDS.

You now have an opportunity to apply (without interference with homestead rights) for 160 acres of valuable timber and agricultural lands in Oregon at $2.50 per acre; timber averages 4,000,000 to 8,000,000 feet per quarter section (cedar and fir); accessible to railroads and rivers; close to Pacific Ocean and in a desirable climate; limited to 160 acres to each applicant; locating fees very reasonable.

FOREST LAND CO., 612-613 Shukert Bldg.

also the following:

$150.00

$150 is all the money required to get 160 acres of timber land in Oregon cruising from 3 to 6 million feet of good merchantable timber. No prior timber or homestead applications affect this, as it is

not Government land. For full information call at

OREGON DEV. CO., 1110 and 12 Call Building"

(Vol. IV, pp. 1964-1970 Transcript of Record)

Volume XVIII, pp. 8820-9045 Transcript of Record, consists of Defendants' Exhibits 267, 270-273 both inclusive, 274, 313, 367-371 both inclusive, and Government's Exhibit No. 124.

Defendants' Exhibit 267 shows a panoramic view and blue print plat of Township 7, South Range 7 West, and the western portion of Township 7 South Range 6 West, with affidavits.

Defendants' Exhibit 268 shows a panoramic picture and blue print map of a portion of Township 20, South Range 1 West.

Defendants' Exhibit 269 shows a panoramic picture taken from northeast of southeast, and southwest of southwest of Section 3 in Township 4 North Range 3 West.

Defendants' Exhibit 270 consists of 93 views, including among others the claims and

improvements thereon, of Julius F. Prahl, and others, who claim to be "actual settlers" upon the lands described, involved in this suit, and who are cross-complainants herein. These photographic views are particularly instructive as illustrating the character of the land, and the testimony in relation to same shows conclusively that the lands were chiefly valuable for timber, were so applied for by the applicants, and that to clear the land would cost relatively more than the lands are worth at the present time, for any purpose, and that these lands could not be cleared within the lifetime of any applicant, excepting by the expenditure of great sums of money.

Defendants' Exhibit 273 consists of 84 views, with notations thereon, showing cabins on certain lands within the limits of the grant, but in the even sections, as illustrative of the character of lands involved in suit.

Defendants' Exhibit 274 consists of six views, with notations thereon, showing various views in various parts of the grant.

Defendants' Exhibit 317 consists of four pictures, with notations thereon, showing views in different parts of the grant.

DAVID LORING, a witness on behalf of defendants, and who entered the employment of the company on March 1, 1882, (Vol. V, pp.

2187-2228 Transcript of Record) was an employee in the Land Department, although connected with the survey of the extension of the line from Roseburg, south. He showed his familiarity with the administration of the grant, from that date down to the time of his resignation, in October, 1894. Speaking of his knowledge of the character of these lands, and their accessibility to actual settlement, or the establishment of homes thereon, he testified as follows:

A. I had occasion to go over the greater part of the lands south of Roseburg during my term as right of way agent. Also after that every year I took two weeks in the mountains hunting, and at a different locality every year, for upwards of fifteen years, and I that way became very conversant with the country and the nature of the land. I can't remember any large tracts which were remote from the immediate valley, which would be easily settled and upon which a man could make a living. There were some small places which would make a very good residence and perhaps could make a garden, but he would have to clear the heavy timber to do anything further, and they were not very near together.

Q. Were these parcels that were capable of being occupied for a home site, for a garden and dwelling, small tracts generally?

A. Almost always.

Q. And were they or not widely separated from each other?

A. Almost invariably. (Vol. V, pp. 2201-2202 Transcript of Record)

Q. Now what is the fact, Mr. Loring, as to whether or not, during all the time you were connected with the company in its land department, the company did not undertake to sell its lands that it did sell at the best price that it could obtain, to anyone who wanted to buy, without regard to two and a half an acre, or without regard to the area, other that these cases where these pre-emption people had, as you say, in the early days gone upon some of these lands where the company preferred them? What is the fact as to how that was done?

A. We always got the best price we could.

Q. And did you, or not, sell more or less than one hundred and sixty acres, as the circumstances seemed favorable to the company?

A. We sold as much as the man was willing to buy.

(Vol. V, p. 2208 Transcript of Record)

Q. Well was there a time during your connection with the company when there began an inquiry for these outlying lands that had hitherto had no market value, and the inquiry was on account of their timber values?

A. My impression is it was after 1894, the high-water; scarcely much of anything before that.

Q. Well now, was this inquiry all at once, or was it gradual?

A. It was gradual and increased as the Michigan and Minnesota timber men came out here.

Q. Now that, as you remember, was not earlier than 1894?

A. I think not. There may have been a few scattering cases.

Q. These timber lands, about which these inquiries were made and about which I have inquired, were not in the valleys that I have mentioned, were they? A. No.

Q. They were in the Cascade Mountains, were they not, and in the Coast Mountains, chiefly? A. Yes.

(Vol. V, pp. 2195-2196 Transcript of Record)

Q. Now, Mr. Loring, your recollection is that the substantial demand for timber lands began in 1894, or about that time?

A. Somewhere after 1894; about that.

Q. There were a few scattering sales, you said, before, but the substantial part of the sales of timber lands in large quantities took place after that?

A. Yes, except this large sale in eastern Multnomah, which was made before our time.

Q. To whom? A. Neppach, I think.

Q. Oh yes, and then there was that sale to the Gardiner Mill Company, too, that was made before your time? A. Yes.

Q. So that down to the time, speaking generally, the conditions of the market were such that there was not much demand for these lands, except by settlers and in small quantities and for a small price? That is true in a general way, is it not?

A. Yes, generally.

Q. And the greater part of the large sales, that is, sales of large quantities to single purchasers and for a price considerably in

excess of two dollars and a half an acre, took place after this demand for timber land arose, which you describe as having occurred about 1894, or a little afterward? A. That is correct.

(Vol. V, pp. 2225-2226 Transcript of Record)

CHARLES W. EBERLEIN, Acting Land Agent, made a detailed, accurate and voluminous report, with map attached, Defendants' Exhibit 309, Vol. XIII, pp. 7022-7142 Transcript of Record. We are justified by the testimony in the case, in claiming that the report made by him as to the character of these lands, is accurate, and quote therefrom as follows:

> "All of the records of examinations of the land in the grant by particular tracts, made during all the years prior to April 18, 1906, were destroyed in the fire in San Francisco of that date. The work of restoring this lost data is enormous and will consume much time and money. Up to the present time it has been possible to restore only a small percentage of that data. However, a very careful estimate has been made by the two different persons who from long association with the grant in the field and who by their judg-

ment and experience in land and timber appraisement are best qualified to testify as to values and character of land in the grant. Their report shows 1,496,640 acres covered with timber and unsuitable for agriculture; 703,652 acres of grazing land unsuitable for agriculture, and 7320 acres that might be used for agricultural purposes at the present time, but which acreage consists of small isolated tracts, many of them remote from transportation and settlements, and scattered in small bodies in different places throughout the whole extent of the grant, along creek bottoms, and on hillsides. They are not easily saleable because more lands may be had and demand does not equal supply. The remainder of the grant consists of 150,000 acres of steep hillsides and rocky cliffs not timbered and not fit for agriculture or grazing, but are waste land. Of the 2,200,292 acres of timber and grazing lands as above, it is estimated that about 250,000 acres might be reduced to conditions suitable to agriculture by clearing the ground of timber and stumps, but the expense of clearing the land would greatly exceed the value of the land after it was cleared. Note: At the present time in Western Oregon

the cost of clearing lands of stumps, etc., and preparing it for agriculture ranges from $50 to $150 per acre."

(Vol. XIII, pp. 7022-7142 Transcript of Record)

J. B. EDDY, Tax & Right of Way Agent, and acquainted with the country for many years, describing the topography of the lands within the limits of these grants, as related to Defendants' Exhibit 259, (Vol. XIII, p. 6698 Transcript of Record) testified:

"The territory known as the Willamette Valley is practically all in yellow within the 20-mile limit of the grant made to the Oregon and California Railroad Company of date July 25, 1866, and is all that portion of the map north of Cottage Grove to Portland, a distance of about 125 miles, roughly speaking. On the east side of the Willamette River it is practically level from Eugene to Oregon City. On the west side it is level in Lane, Benton and Polk Counties; Yamhill, Washington and Columbia Counties are more rolling. It was taken up largely under the old Donation Land Act, in the early days of the settlement of the state. * * * The bulk of that land covered with yellow, not taken by

these wagon road grants, is agricultural land. There are large areas of the Willamette Valley that are open plains; French Prairie, Howell Prairie, Tualatin Plains, and the Albany Prairie, and quite a number of others of lesser note. The sides of this field in yellow, begin to rise up gradually, are foothills—foothills of the Cascades on the east side, and foothills of the Coast Range on the west. In Polk County the foothills begin practically at the town of Dallas. East of Dallas it is level. West of Dallas it is foothills, rising up to tall mountains and to timber. The large body of land in yellow in the vicinity of Roseburg and Oakland, in Douglas County, outside of the Roseburg and Coos Bay Military Wagon Road grant, were settled under the Donation Law in the fifties. The lands marked in yellow that were thus settled are small prairies and foothills. The large body of yellow along the creek from Ashland to the Rogue River was settled in the early fifties under the Donation Land Law and the Pre-emption and Homestead Laws. That is the section known as the Rogue River Valley, and from the junction to Bear Creek with the Rogue River southerly to Ash-

land, and is a valley mostly prairie, open country. The Siskiyou Mountains are at the south end. The summit of the Siskiyou Mountains is about ten miles this side of the Oregon and California boundary; and the summit is about fifteen miles from Ashland, on a direct line. Ashland is about twenty miles from the summit by the wagon road, but in a direct line it would be perhaps twelve or fifteen miles. Cottage Grove is approximately 140 miles from Portland. Roseburg by railroad is 198 miles from Portland. Ashland about 343 miles from Portland. He cannot speak from knowledge as to these lands in the Willamette Valley in their native state being covered with any kind of timber; he can only speak from information; that there was on his first appearance in the valley extensive growths of fir and oak, mostly second growth fir and oak grubs-scrub oaks. These lands in the valley were not called timbered lands in any sense as compared with these lands in the mountains. The lands in the valleys are such lands as, when cleared, make first class agricultural land, and the lands in the mountains, when they are cleared, would not be worth much, if anything. This second

growth fir and oak grubs in the Willamette Valley is good for cord wood."

(Vol. V, pp. 2557-2561 Transcript of Record)

R. A. BOOTH, formerly of Booth-Kelly Lumber Company, an experienced man of affairs, thoroughly acquainted with the lands involved in suit,—referring to Defendants' Exhibit 332, (Vol. XIV, p. 7268 Transcript of Record) being maps showing the lands of the Booth-Kelly Lumber Company, and the Wentworth lands, known as timber lands,—testified:

"That these lands of the Booth-Kelly Lumber Company thus indicated on these maps, are chiefly valuable for their timber—except those that have been cut over." (Vol. V, p. 2577 Transcript of Record) * * * "These lands, (referring to the Wentworth lands) are chiefly valuable for their timber. Speaking of the character of these lands, with the timber cut off, they are ordinarily termed stump lands, the stumps still remain and all of the heavy debris such as does not burn readily with fires that are run over them for the purpose of clearing them as well as they reasonably and easily can be done for the purpose of protecting the

remaining forest; they are hillsides, mountainous. The lands of the Booth-Kelly Lumber Company now owned in Lane County and in Linn County adjoining those in Lane, a bit more than half of them, or about 75,300 acres out of a total of about 136,000 acres, were acquired from the Oregon and California Railroad Company, and were originally part of this grant to that company. * * * The timber lands owned by the Booth-Kelly Lumber Company, as shown on these maps, are in the western foothills of the Cascade Range. They are along the small creeks which are tributary to the Willamette River, the different prongs, and in the hillsides and ridges between the streams. They are all mountainous and hilly lands, except such as they find on benches formed by old slides and erosions and the narrow creek bottoms. The soil varies. It is all more or less rocky. Some of it is dark alluvial soil on the benches. Some of it is red. Some of it is rocky ridges. It has no value except for the timber, where the timber is standing, because the light is excluded, and there is no growth of vegetation that is valuable. After they are cut off and the light debris burned, so

as to give a coating of ash, they are good grazing lands. Grass grows readily wherever it is seeded, and they form good pasture lands. If it is seeded immediately after burned, with such tame grasses as are in ordinary use in that locality, they can all be used the greater portion of the year, if the timber is cut off and the debris burned and then seeded in the stumps. The high lands perhaps would be covered with snow during three or four months of the year, and only the lower lands could be used. From his knowledge and investigation, the cost of clearing these lands of the stumps to render them suitable for plowing, where there is any soil that could be adapted to pasturage or grazing or agricultural purposes of any kind, varies greatly because of the different number of trees on the ground and the different character of the soil in which they grow. It would range anywhere from $50 to $500 an acre.

Q. Now, let me put to you this question. Suppose that an intending settler should apply to purchase one of these quarter sections in the state of nature in which it was before any of this timber was cut off, and should offer to the company, seeking to purchase it, $2.50 an acre, under this Act of April 10,

1869, go on the premises as an actual settler, and there to make his home as an actual settler. I wish you would state to the court whether or not in your judgment such land is adapted or was adapted to actual settlement in quarter sections in that way.

A. It is not adapted to settlement, and settlers could not make a living on it until after the timber was removed, because of shade excluding the light and preventing any vegetable growth.

Q. Would or would not such settler be able to make a living on these lands for himself, or for himself and family, without cutting and selling the timber therefrom? A. He would not.

Q. What, then, is the chief value of these lands and of lands similarly situated in this grant? A. In their virgin state?

Q. Yes, that is what I mean.

A. The lands to which I refer belonging to the company, and those intermingled, are chiefly valuable for their timber.

Q. What would you call these lands then, what class would you put them in, agricultural or timber, or stone or grazing, or what?

A. Timberlands. (Vol. V, pp. 2577-2583 Transcript of Record)

Witness further testified:

"That he was familiar with the unsold lands of the Oregon and California Railroad Company in Lane County; some of them in Linn, Douglas and Josephine, and that the lands of the Booth-Kelly Lumber Company are similar to the remaining lands of the Oregon and California Railroad Company that are intermingled and lying in the same vicinities. He would call these unsold lands timber or burned over lands. They are essentially the same in soil or in rock or in topography, in a general way, as the lands of the Booth-Kelly Lumber Company, and he would say as to the ability of a settler to make a living on these lands in their native state, that the settler could not do it. * * * The highest price that he knows, of timber investors paying for this class of land per quarter section, taking the best quarter section in Lane County, is about $1.00 per thousand on a stumpage basis. There are quarter sections that would be worth $10,000 at that rate. * * * The increase in value of timber lands and timber holdings in all parts of western Oregon, since the purchase by the Booth-Kelly Lumber Company of these lands, has been quite marked. In fact

Booth-Kelly Lumber Company was the first large buyer from the Oregon and California Railroad Company, to do an interstate business. The Booth-Kelly Lumber Company demonstrated that the timber had value and was a fair competitor with other fir timber shipped from coast points. When that was known, buying became general. Large timber buyers have made investments in Western Oregon and now have holdings there, from Wisconsin, Michigan, Minnesota, Illinois, Iowa, and other points, and also by people in Oregon. He considers that the Booth-Kelly Lumber Company was the pioneer company in demonstrating the fact that these timber lands when accessible to transportation, had a value resulting from the manufacturing of the timber into lumber and its shipment. Then later investors from these states mentioned, gradually came into this market, and from that time the market gradually appreciated. He can name quite a number of these people who have thus come from these states and made investments in various parts of Western Oregon in the timber sections; Charles Green, the Wentworths, the Wright-Blodgett people, various people from Saginaw, Michigan, the Danahers, and others, from Detroit, the Drew Timber Company, and many others. The investments of these

people extended to timber lands of Western Oregon in different localities, both within and without the grant. From the date of the organization and operation of the Booth-Kelly Lumber Company, the price of timber lands in Western Oregon has been gradually appreciating, and he thinks, it is continuing. This market has developed in all of the counties of Western Oregon where there are timber lands. (Vol. V, pp. 2583-2588 Transcript of Record) * * * He has lived in Oregon all his life, and most of the time in Western Oregon. He commenced lumbering first in 1880, and has been interested in it at all times since, and has been acquainted with the value of these timber lands, or their market value, or whatever value they may have had, from 1880 down to the present time. These timber lands of the Oregon and California Railroad Company had no market value about 1880 of consequence for timber purposes, or otherwise. At times small tracts, 40 or 80 or 160 acres, were purchased by small mills for local use, and at the time in the 80's when the railroad was extended from Roseburg south, there was some little market developed in that way for railroad use, but not in any other way. He thinks that these lands first began to have a market value about 1898; that their purchase was the first of consequence. About 1898 all

the principal valleys of Western Oregon had been settled in a general way, and these valleys were used mostly for agricultural and grazing purposes. The first large claims were taken under the Donation Land Act and subsequent acts for homesteaders, the pre-emption law and public entry. In 1898 there was little land in the valley belonging to the railroad companies. There was considerable in the foothills that was purchased for agricultural and grazing purposes. Prior to 1898 there was no demand in the region of the holdings of the Booth-Kelly Lumber Company by purchasers, or by any one, for these timber lands of the Oregon and California Railroad Company. When Booth-Kelly Lumber Company went in there, these timber lands of the railroad company were all offered for sale. There had been no purchases of any consequence. The timber lands of Josephine County were purchased earlier than those of the Willamette Valley. The timber lands there were mostly covered with pine, and had uses different from fir, and the operations followed immediately there, after the completion of the railroad. The chief value of these lands was their timber. * * *

Q. What would you say as to the character of the soil there, and as to the fitness for any particular use after the timber was removed?

A. The most of the pine that we operated was taken from the granite soils. It grows there on that class of land more than any other, at least in all the regions near the railroad where we operated. The soil has little value after the timber is removed. There is, however, a red soil in the country, in that section where the pine also grows, that is valuable for fruit purposes.

Q. What would it cost, roughly speaking, to take the stumps out of this land that you refer to in Josephine County, and to make it arable, where there is any soil for that purpose?

A. It would vary, I think, from $20 to $50 an acre. The trees are scattering, and there is but little underbrush.

Q. Less stumps per acre on that character of land than on the lands in Lane County?

A. Yes, and they are more easily removed. (Vol. V, p. 2590-91 Transcript of Record) * * He did not think that he stated in his testimony that these timber lands had no value and now have no value excepting for timber that is on them, but he said, and repeats, that that is their chief value. He thinks that they have some value after the timber is removed.

He thinks that the reforesting is entirely problematical, but it is demonstrated so far as their value as pasture is concerned. The men who own these timber lands, who have logged them off, in his region, are considering the question of what to do in that respect. The beginning of the market for timber was when the Booth-Kelly Lumber Company had demonstrated that by manufacturing the timber into lumber and shipping the same, there could be something realized out of the timber. (Vol. V, pp. 2629-2630 Transcript of Record)

* * *

Q. Suppose the Oregon and California Railroad Company had in 1906 or 1907 offered for sale all of these timbered lands to so-called actual settlers in quantities not exceeding 160 acres and at a price not exceeding $2.50 an acre, and had sold them to so-called actual settlers or persons who would go actually and build a cabin and live on the land for six months, or whatever the time, three months, no time being fixed in the statute, and the title of the company had vested in these actual settlers, how long, in your judgment, Mr. Booth, would it have been until these actual settlers acquiring these lands at $2.50 an acre, could have resold them to timber buyers and timber investors and mill men at a large advance; and how long would it have

been until most of these lands would have passed into timber investors or timber men for the purpose of development? Q. You may answer.

A. I think your question is at what time they could have done that?

Q. Yes; and what would they have done probably?

A. Well I could answer it perhaps more accurately by referring to the conditions in the Mohawk or Wendling Basin. When we purchased the lands of the railroad company there, about all of the even sections had been taken either by homesteaders or entrymen, under the Timber and Stone Act, but there were no residents in there except along Mill Creek, and as I recall now in two places where the lands had been cut over in part and the logs floated down the stream to Coburg, and there were two families living there, the families, except the husband, remaining on the property, but the husbands were away at work. And with that exception there was no one in that region. And of course they could not make a living on them, and did not attempt it, and there was no opportunity given them until our mill was established there, which was about 1898.

Q. What became of the title to these even sections?

A. We purchased them.

Q. That is to say, their chief value was for the timber, and the party holding the title disposed of them for that purpose?

A. That is right.

Q. And in your judgment that would have been the result if these lands had been sold to actual settlers under this $2.50 an acre—

A. It is the result of all the lands we own.

Q. Well, from your knowledge of the character of the lands that you own, the same thing would apply to other lands in the grant of the same class. A. Yes, sir." (Vol. V, pp. 2632-2634 Transcript of Record.)

A. C. DIXON, manager of the Booth-Kelly Lumber Company, testified that he is the person who made the statement before the Committee on Public Lands of the House of Representatives, March 12th, and 14th, 1908, on Res. No. 48, instructing the Attorney General to institute certain suits, etc., which resolution was afterwards passed, and became Joint Resolution of April 30, 1908, under which this

suit was brought, and that his statement, (Vol. V, pp. 2642-2646 Transcript of Record) was a correct statement of facts at the time he made it, and was his testimony. We quote therefrom as follows:

> "That he thinks he knows, in a general way, the present market value of stumpage of white and sugar pine. It is another very difficult question to answer. It is from $1.00 a thousand to $2.50, and depends very largely upon accessibility to transportation and availability for immediate use. Arthur Hill, who appeared before this committee and made a statement, was, probably at that time, the largest stockholder in the Booth-Kelly Lumber Company. He then lived at Saginaw, Mich., but is now dead. Probably with one or two others, Blodgett and the estate of Arthur Hill control a majority of the stock of the Booth-Kelly Lumber Company, although he is not sure. They are very large holders of stock. No policy as to the best use of logged-off lands of the Booth-Kelly Lumber Company has been settled upon. It has been actively discussed several times and he thinks covered by what the witness Booth said, discussing the policy of reforesting, the disposal to settlers, and the possibility of

grazing and pasturing lands. He has no means of knowing what would become of the titles to these timber lands if the company had sold them to actual settlers in quantities not exceeding 160 acres at a price not exceeding $2.50 per acre, and had made these sales, say, in 1906. The titles that had been given to individuals before that time largely went into the the hands of lumber companies and timbermen. He has no personal knowledge of the lands that the so-called actual settlers have applied for, excepting from newspaper reports and court records.

Q. Well, what would be, in your judgment, the value of the best quarter section of the unsold land of the Oregon and California Railroad Company? What would it be sold for at private sale without being forced, for the purposes of the timber holdings or the timber that is on the same, within your knowledge?

A. The best possible price that could be secured would be from some one who was operating close to that section, right up against it, could use the timber quickly, you said quarter section, or section?

Q. Yes, 160 acres of the best timber land that is left.

A. I should say from eight to ten thousand dollars." (Vol. V, pp. 2654-2656 Transcript of Record)

Witness further testified that the following statement made by him before the Committee on Public Lands, was then, and is now, correct. "The reason for that is this: the land is heavily timbered, much of it on steep hillsides, and in most instances the soil is rocky and not susceptible of cultivation. Now, no actual settler could have taken 160 acres of these lands, nor 1600 acres, nor any other number of acres, and made a living for himself and family. It would have been practically impossible, and is today, with the better means of transportation and other facilities that they have now." (Vol. V, p. 2659 Transcript of Record)

Witness further testified that the following statement therein made by him was then, and is now, correct.

> "We think that there is no question about the original purpose of the Government having been literally carried out in a much better way than it could have been under actual settlement. In this regard, Secretary Fisher, in talking to me the other day, said that if the lands were

of the character I said they were, the Government made a tremendous mistake in 1866 in granting to the railroad company lands of a character not susceptible to settlement and then asking the railroad to sell them only to actual settlers. Now, they did do that, and you must know without seeing photographs of the timber, that these lands are timber lands, or we would not have them, because we are in the timber business only. Now, if the Government did make this mistake 40 years ago, we ask you here that we be relieved from the ill effects of it. * * * We have done the larger part of the work necessary to make that land valuable for cultivation, and nobody wants to buy these lands now as homesteads at any price. Eighty-five or ninety per cent of them are useful only for reforestation, and we have not started to reforest them because we do not know to whom they belong. We have spent the necessary money to clear them of timber, and if the intention was that actual settlers should make homes on these lands, how much less useful for this purpose would they be if the timber was still standing."

Witness testified that he thought the words "nobody wants to buy these lands now as

homesteads at any price," contained in this statement, were not sufficiently full as to the use to which the lands could be put. He stated that they could be used only for reforestation, at least 80 or 85 per cent. He should have said reforestation or pasture, because he knows they are used for that. It was an oversight that he did not say so. He further testified before the Committee on Public Lands, at that time, as follows:

"The Chairman: what is the general description of the lands which your client holds? Mr. Dixon: They are all timbered lands, all covered with fir timber. They are rather hilly, usually along a little canyon with a creek running down the center. We have five timbered bodies, each one along a creek or river. We like to have them that way on account of the facilities for operation. The timber is cut and hauled down to the creek; then we build dams and float it out to the river or railroad it out." Witness testified that that statement is correct, except perhaps in using the word "all". The lands are all timbered lands technically, that is incorrect because there are a few acres now and then that are not in timber, but the statement is to all intents and purposes correct. Those acres that might be capable of cultivation are widely separated from the rest, in spots here and there

throughout the grant. (Vol. V, pp. 2660-2662 Transcript of Record)

Attention is called also to hearings before the Committee on Public Lands of the House of Representatives, on H. R. 22002, concerning the Oregon and California Land Grant, April 2nd, and May 2nd, 6th, 8th, and 25th, 1912, (Vol. VI, pp. 2669-2698 Transcript of Record) which statement Mr. Dixon testified was made by him before the Public Lands Committee, and that that statement was correct at that time, and states the facts as he wishes them to be considered in his testimony. In the course of that statement he says:

> "The land is heavily timbered, much of it on steep hillsides, and in most instances the soil is rocky and not susceptible of cultivation. Now, no actual settler could have taken 160 acres of these lands, nor 1,600 acres, nor any other number of acres, and make a living for himself and family. It would have been practically impossible, and is today, with the better means of transportation and other facilities that they have now."

This statement is a part of the report of the Committee on Public Lands, and under the stipulation of counsel in this case, is admis-

sible in evidence, even though not verified by the witness.

Mr. Dixon, on April 10, 1912, at the request of the chairman of the Committee on Public Lands of the House, made a written statement addressed to the President (Vol. VI, pp. 2701-2703 Transcript of Record). At that time Mr. Dixon was representing, primarily, the Booth-Kelly Lumber Company, and at the same time representing the owners of at least 90 per cent of the lands covered by forty-five separate suits brought by the United States against purchasers of what are known as Oregon and California granted lands, and referred to in this record as the forty-five so-called Innocent Purchasers suits. Speaking of these lands, Mr. Dixon says:

> "The lands in our possession are practically all such as are not capable of cultivation until after the timber is removed, and the stumps cleared from the lands, and then a major portion would only be useful for purposes of reforestation. These lands never could have been put into the hands of actual settlers and actually settled upon, for the reason that a settler could not make a living on 160 acres or any other number of acres of these lands. We had used them in devel-

oping the country in the only way in which they could have been used, and in this use we have spent millions of dollars in building railroads, developing the streams, and building sawmills, and are now furnishing employment to thousands of men, my own company having employed at the time the resolution of April 30, 1908, was passed, in the neighborhood of 1000 men, and our company was in process of development, so that within a few years we would have been employing from three to five thousand men — very many more than the number of men that could have been provided with 160 acres each from the lands in question. * * * He has heard all of the testimony of Mr. Booth as to the availability of this land for grazing and other agricultural purposes, and thinks that his testimony is generally correct upon these questions. It is true that the more the settlers could get for timber on the lands, the more money he would have for development purposes, but he does not think the value of the timber would have anything to do with the settlement. If the settler could sell the timber on these timbered lands, it would certainly have the effect to help rather than retard the settler. He does

not think the value of the timber would have any bearing on his testimony in regard to the use of the lands for dairying or other agricultural purposes. Solid bodies of timber lands, in a general way, are essential to practical milling; the removal of the timber is also essential to any subsequent use of the lands in this vicinity for grazing or other agricultural use, referring now to lands that have heavy growth of timber upon them. It is true that if the railroad company should withhold permanently the alternate odd numbered sections in this timbered region involved in this suit, particularly in these localities with which he is personally acquainted, the necessary effect of that would be to prevent the logging off the lands and prevent their ultimate subjection to grazing or other agricultural use, such of them as are adapted to that use. The railroad company controls practically all transportation facilities from Eugene south to the southern boundary line of the state, that is, with reference to the territory within the exterior boundary lines of the railroad grant, and has controlled it since the railroad was constructed. The meetings referred to in his testimony and that of Mr. Booth were call-

ed, as far as he knew, primarily to object to the advance in rates threatened in 1906, and to rates that were considered unfair and these protests in regard to the land grant developed at these meetings were the first that he heard. The principal complaint was against traffic matters, unfair and unjust rates, as they thought at that time, at least, and the matter of withholding the lands from settlement, the matter of the railroad company building its own mills to saw their ties, and other things of that character, were also discussed, including withholding the lands from sale. The principal object of the meeting at Eugene, so far as he knew of it, and he was one of the Committee on Arrangements, was to discuss traffic matters. Personally he did not know of the resolution in regard to the sale of grant lands until about the time the meeting was called to order. There was no commercial or industrial reason at any time since he has known these lands, as to a majority of the lands, why these lands could not have been sold in tracts of 160 acres and at a price not exceeding $2.50 per acre. He would not speak as to all of these lands, because he does not know. The vast majority of

them could have been sold at that price at any time since he has been connected with the lands, in 160 acre tracts. He is not thoroughly familiar with the Timber and Stone Act requirements, but these lands could have been sold to individuals, in his opinion, at any time that they had an opportunity. He does not think the railroad company had to charge more than $2.50 an acre in order to develop the country. He would say that perhaps 55 or 60 per cent of the logged off lands of the Booth-Kelly Lumber Company have been logged off since the year 1905. There have been practically no sales made at all of land grant lands by the purchasers of such lands since this agitation concerning the limitations upon the sale of the land by the railroad company, commenced in 1906. With reference to the limitations upon the sale by the railroad company of these lands, the Booth-Kelly Lumber Company has repeatedly refused to buy grant lands since 1906, and refused to sell these large bodies of timber. Including the holdings of the Booth-Kelly Lumber Company and their timber lands in that vicinity and for that matter the other timber within the exterior boundaries of this

railroad grant, consists almost all together of fir and pine. It takes a number of years for these trees of long growth to reach maturity. There would be no very great change in a period of 25 or 30 years, nothing that would be noticeable except to an expert or some one making a critical examination. The conditions are approximately the same in October, 1912, as they have been ever since he has been acquainted with the land, and from the age of the trees were in the same condition in 1912 as they were 30 or 40 years ago without more than a slight change in the growth of the trees. * * *

Q. Now in your letter of April 10, 1912, to the President, referred to and submitted to the Committee on Public Lands of the United States Senate, as you have heretofore identified it, you have used this language: 'Within the next several years a great deal of irritation was created in Oregon by reason of the refusal of the Oregon & California Company or the Southern Pacific Company, to place a price on these lands or offer them for sale, and as a result of this irritation a number of commercial and other trade organizations adopted resolutions condemning this course on the part of the railroad company, and asking that some steps be taken, to com-

pel them to dispose of the lands.' Referring to that, and refreshing your memory from that statement, what is the fact in that respect. Is that correct?

A. That is a correct statement." (Vol. VI, pp. 2702-2710 Transcript of Record) Witness further testified "that he is not positive, but thinks that Senator Mulit, State Senator of Jackson County at that time, introduced the resolution before the meeting at Eugene in 1906, relating to the sale of these railroad lands, but he is not sure that he was the one who introduced the Memorial in the Legislature of 1907. It is his recollection that the resolution that Senator Mulit brought to the Eugene meeting was introduced and adopted at that meeting at Eugene. That resolution and all the others that he ever knew anything about were simply urging the company to dispose of the lands. He never heard of the matter of forfeiture until 1908, when he was in Washington.

Q. That is to say, the demand of the public in these meetings that you attended or that you knew of, was that the company be required to dispose of the lands as they had heretofore disposed of them, for the purposes of use to those who had use for them?

A. I don't know as to the disposing of them as they were heretofore disposed of, but the general idea and desire, as I interpreted it, was to have them sold and disposed of at a reasonable price. I think there were a great many thought they ought to be sold at $2.50 an acre, but a great many others didn't care." (Vol. VI, p. 2700 Transcript of Record)

Witness further testified "that there was no particular desire, that he knew of, to have these timber lands sold to actual settlers. He never heard the idea advanced in the community that these lands could be utilized for actual settlement.

Q. Would actual settlers have purchased these lands for actual settlement or for the timber that is on them?

A. I don't know how to answer that question. If they had been actual settlers they could not have been purchasing them for the timber that is on them. But if they had been purchased they would have been purchased for the timber that is on them.

Q. There occurred a protest in this case about actual settlers. We have some 7,000 in this record pretending, some of them, to

have actually settled upon the best timber lands in the grant, and others to have applied for the very best timber lands in the grant unsold, and for $2.50 an acre, in 160 acre tracts, and there have been some 7 or 8 applying for the same quarter section, according to the record. Now, would these lands have been purchased by men to settle on them, or for the timber, if they had been sold at $2.50 an acre?

A. As far as the lands I am familiar with are concerned, they would have purchased them only for or chiefly for the value of the timber that is on them.

Q. You base that judgment upon the history of the disposition of the lands in the even sections of the same class, do you not, in part?

A. Largely, yes; the fact that I don't think they could do anything else with them, a big portion of them.

Q. You mean that they could only use them for the timber that is on them? A. Until the timber was taken off.

Q. Their chief value, then, would be the timber?

A. I think so." (Vol. VI, pp. 2711-2712 Transcript of Record)

F. A. ELLIOTT, State Forester, testified, referring to Defendants' Exhibit 259, (Vol. XIII, p. 6698 Transcript of Record) as follows:

"The character of the land in general is rough and mountainous; that is, the land itself. * * * all lands that were considered unfit for cultivation were designated as grazing lands when denuded. Taking Southern Oregon, beginning with Douglas County, there is a great deal of land, among the unsold portion, that is barren, rocky, or covered with chaparral or brush, practically worthless for any purpose, that was classed as grazing land, simply because it was of no value for anything else. It has more or less brush, chaparral and all kinds of brush on the land and is rocky, very rough land. There is more or less of that scattered all through the grant, back in the mountains and foothills. He presumes Douglas County has more than any other kind of this character, of worthless land, because there is more railroad land in Douglas County. Josephine County would probably have a higher percentage of that kind of land than any other county. Offhand he would say that 40 per cent of the lands

in Jackson and Douglas Counties would be worthless. The heaviest and most valuable timber lands of the grants, are in parts of Columbia, Washington, Multnomah, Clackamas, Yamhill, Polk, Benton, Linn, Lane, and Douglas counties. There are tracts of pretty good timber in Jackson and Josephine Counties, also in Lincoln County. Coos County is a very heavily timbered county. The comparative stand of timber on the unsold lands, compares favorably with the timber on the even sections, and with the timber in Western Washington and in other parts of the world. It is just about an average of the timber in this state, with the exception that some of the very heaviest bodies of railroad lands have been sold. Generally speaking, he is familiar with these lands conveyed to the so-called innocent purchasers by the company, aggregating something over 400,000 acres, and they are the choice selected timber lands of the grant, up to the time these sales were made. There is a great deal of timber land in the grant which is left, that is substantially the same, but at the time these sales were made, the land that was sold was more accessible. The remaining lands now probably would not run quite as good in the stand of timber, but these lands are becoming more accessible all the time, and at the present time

(1912) these unsold lands would be practically of the same quality of timber.

Q. What, from your knowledge of the timber lands of this company, both those now owned, and those heretofore owned and sold to these innocent purchasers, and from your knowledge of the timber lands in the even sections in Western Oregon, within the limits of this grant, and co-terminous with the unsold portion, has been the highest market price paid for any particular body of this timber land, quarter section or otherwise, where the sale was a bona fide sale, made in due course, the seller selling because he wanted to sell, didn't have to, the purchaser buying because he wanted to buy and was able to buy? What is the best price for any quarter section that you know of, that has been paid?

A. Well, the best price that I absolutely know of was $10,000.

Q. Where was that situated?

A. That was in Lincoln County. I am not quite sure—I will have to look at that map to see whether that is within the grant either. It may not be. No, it is not. No, this is outside of the grant. (Vol. VI, 2717-2719 Transcript of Record)

Witness further testified as follows:

"He does not know just where the claims of the Lafferty defendants, so-called, John L. Snyder and about sixty-seven or sixty-eight others, are located, but knows all granted lands in Columbia County, quite well, and has cruised quite a good deal of it. These lands are generally very heavy timber, of the rough, mountainous country, and he would think these quarter sections in this best timbered area, would very easily average anyway $3,000 or $4,000. Some of them no doubt would bring a good deal more, but he does not know where these claims are located, and has not been in there since they were located.

Q. Now, taking this grant in its entirety, and based upon your knowledge of the same, obtained by cruising that which you have cruised, and by examinations made by you as an examiner, and other means of ascertaining the character of the land in person, by traveling over the same on its trails, from your knowledge obtained in your official capacity as State Forester, and having supervision of the fire patrol of the timber lands of the State of Oregon, including these and the lands in the even sections as well, and taking into consideration all the knowledge that you have of these lands that are unsold,

involved in this suit, that are shown on this Defendants' Exhibit 259, in colors, in green, I wish you would state to the court what per cent of that grant in your judgment, is suitable for actual settlement for agricultural or horticultural or other such purposes?

A. What per cent of the land is agricultural land?

Q. Yes, that would be available for any agricultural or horticultural use.

A. Well, I should say from five to ten per cent.

Q. Now, suppose, Mr. Elliott, that the company had sold these lands, or would now sell these lands, in this grant, and particularly the timbered portion thereof, and that portion which is chiefly valuable for timber, to the so-called actual settlers, at $2.50 an acre, in quantities not exceeding 160 acres, and give them a good title to each quarter section, and these purchasers or actual settlers, having this title to these timbered lands, should desire to make the best investment that they could make, the best disposition or use of the land which they could, what would become of the title to these lands, in the ordinary course of business? Who would acquire

these lands, and for what purposes could they be used, and would they be acquired, if you know? You may answer.

A. What would these lands be purchased for? Was that the question? Q. Yes.

A. They would be purchased for the timber, no doubt.

Q. What would become of the title to these lands? Where would the lands go shortly?

A. They would go into the large timber holdings. Of course, occasionally, a man might log a quarter section off himself, and keep the land, but it would be very seldom that that would happen.

Q. From your knowledge of the disposition of the lands in the even sections, coterminous with these, where titles had been acquired under the Homestead Act, or under the Timber and Stone Act, or other public laws of the United States, what has become of the lands in the even sections, where patents have been issued by the United States to these various parties, mainly?

A. It has very largely gone to large timber holders. Of course there are claims scat-

tered all over the country that still belong to the original claimant.

Q. What is the chief value of these lands that have a value?

A. It is timber.

Q. Now, there has been some testimony in this case that some of these lands have been classified by the cruisers of the company as grazing lands, and especially after they have been denuded of the timber. What uses, if any, could the so-called grazing lands be put to, and, in what way can they be said to be grazing lands, and what is the class of lands that you have classified as grazing lands, other than these worthless lands that you have spoken about already?

A. Well, the reason for classifying the lands as agricultural or grazing lands when they were denuded, was simply for the purpose of having a classification. Now, there was a time when we thought that all the land when it was denuded would either have to be used for agricultural or grazing purposes— That is all the uses we knew for it. But under present conditions, and since the National Forests have been created, these lands largely, very largely, should be used for growing timber on.

Q. What do you mean by that?

A. It should be kept as permanent timber land. Nearly all the lands in this grant are lands that should be used for growing timber on.

Q. You mean reforestation? A. Yes, reforestation.

Q. I will ask you to state whether or not these people who have logged off their lands, these large timber owners, who have manufactured their timber, cut off their lands, have determined yet what to do with the logged off lands, if you know.

A. Very few of them have. Of course there are some lands that they are clearing up, and putting into cultivation. Take along the Columbia River and places where it is susceptible of cultivation, they are using it. But otherwise it has generally grown up to young timber or brush, and not being used at all. (Vol. VI, pp. 2720-2726 Transcript of Record)

Q. Suppose that an actual settler, or person denominated as such in this record, should apply to the company for the purchase of a quarter section of this so-called grazing land, that is, land that is not chiefly valuable for

timber, and the company should sell this quarter section to him, at the maximum price of $2.50 an acre, or less, and he should be expected to go out upon the property with his family, if he had one, support himself or his family by having this 160 acres enclosed, pasturing his stock on this 160 acres, if he has any stock, make his living for himself or his family, and a home there, what, in your judgment, would be his ability to do that?

A. Well, I don't know of any quarter section, don't call to mind any, that I think a man could make a living on. In fact, I know of quite a number of places where 40 and 80 or 160 acres have sold a number of years ago, generally to fill out a piece of land, maybe a little fairly good land on this, to fill out a quarter section on Government land, for instance; but I don't recall to mind now any quarter section that the company has ever sold since I have been with them that a man has gone onto it and actually made a home, and made a living on that quarter section.

Q. Suppose that the company would sell one of these best quarter sections of timber land to this so-called actual settler, at the maximum price of $2.50 an acre, and he should be expected to go out on his land to

make a home for himself and his family, if he had one, what, in your judgment, would be his ability to make a living, for himself and his family, on this timbered quarter section? A. It would be impossible." (Vol. VI, pp. 2726-2727 Transcript of Record)

Witness further testified "that there are very few, if any, entrymen who took homesteads within the limits of this grant on the even sections on the timbered area on the lands at the present time. They stayed on the lands long enough to get title to it, and have abandoned it and their improvements have gone to rack lots of times, and generally you might say they have no improvements left on them. The improvements in the beginning were just makeshifts as a general thing. Occasionally one would find a claim with pretty fair improvements, maybe 5 or 10 acres in a fair state of cultivation, but this is largely now grown up to brush. These lands in the timbered portions of the even sections thus homesteaded are now largely owned by large timber owners. * * * His opinion as to the character of these unsold lands involved in this suit applies, generally speaking, to the even numbered sections intervening those lands. There may have been a quarter section taken up here and there

that would support a family, and there might have been a quarter section sold years ago, but the land that is now vacant, that is now in the hands of the railroad company and the lands that are not held by settlers, or not being cultivated or lived upon, he would say as far as he knows, there is none that will support a family. The length of time it would take to grow timber large enough for milling purposes on logged off land, depends on the location. Where the red and yellow fir grow one gets fairly good small saw timber in fifty to seventy-five years, good piling and some logs out of it. Pine timber would take longer. At present prices the present growth of timber would average about $3,000 a quarter; that would be a very conservative estimate of the valuation on it. For timber lands say $20.00 an acre, referring to the value of timber. He thinks the only practical use that can ever be made of that land is with proper methods of reforestation, to reforest it and get a new crop of timber about every seventy-five years. In seventy-five years from now it would probably be worth as much as the present crop is at this time, anticipating an increased price for the timber. At present prices it would not be worth so much. In his judgment there is approximately 4,600,000 acres of land within the exterior boundary

limits of this grant that will never have any practical use excepting that of reforesting and getting a new crop of timber about every seventy-five years. This includes the land in the immediate vicinity of the Southern Pacific Company's mill at Marcola, that is the main portion of it. There may be little strips of land along near the Mohawk Creek that would be of more value for agricultural or grazing purposes, but the main portion of the land is of more value for raising timber. The country there is quite rough and generally is too rough for agricultural purposes." (Vol. VI, pp. 2761-2762 Transcript of Record)

HOMER D. ANGELL, testified, (Vol. VI, pp. 2764-2787 Transcript of Record) among other things as follows:

"He thinks he is familiar with the stand of timber in Western Oregon, which would be deemed commercially valuable. He gained his knowledge chiefly from his work in the Government service, in surveying timber lands. His work has been quite largely in timbered areas, and it was necessary to his report, to characterize the topography of the land, including the timber upon it, and the chief value that he ascribed to the land, and his experience in making these surveys and

reports was in Oregon, and especially timber lands in Oregon, Washington and Idaho, and some portions of Montana. In each instance, the claims upon which these cabins were constructed, and upon which these parties whose names he had given, had made claims, that he examined, were taken upon lands that had a very heavy stand of timber, and there was no instance where a claim was made on lands that would not be classed as timber lands. What is considered a stand of timber per thousand feet board measure in Western Oregon that would make it commercially valuable for timber, depends somewhat upon its location, but his general experience is, that if there is a million feet to a quarter section, unless it is so isolated that it would be impracticable to market it, that it is valuable for timber. He has been over a considerable portion of the lands involved in this suit. He has been in Klamath County, but could not definitely say whether he has been on the portions of the grant in that county, but he has been pretty well around in the timbered area of that county. He has been along the road from Ashland to Klamath Falls, and on most of the prominent roads, leading out from Ashland. He did some surveying in Klamath County several years ago, near Ashland, but does not recall the township. The timber

through which he went where he made these surveys, was of good quality and a good stand of timber. A portion there, is exceptionally valuable for Oregon timber. It is what is called, he believes, sugar pine, and various qualities of pine, not very common in this state. But the major portion of timber is fir. He has been through Jackson County from several different directions, and especially in the timber. He surveyed, he thinks, at least one township in Jackson County, but on Williams Creek. He went from Jacksonville, and it is not a great way out there, west. He has been over lands of the company in the Williams Creek country in Jackson County. The stand of timber in there is not so good as the general stand in some sections of Southern Oregon. The timber is more scattering, but the land in that township is valuable only for timber, in his estimation. Outside of the timber lands, and outside of the valleys of the Rogue River and streams that lead into it, in Jackson County, in his opinion, the lands are of little value. These lands are rocky, covered with very thick brush, and scattering timber in places. There are open places, but outside of small tracts along streams, they do not seem suitable for agriculture, and there is a very poor stand of grass, for grazing purposes on the major por-

tion of it. The brush that grows over a good portion of this land that he has thus described, is buck brush, commonly called, and manzanita, and these have no commercial value whatever of which he has ever learned. He has been over quite a portion of Josephine County out from Grants Pass. In a general way, these lands are similar to the lands in Jackson County, although the timber is better, he thinks, than in Jackson County, and perhaps more mountainous. The soil of the lands in Josephine County, on these uplands, is of poor quality, not adapted to agriculture. A good portion of the soil is a sort of red soil. There is a great deal of decomposed granite soil. In fact he has had occasion to ship some of that granite from Grants Pass for use at Portland in making walks, and it is used as ballast on railroads to some extent. He does not know of any use that it can be put to for agricultural or horticultural purposes. He has never been in Curry County. He has been over Douglas County quite generally. He did considerable surveying for the Government in that county, ran about thirty miles in length of the Willamette Meridian, he thinks, in Douglas County, and the lands of the company with which he is familiar in that county, are very mountainous and covered with heavy timber or under-

growth, with the exception of isolated tracts on creek bottoms or streams, and are not suitable for agricultural purposes. They are chiefly valuable for their timber, and there are portions suitable for grazing, but not to any great extent, back in the mountains. The chief stand of timber, a very valuable stand in that country, is fir. He has been over portions of Lane County in the timbered area; in fact, up on the McKenzie River, and north and south. He has made some examinations of timber lands in Lane County in a general way, looking to see the quality of the timber, and if there were timber lands vacant, but has not made any examination, or been over any of the lands west of Eugene, in the Suislaw country belonging to the company, or other timber owners. The lands which he examined in Lane County, or has seen, were principally tributary to the McKenzie River. They were very high mountainous lands, covered with timber or old burns grown up with undergrowth, and the chief value of these lands covered with timber, were for their timber. It was practically its only value under known conditions. He knows of no use to which these burned over lands in their present condition could be put, but he presumes that if they could be denuded of the brush so that the grasses might grow, they

would be suitable for grazing, but the cost of putting them in such shape that they would be suitable for that purpose, would be prohibitive. He has been in the Eastern portion of Linn County in the timbered area, in the Santiam country, up from Lebanon. He did some surveying on the Santiam, in township 10 South, range 4 East, but is not sure that this is in Linn County. He has been over a considerable portion of the company's lands in the eastern part of Linn County, and especially in connection with Government surveying. The chief characteristic giving these lands value, is their timber; practically their only characteristic, other than isolated portions. These portions that might be utilized for some agricultural purposes, are small tracts, and his experience has been that there is no tract other than just a few acres, that is suitable for agriculture, at least without an enormous expense. These tracts are isolated and separate from one another, and lie chiefly along streams. There are certain level patches on divides that might be adapted to agriculture, but no body of land of any considerable size. He has not been in Lincoln County to any extent. He has been over portions of the timbered area of Marion County, and the lands, according to his information remaining unsold in the grant in that

county, are mountainous and rough, and portions of them are covered with a good stand of timber, and their chief value is for the timber. There is a considerable area of burned over lands in Marion County among those lands. They are covered with stumps and standing dead trees, and heavily covered with undergrowth. Such lands have practically no value under modern conditions, of which he knows. He has been out through portions of Polk County, and has been on and examined some of the lands of the Company. The lands that he had to do with in Polk County were timbered lands, and portions of them were in old burns, and those that were covered with timber were chiefly valuable for their timber. The burned over land is of very little use without a great deal of expense in attempting to clear it. He has been over portions, but not over the whole of Clackamas County. He has been in places over the timbered lands on the Clackamas River. These lands are timbered, with the exception of portions that are scattering burns. The chief value of the lands belonging to the company that he has examined in Clackamas County, was their timber. He has crossed over the mountains going from North Yamhill to the Coast in Yamhill County, over the headwaters of the Trask, and in going that

way he presumes he would see or go over unsold lands of the company. The company's lands are scattered through there in the odd sections, and he thinks it would be impossible to go across, without crossing the company's lands. These lands and the adjacent even sections are mountainous, and considerable portions of them are covered extensively with timber, a good stand of commercial timber, and in places there are burns. He has to some extent been over the company's lands in Multnomah County, up towards Latourelle Falls, back from the Columbia River. These lands are very mountainous, exceptionally so, and covered with a heavy growth of timber. Portions of those lands perhaps have the heaviest growth of timber in the grant. He has been in the vicinity above Latourelle Falls, and towards Larch Mountain, and these lands have an exceptionally good growth of timber. It is his impression that he has not been over any of the lands in Washington County. He has been over roads leading into Tillamook County, which passed through the mountains, and in doing so, had to go over the timber lands. And from his knowledge of these lands in Tillamook County, he would say their chief value was for the timber. There is an excellent stand of timber on the mountainous lands in Tillamook County. He has been in

Columbia County, out in the vicinity of these claims, the pictures of which were identified by him, and he examined somewhat the character of the lands surrounding these claims. The general character of the unsold lands of the Company in Columbia County is very heavily timbered and covered with a very heavy undergrowth. Their commercial value is for the timber only. According to his understanding of the value of timber, these claims of 160 acres each, are worth from $5,000 to $20,000. The market value of stumpage on such timber in Western Oregon runs from 75 cents to two or even three dollars, owing to location with reference to ability to get out. He has not dealt in, bought or sold timber lands, but knows of them being bought and sold. He has quite a general knowledge as to the value of timber, for the reason that he had considerable to do with it at the time he was connected with the Oregon and California Railroad Company. The lands that were sold, the stand of timber was taken, and he placed valuations upon it, and then he had to do with the value of timber other than that. He surveyed in the Forest Reserves, but not for the purpose of locating the reserve itself. He has surveyed for the Government, lands that were in the reserve. He has been through Coos County, and thinks

he surveyed a small fractional township in that county, in the timbered area, which had an excellent growth of timber. The character of the lands which he surveyed in Coos County is very rough and heavily covered with undergrowth. Its chief value is for its timber. He was reared on a farm in eastern Oregon, and lived on a farm until he was about fifteen years old, and since that time has some knowledge of farm life from observation in this country, particularly in Western Oregon.

Q. Now, suppose the company had sold these lands to so-called actual settlers, in quantities not exceeding 160 acres, and at a price not exceeding $2.50 an acre, and the actual settler had obtained a good title to the quarter section thus sold to him, and it was covered with this stand of timber or with the timber that is on these unsold lands, how long do you think it would be after the so-called actual settler got his title at $2.50 an acre, that he could sell that land to timber investors?

Q. And what would be the best use that he could make of that land?

A. Practically the only use he could make of the land would be to sell it for its timber, or sell the timber. My experience has been,

in surveying in the timbered areas of this state, as well as other states, that lands acquired by homestead from the Government on the timbered areas are never occupied for any appreciable period after title has been acquired. I suppose that in all the lands that I have surveyed, and that I have been connected with since 1892, there were not half a dozen that were acquired either by homestead or by purchase, that the parties lived on after they secured their title.

Q. What did they do with the land?

A. They moved off, the buildings went into decay, and the small portions that were cleared were soon overgrown with undergrowth, and if there was timber on the land, the lands were sold to holders of large timbered tracts.

Q. Would that be the experience of these lands if the title was passed to these so-called settlers, in quantities of 160 acres at $2.50 an acre?

A. It would.

Q. Now, suppose that a settler was expected, under the Act, to go out there and live on one of these quarter sections, like some of these photographs which you have

taken here, and to make a living for himself and his family on that quarter section, and to confine his stock that he might own and might pasture to the quarter section, what, in your judgment, would be his ability to make a living for himself or his family on that quarter section.

A. In my opinion it would be impossible to make a living off the land itself. If the land was contiguous to roads, he might cut wood and haul that to market and make a living, or he might by trapping or hunting; but by making a living from agriculture on the land, it is an impossibility.

Q. Could he make a living by grazing on the land?

A. There might be some isolated claims that he could, in some portions of Southern Oregon, but in the mountainous regions of Tillamook County or Yamhill County, Columbia County, or in the Cascades, along the border of the Cascades, where the company's lands are now located, it would be impossible in practically every instance to make a living by grazing.

Q. If he undertook to live on any of these quarter sections by means of pasturage,

would he or would he not have to have an out range besides?

A. It would be impossible to make a livinv off any one of these timbered quarter-sections by grazing, being confined to that quarter only, in its present condition.

Q. Suppose a man went up into these big burns, picked out a quarter section that was burned over, or that did not at the present time have any considerable amount of timber on it, and undertook to make a home there for himself and his family, put some of this land to grass in the stumps after burning off the debris, do you think, or do you know of any quarter section within the limits of this grant where a man could go and take his family and fence his quarter section and make a living by pasturage on that quarter section?

A. I do not think there is a quarter section in the grant that could be used for that purpose. One of the main reasons why I am inclined to that opinion is that these lands are in high altitudes, and there is considerable snow falls there, and it lies on for a long period, and it would be necessary to raise hay in order to winter stock, or else take them to some other place during a large portion

of the year. And a great deal of this land, when we begin surveying in June, the snow is very deep, especially on the north hillsides and all the mountains, and does not go off until midsummer, and then snow begins to fall in September in a great many places. As soon as we have the fall rains in the valley, it is snowing on the mountains.

Q. Some of these lands under the testimony here have been classified as grazing, and there has been some testimony that these lands when logged off could be seeded, after the fire had run through and burned over the land, and that the land could be pastured in that way over considerable areas. Do you not think, or do you think, that would be practicable, that it could be done?

A. Not practicable under present conditions. From my own personal knowledge, I know of thousands of acres that have been logged off that are admirably situated for that thing, if it could be done, but they are not utilized for that purpose, and I presume the chief difficulty is that as soon as the timber is removed, there is a very dense growth springs right up, and that may all be taken off one year, and next year it is all on there. It is almost impossible, seemingly, without taking the stumps and plowing the land thor-

oughly from year to year for a number of years, to eradicate the undergrowth. . . .

There was a great rush for timber lands here and the people who lived in Oregon, most of them, woke up about the time the timber was all gone, to the fact that they were valuable. After the lands practically were all taken, he did some reconnoitering around through various counties to see if there was any timber that might still be had. This was along from 1900 on. The timber excitement in Oregon started before 1900. He knows a great many people came here from Michigan and Minnesota as early as 1892, and took lands in the Santiam country. Large portions of these timber lands were acquired from the Government in 1900 and subsequently. He noticed the excitement with reference to filings in his Government work as early as 1892. Perhaps it was not so generally known then—it was more quiet. People who had come from timbered states, such as Minnesota and Michigan, were quietly taking up claims, and his connection with it was to the extent: these people who would locate on a township and where there would be three in a township, they would make application, and ordinarily the Department would order the township surveyed, so that in all these townships that they surveyed they

would find three or four settlers, maybe half a dozen, who were acquiring timber claims under homesteads. There were no other persons in the township. It gradually increased until along in 1900. It was, he supposes, at its height along in there some place. Large bodies of these lands were acquired in 1900 and subsequently through Santa Fe and other scrips that were required to be filed on surveyed lands, although he has no particular knowledge as to that. He did not have much to do with lands upon which scrip was placed. Scrip was either placed after the lands had been surveyed, or if it was scrip unsurveyed lands, they knew nothing about it. They would put the scrip on and would not ask to have it surveyed. That was principally Northern Pacific scrip. There was some 'additional' scrip. These photographs were all taken in the examinations of this land made while he was employed by the O. & C. Railroad Company and under the direction of the officers of that company."

The Defendants-Appellants called eleven witnesses who were at the time, or had been, employes of the Company, and had had experience in cruising a large proportion of the lands involved in this suit. (Vol. VI, pp. 2800-2908). These witnesses are unimpeached, they severally testified as to the particular

lands cruised by them, the character of these lands in their original state, whether they were grazing, agricultural or timber, and the lands examined by these witnesses and about which they have testified, are classified in Defendants' Exhibits 342, 343, 344, 350, 351, 353, 354, 355, 356, 357, (Vol. XIV, pp. 7309-7346) to which the attention of the Court is drawn. Defendants' Exhibit 342 is a standard map showing in colors the lands examined, proved and reported upon by twelve of these cruisers who testified, and they testify with substantial unanimity, giving details and particulars that the lands cruised by them are chiefly valuable for timber, and that the percentage that could be made agricultural, even by clearing, is small, and that in a state of nature the percentage that is agricultural, or fit for settlement, would be nominal. It is unnecessary to review this testimony in detail.

FREDERICK A. KRIBS, an experienced timber buyer and investor, testified in substance that the lands involved in suit were chiefly valuable for timber, and that he had been over and through a considerable portion of these lands, and that they were timber lands. He further testified (Vol. VI, p. 2913):

"Q. Suppose that a so-called actual settler should apply to purchase 160 acres from the company at $2.50 an acre, and the Company should sell it to him in good faith, for the purpose of allowing him to make settlement on it, giving him a good title, and he was expected to go upon the land with his family, and fence it, and devote it to any useful purpose, such as grazing or agriculture, and make his living, confining his pasturage to that quarter section, what, in your judgment, would be his ability to make a living on any of these quarter sections in that way?

A. Well, over these mountains, on account of the bad weather and conditions generally speaking, I do not think he could make a living. I do not think he would stay there.

Q. Suppose that the company had adopted the policy of selling all of these lands, timbered and otherwise, to actual settlers, in quantities not exceeding 160 acres, at a price not exceeding $2.50 an acre, and had conveyed to these so-called actual settlers these timberlands with the understanding and expectation that they would go out on these timber-lands, attempt to make settlement, make a living, make a home, what use would those

actual settlers make of these lands and what would become of the title?

A. Well, they would hold it until there was a good——

A. They would hold it according to their means, until there was a good market, and they would sell the timber to some lumberman or speculator, and it would all be owned by lumber companies now, or the most of it.

Q. What would be his ability, or what would be the possibility of a man being able to make a living as a settler on one of these quarter sections of timber-land?

A. Well, he might make some kind of a living, but it would be a very poor one, if he confined it strictly to one of these quarter sections high up in the mountains.

Q. Are these lands or not fit for actual settlement?

A. I would not say they were fit for settlement."

Referring to Defendants' Exhibit 259, which is a map purporting to show in colors the lands within the limits of the two grants (Vol. XIII, p. 6698), he further testified:

"He is familiar with some lands, knows more about them than he does others, but in a general way he is familiar with nearly all of the lands that are colored on that map, 'Defendants' Exhibit 259'. There might be some to the extreme east side that he does not know much about, on account of their location being so far up streams, but generally speaking the greater part of these lands are valuable for standing timber and in many townships he has made personal examinations and estimates. The character of the timber in Douglas County on these lands, is fir, and in the higher mountains principally old yellow fir; in the lower altitudes, red fir with now and then a little cedar and other kinds of timber but it is principally fir timber. The topography of the country where these timber lands are situated, are rough and mountainous and the elevation runs from 1200 to 3000 feet but through the upper Umpqua he would think about 2200 feet would strike a general average. He thinks the lands owned by the Railroad Company in Coos County would be the lands that would be up on the Coquille waters. He has selected a large part of his Company's lands on the head waters of the Coquille and these remaining lands he presumes are the ones that were not purchased. They are heavily timbered

lands as a whole and their chief value is timber. He is acquainted with the timber lands of the Railroad Company in Curry County. In Curry County, these lands are in Townships 34 and 35 south, ranges 11 and 12 and township 31 ranges 12 and 13. 31-12 would be in Coos County, 31-13 mostly in Curry County. They are principally heavy timbered lands. Township 35, ranges 11 and 12 must be these green lands shown on the map. They are on the Rogue River and there are a few lands that he cannot personally tell about. The topography of the country, of these lands in Curry County, is mountainous. He is acquainted in a few places in Josephine County but has not an active personal knowledge, as he has never done much work personally in that country. He has had men in different parts of the country and along back from the roads and mountains generally, a rough mountainous country, and the lands where there is timber, are valuable for timber. In other places, there would be old burns or openings. He has gone through there in a general way, but has not done a great deal of work in that country. The character of the topography is mountainous. There are some places where the soil would be fair in Josephine County in these timbered areas. Other places quite a bit of rock and more like

a mining country. Up the Rogue River in Jackson County there is land known as the Hopkins Tract on Jenny Creek, he thinks that would be in the south side of the county. There is a tract known as the Goodfellow tract on the Upper Rogue on the east side which is fine sugar and yellow pine and the odd sections in through that end of the country are also fine timber, and the land is chiefly valuable for timber. He has not been personally in the western part of Jackson County on the Applegate Creek. He had a man or two in there. Lands that are not covered with timber in Jackson County, but which are covered with chaparral, manzanita and other such like small growth, would have to be used for grazing land, something like that. The topography of these lands, both timber and otherwise, is all high elevation, mountainous. A man could have a tract of that and use it for summer grazing for cattle and sheep and so on. If a man was in the stock business for a living, and had 3000 or 4000 sheep, he ought to have about 14000 or 15000 acres of land, to graze them on. He does not know what the Forest Service figures this pasturage at, per acre, of these burned over and timbered lands to sheep men or other stock men per annum, but he rents land east of the mountains in the same localities

and gets seven and a half cents an acre for them. They are able to graze these lands generally from April to in September. A man could not make a living at a rental of seven and a half cents an acre for 160 acres of this grazing land. It would not amount to anything. He spoke of some lands known as the Jenny Creek country but he could not say from memory whether that is located just in Jackson or Klamath County. It is a very high grade timber on that stream. Jenny Creek as shown on this map is in Jackson County. Most of these lands to which he refers are in Klamath and part in Jackson Counties. That is fine timber, some of the best in the State. These timber lands in Klamath County are chiefly valuable for the standing timber. He is not very much acquainted with the unsold lands of the company in Columbia County. He has been along some of the roads but has never been interested in the timber there. He has had men out in Tillamook County but has not been there personally. He optioned and spent a lot of money in examining two different tracts of land in Tillamook County. It was very heavy timber land but he did not buy it. These lands that he optioned would be in the edge of the grant, just outside the indemnity limits of the grant of July 25, 1866, and with-

in the limits of the grant of May 4, 1870. These lands that he had under investigation were heavy timber, very rough and mountainous. He has no knowledge of the unsold lands of the company in Washington County. He is acquainted with the holdings of the Simpson Lumber Company to an extent, in Coos and Douglas Counties and is acquainted with the timber holdings of the C. A. Smith Lumber Company in Coos and Douglas Counties and has been over a great many of these lands personally and he thinks he is able to judge the timber character of a 40 when he sees it. There are two ways of ascertaining the timber stand on a given forty, with a view of buying or selling and that is what they call 'double running.' The land is all run out in its legal subdivisions by use of the compass and is checked up on the different points to see that it is correct, then they make a tree count, or if the timber is standing pretty evenly all over the forty, measure half acres or acres here and there, strike a general average of what it is thought it will average per acre, right through and then multiply by the number of acres of timber, and have a scale measure on the stump and do the figuring from the scale. The location of the unsold timber lands in this grant in western Oregon and the even sections owned by dif-

ferent people are considered good and the timber belt is considered about the largest in the United States. The predominating commercial tree in that territory is Douglas Fir, which ranks as a tree that will make very good lumber. It is secondary in value to high grade pine but is considered very fine lumber. Referring to 'Defendants' Exhibit 315' witness says that he has been pretty much through all that country where these pictures were taken. He could not identify from the picture, the identical 40 acres of land that any particular picture was made from, but knows these pictures were all taken down in Mr. Smith's timber and he knows the man who took the pictures. He has two or three of these himself and these pictures fairly and correctly represent what they purport to show. Relatively speaking the timber lands of Coos County is a larger belt than in other localities and it is heavy in point of stumpage. It will average all about as well in quality.

Q. What is the highest price for which a quarter section of a large holding of timberlands has been sold within your knowledge and experience in this part of the State of Oregon, western Oregon, for instance?

A. Where I am posted, the last two or three years, there were quarter sections sold

from $4,000 up to $12,000 per quarter. But before that it was some cheaper, as there was not a great deal of opposition in picking up timber then.

Whereupon witness testified they are asking for timber lands in the locality near Timber in Washington County in the Nehalem and Tillamook, since the railroad went in, from $2.00 to $3.00 per thousand for their stumpage, and there are quarter sections there that will go from ten million as high as twenty to twenty-one million to the quarter section. Some of these quarter sections could not probably be bought short of $60,000.

Q. Well, then, if an actual settler under this law should apply to the company to buy one of these quarter sections at $2.50 an acre, of which there are some 7,000 intervening in this case, actual or potential so-called settlers, his quarter section would cost him $400. Would he or not be able to sell one of these quarter sections for the prices that you have named?

A. He would get a good fat price as soon as he would get his title.

This witness testified as to the pictures shown in Defendants' Exhibit 315 from per-

sonal knowledge of the location. He testified in substance and effect that the pictures were correct representations of what they purported to show. Defendants' Exhibit 315 is a copy of the "American Lumberman" of date November 11, 1911, C. A. Smith Lumber Company and others, Coos County, Oregon, and various photogravures illustrating saw-mill of C. A. Smith Lumber Company, Marshville, Oregon, growth of timber in Curry and Coos Counties (Vol. VI, pp. 2925-2934 3076). These photogravures should be examined in connection with Vol. XVIII. They bring vividly to the attention of the Court the character of these lands.

W. R. WHIPPLE, of Josephine County, testified:

"Now, assuming that there is that number of acres of unsold railroad land in Josephine County, consisting of 167,480.98 acres, what is the fact as to whether or not there are any lands in that list, that lot, capable of actual settlement, upon which a home-builder could or could not make a living?

A. I doubt whether there is. There might be once in awhile a quarter section where they possibly could by working hard, but I don't know of any where they could make a

comfortable living, with a reasonable amount of work.

Q. The land that is timbered, if cleared, what would be the character of the soil as to the greater portion of the lands in that county?

A. It is nearly all poor, rocky, shaly soil.

Q. Would it or not be susceptible of agricultural use after it was cleared, even?

A. It would not." (Vol. VI, p. 2936 Transcript of Record)

ELMER S. SHANK testified:

"From his investigation and knowledge of others at Grants Pass engaged in the timber business, he would say that from eleven and twelve to sixteen per cent of the total unsold lands of the company in Josephine County would be chiefly or solely valuable for timber purposes. From his knowledge of the total area of these unsold lands of the company in Josephine County, he would say that between four and five per cent of them is capable of being put to agricultural purposes, but of this four to five per cent there is about three per cent that on account of being heavily timbered, uneven in character,

or burnt-over land, would not be agricultural until the land was cleared, the expense of which would run from $40 an acre to $75 and $100 per acre. He has had considerable experience in paying for clearing land of that kind. A settler generally tried to get as much cleared ground to start with as possible. That is the drawback against this country. The land costs so much to be cleared, and it is easier to sell at twice its intrinsic value, land that is cleared, above that which is not cleared. There are two general divisions of soil in Josephine County, red soil and granite soil. The unsold railroad land is largely granite land or red land, of rather high elevation, meaning by high elevation from 1,600 feet upwards. Geographically speaking, that district is very old. It is of volcanic formation, and thrown in a great deal of confusion. The ranges are not long, but are broken—short, steep hills—and whenever the grade is about twenty per cent, it is very rocky. He would think that twenty or twenty-five per cent of this unsold land was quite rocky, but as to be totally unfit for cultivation, that it is a question almost impossible for him to answer. Not over two and one-half per cent would be available now for practical settlement. (Vol. VI, pp. 2960-2961 Transcript of Record) * * * He did

not in his direct testimony estimate that 85% of these unsold lands were not good for timber, but that 15% had good timber, and that 4% was agricultural land." (Vol. VI, p. 2966 Transcript of Record).

R. L. BOOTH testified:

"The township of railroad land east of him there is principally timber, saw timber, good timber, and he would say that that is the chief value of that land. The other railroad land there has dead fir timber on it, burned down many years ago. The snow fall in the high part of it is six feet in the winter. The burned over land is red shot land. This burned over area was at one time covered over with heavy timber. There have been saw mills there. There has been scattered timber on the creek west and northwest; it is all dead, that is, practically speaking—just a few trees left. The burned over land is good enough soil. The timber is of no value at all. The stumps are still there pretty thick. It was good timber, some of it—very nice timber—large fir timber. The roots of these trees are still in the ground and sound. It would probably cost to clear timber land of that character from $100 to $125 an acre, and it could be cleared. It would cost that per acre to clear it, the best a man could do. The lowlands, where the hills are not so high,

would be pretty good fruit land. On the ridges, where the ridge switches off, the land is pretty steep. He thinks that there would be about twenty-five per cent of this land that could be cultivated if it were cleared, and this is true of all of the even sections in that same territory. He was county commissioner eight and a half years. He would not want to farm this land on the higher points, which is covered with five or six feet of snow. Crops would be late starting in the spring, and the weather would be cold early in the fall, and he does not think it would be practical to use for agricultural purposes." (Vol. VI, pp. 2969-2970 Transcript of Record)

H. W. SCOTT testified:

"The character of the unsold land of the company involved in this suit situated in Washington County, is generally rough and broken, heavily timbered in a great many cases, and a great deal of the land is rocky and not fit for cultivation on that account. It is unfit for cultivation on account of being too rough, steep and broken. In a great many cases there is quite a high altitude, snow getting very deep in the winter. The soil is generally all coarse mountain land and very unproductive. In order to clear this land for cultivation it would require ordinarily from

$100 to $200 an acre to put it in cultivation. * * * Not over twenty per cent of these lands in the aggregate could be used in any way for agricultural purposes, even after the timber was cleared off, and he would not consider, in his judgment, that any of it would be available for any agricultural purposes without the removal of the timber. There might be an isolated case where somebody has gone on to a piece of land, cleared up a few acres and abandoned it. There are a few cases like that where they started out on it and could not make a living on it, referring to both the even and odd sections. He saw a great many places in the last two or three years where there were notices tacked up on trees notifying people that they had settled and located on a certain piece of railroad land and every case that he ever saw where these notices were, was always where there was good timber. * * * He remembers one place on the South Trask, on the bottom, where it was settled up and houses were there, were settled twenty-five years ago and ten or fifteen years ago they were all abandoned, the houses going to rack and some of them had quite little clearings in there. They sold these lands. Some of these homestead entries within the limits of this grant with which he is familiar were abandoned be-

fore final proof, they were finally retaken. A great many of them were taken under the Timber and Stone Act and proved up under that act. The lands within the limits of these grants in Tillamook County is very rough and mountainous, steep and broken and rocky in a great many places, heavily timbered and chiefly valuable for its timber, the only value that he considers the land has now. It would cost to clear any of these lands that might have the soil that could be utilized for agricultural purposes $100 to $200 per acre. * * *

Q. Well, isn't it true, Mr. Scott, that there here and there throughout this grant, in the low little valleys and ravines and draws leading down to the larger streams, there is here and there a spot where a house could be built, that is level, with a half-acre in a place, that you could get a garden, plant a few potatoes, sow a few oats, and make a pretense of a home, and settle on this land?

A. Yes, sir.

Q. Well, what would the balance of the settlement be good for?

A. It wouldn't be good for anything. A man would starve to death on a settlement like that.

Q. Well, where these quarters were timbered, and a man could find half an acre where he could built his cabin or his house, put out a garden of a half acre in potatoes, and things of that kind, couldn't he make a living by getting the timber?

A. Yes, if he could sell the timber for the price it is worth nowadays, he probably could live off the sale of the timber. He certainly wouldn't live off what he would produce from the soil anyway.

Q. Then such claims on such tracts, if I understand you, would be chiefly valuable for the timber?

A. Yes, sir." (Vol. VI, pp. 2975-2980 Transcript of Record).

J. D. ZURCHER testified:

Q. "Now assuming that this timber on certain parts of it stands upon soil that, when the timber was removed, it might have some agricultural value, or some value for grasses or fruit or grazing purposes, or other agricultural or horticultural uses, about what per cent could be made available for such agricultural or horticultural purposes when the timber was removed, in your judgment?

A. Oh, I should suppose it would average 15 or 20 per cent. (Vol. VI, p. 2997 Transcript of Record) Witness further testified "that he could not say exactly what it would cost to remove this timber and clear the stumps and roots and make it available for use in agricultural pursuits, but should estimate that it would run all the way from $100 to $300 or $400 an acre to cut that timber off and clear it. * * * He would say that about seventy per cent of the unsold land of the company in Douglas County was merchantable timber land, that would leave about thirty per cent of that land that would be practically worthless, the soil being rocky and unfit for cultivation of any kind. The country is all very rough. The Gardiner Mill Company he believes is the only company at the present time of those shown on the map that are manufacturing lumber out of their holdings in Douglas County. The Neenah-Oregon Land Company is a Wisconsin corporation and he thinks also the C. A. Smith Company. Kendall Brothers is a partnership, of Pittsburg, Pa., Pillsbury Lumber Company he presumes is a Minneapolis concern. The Lennan Land Company he thinks is an Oregon corporation with offices in Minneapolis. The Bradford-Culver Timber Company is a Wisconsin corporation.

The Myrtle Lumber Company is an Oregon corporation, but the principal stockholders are the Lovejoys, who are eastern people. The Gardiner Mill Company is an Oregon corporation whose principal stockholders are California people. The Weyerhauser Land Company represents the Weyerhauser interests and everyone knows who they are, not a resident, but a foreign corporation. A. H. Hinkson lives at Eugene, Oregon. Sparrow, Coach & Kroll he believes is an eastern company. The C. A. Smith Company is not manufacturing any lumber from its Douglas County holdings, but it has holdings also in Coos County, and a mill at Marshfield. With the exception of the Gardiner Mill Company, none of these large holdings are being utilized for the manufacture of lumber or any other useful purpose. These timber lands of these various companies other than the Oregon and California Railroad Company, in his judgment, are the best timber lands in Douglas County. He is acquainted with the stumpage or number of thousand feet on a forty on some of these lands. Township 26 south, range 9 west, is very heavily timbered. The land in section 14, township 26 south, range 9 west, is owned by the C. A. Smith Company and will run 16,000,000 feet of timber to the 160 acres. West of the railroad in

Douglas County in the Coast mountains, the land is reckoned among the best timber in the State of Oregon. On the east it is not so good. With the exception of the Gardiner Mill Company of which he can speak positively, and the exception of the Neenah-Oregon Land Company, all this timber was bought about five years ago by these companies, that of the Neenah-Oregon Land Company has been purchased within the last two years. This map shows all the streams, all the roads, all the donation land claims taken up under the donation land law, the principal towns and postoffices in the county. It does not show the mountains but that is shown by the topography of the map. * * * * The settlers referred to on this unsold railroad lands they called squatters who go out and build a little cabin, clear a little place for a little garden. Some of them would and some of them would not do that and start in to making posts, cutting and selling wood. In no case that he investigated had the so-called settler made any offer to the railroad company to purchase land. They were trespassers. In his experience these cases were few and were in Douglas and Jackson Counties. There had been a number of homestead entries relinquished and a timber and stone filing made on the land. As far as he knew,

cabins and improvements of homestead entrymen on the even sections within the limits of the grant had all been abandoned as soon as title was perfected and the title passed to timber companies, especially in a certain section. These lands that were homesteaded and subsequently entered under the Timber and Stone Act in even sections, were all timber lands.

Q. Well, then, if I understand you, Mr. Zurcher, there are not very many settlers within the limits of this grant on the even sections, at the present time?

A. There are not. Take practically all this territory in through here (pointing to the southeast part of the map) and all you will find is an occasional bachelor's cabin. Once in a while you will find a man with a family on a little creek. You won't find any farming country in there at all. * * * * *"

Witness further testified: "That his knowledge concerning the homestead, timber and stone and other public land entries on the even sections within the limits of this grant in Douglas County, was obtained from the Land Office Records as to what the notices are, and from traveling through the country all over Douglas County. He found that in

the even sections, which were the only sections that could be entered, he would find a timber claim entered and a homestead entered, for instance one would go out and take up a homestead, live on it there until he would commute it and either hold if for investment or sell it to some timber company. The lands obtained through a majority of these entries have been sold to timber holding companies. This country is all rough, broken land, heavily timbered." (Vol. VI, pp. 2997-3006 Transcript of Record.)

C. H. STEWART testified: "That part of these lands that are covered with timber would be so expensive to clear that it would be almost prohibitive. He would say that it would cost from $150 to $200 an acre to clear. The chief element of value of these timber lands would be the timber. (Vol. VI, p. 3009 Transcript of Record) * * * He knows of quite a number of homestead entrymen, who as soon as they secured their title from the government, sold it, to some of these eastern land syndicates. These homesteads were on the even sections and were about of the same character as the lands that he has been describing. They were timber lands, that is, the value was in the timber and not in the land." (Vol. VI, p. 3014 Transcript of Record)

W. H. FALLIN testified: "During his time of office as assessor he had absolute charge of the classifying and cruising of all the lands in Josephine County, railroad, government and all of it. As assessor he had been on the land a good deal, and really knows about the lands. He never cruised any and don't know anything about cruising. The unsold lands of the Oregon and California Railroad Company is mountainous, part of it is timber land and part of it is barren. It is bald hills considerable of it; he really did not cruise it, there wasn't enough timber on it to cruise it. * * * This barren land that is free from timber is rough, rocky and barren granite, with some grass growing on it. He would think there was not over five per cent of this unsold land in Josephine County that would be suitable for agricultural or horticultural purposes, that one could use at all. Wherever there is a stream or creek, there is probably a little bit of bottom land there, that might be used for agricultural purposes. * * * A very small per cent of the lands that are covered with timber, where timber is the chief value, could be utilized for agricultural purposes after the timber is removed, he would say that it was not over five per cent, that would be putting it pretty strong. * * *

Q. Suppose that an actual settler, so-called, should apply to the company under the Act of April 10, 1869, to buy at the rate of not to exceed $2.50 an acre, a tract of this land not exceeding 160 acres, and the company should sell it to him, and there was no other land there over which he could roam his stock outside of his 160 acres, what would be his ability to make a home of his 160 acres, and support himself, or himself and family if he had one, in your judgment?

A. I do not think he could make a living on it. In fact, they don't live there. There is many a township where there is not a settler living there.

Q. Why wouldn't he be able to make a living, as an actual settler, for himself and his family?

A. The ground wouldn't be productive enough. He couldn't raise anything. And he couldn't graze enough cattle on 160 acres, there wouldn't be enough sustenance for them to live on.

Q. Something has been said in the record in this case about clearing off some of this land by grubbing it, burning the timber stumps, and then seeding it to grass. I wish

you would state, in your own way, whether or not any of this land is available for such use, and whether it would be at all practicable for this so-called settler to make a living that way on 160 acres.

A. There are thousands of acres in that country without any timber at all. They had bald hills—there is no grass there only for a short time.

Q. Couldn't man have some of this land cleared, and take 160 acres of it, after the timber was cut down, seed it to grass or some kind of forage, and make a living by raising stock on the 160 acres?

A. Well, he might, but I don't believe but a little of it. Of course, he might pick out a piece once in a while that you could do that.

Q. Do you know of any instance in that county where any other party is attempting to make a living in this way on this land, as grazing land, limiting it to 160 acres?

A. No, not in those outside districts." (Vol. VI, pp. 3015-3019 Transcript of Record)

IRVINE P. GARDNER testified:

"That these unsold lands are chiefly valuable for their timber. In the present condition, at this time, a great deal less than one per cent of this total area, in his judgment, would be available for horticultural or agricultural purposes. Twenty-five to thirty per cent could be farmed after the timber is removed. He has a homestead of his own, and what clearing he has done has cost him from $100 to $200 per acre, and he has cleared a great deal of land, and helped clear land in camps.

Q. From your knowledge of the timber that is on this land, that you say might be utilized for some agricultural or horticultural purposes after the timber was cleared, what would you say the average cost per acre would be to clear such land and make it available for use? Go ahead and answer.

A. After the timber is cut, or before, at the present time—take it in its present state?

Q. Take it as it is.

A. Taking it in its present state, the average cost would be from $75 to $100 per acre to clear.

Q. Do you say, or do you think that you could clear some of this land that runs

6,000,000 feet board measure to a quarter section, at the rate of $100 an acre?

A. Why, it would have to be done in a commercial way, with donkey engine and derrick, certain people are contracting to. It costs from $10 to $25 an acre to slash, and it will take on your trees anywhere from two to ten sticks of powder per stump. I never figured it out that way, but it would take—some of it could be done. It would probably average nearer $150 than $100 to clear it free of stumps.

Q. What is the fact, if you know, as to the presence of the roots in the ground of these trees, after the stumps are blown out by powder?

A. Well, if they blow the stumps out, the roots will bother if not pulled up, for a few years. * * * Ninety-five per cent of the even sections, within the limits of this grant and adjacent to the railroad lands, is covered with merchantable timber. From his experience in the abstract office and looking up titles, checking blue prints, etc., he knows that the title to the even sections, where the title has been disposed of, has passed into the hands of timber companies, a good deal of it. It was originally entered under the Tim-

ber and Stone Act, the Homestead and Commutation or Cash Entry Act, and Scrip. A great deal of it has been taken under the act of July 30, 1898, and the acts of 1902 and 1903. The Act of July 30. 1898, is the act of Northern Pacific scrip, individual claimant scrip. The Neenah-Oregon Land Company has bought probably thirty homesteads, which it will be glad to lease for taxes, and cannot lease one. * * * Very little of this land is capable of being used for agricultural purposes. * * *Looking over the country generally, his blue prints and in the abstract office, probably in that territory 500 people obtained that land under Homestead or the Commutation Act. The rest was taken under the Timber and Stone Act. He is not stating anything but what he has examined himself personally, through cruising. A great many of their cabins have been burned, and a great many have been abandoned. Some few of them, the patches that they have are being used by cattlemen and others, who keep up the fences.

Q. What I am getting at is, the entryman that settled the land, what has become of him in nine cases out of ten, if you know?

A. Sold out and out of the country, most of them. A majority of this land in our

part of Douglas County was settled in 1902 and '3, and 1901, a great deal of it by people who came from Michigan, Wisconsin and Minnesota, and took up land.

Q. Now in the main, to whom were these homestead claims or homesteads transferred —to what class of purchasers, from your knowledge, if you know?

A. Timber companies. (Vol. VI, pp. 3029-3033 Transcript of Record) * * * Less than one per cent of these lands are agricultural in character, in Douglas County, in his opinion, until the timber is removed." (Vol. VI, p. 3035 Transcript of Record)

WILLIS VIDITO testified:

"The chief value of these unsold lands in Benton County would be timber, nearly the total value. * * *

Q. Now, suppose that an actual settler, under this so-called claim of the government that the company is under obligation to sell to actual settlers at the rate of not to exceed $2.50 an acre, and in quantities not exceeding 160 acres, should take a quarter section, or apply for it, and the company should let them have a quarter section of this burned over

land upon which to settle and make a home, how would that man make a living on that piece of land?

A. There is none in township 6, 7, nor 8 west, and 13 south, 6, 7 nor 8 west, in 14 south, that anybody could make a living on, either government land or railroad land.

Q. Why?

A. Well, it isn't of a nature that they could do anything with that quantity of. I took a claim in 1872, and I couldn't make a living on that, and it was the best, I think, that was available at that time, nearly forty years ago. * * *

Q. I mean, suppose a settler would go in there and buy 160 acres, take a homestead of 160 acres, expecting to make it his home, and be confined to that piece of land to make his living, either by pasturing stock, or any useful avocation, relating to agriculture or horticulture, how would he get along?

A. He would be caught.

Q. He wouldn't, then, be able to make a living on the piece at all?

A. No, he couldn't make a living for a family on a piece of land, unless he had money to squander and live on it.

Q. I mean out of the land?

A. No, he couldn't make it out of the land. I never have advised anybody, in years past, not in the last ten or fifteen years, to ever take a homestead. I knew where there was vacant government, but I couldn't recommend anybody to take it.

"That he knows of part of the even sections within the limits of this grant, where the land is chiefly valuable for timber, which had been taken under the Timber and Stone Act, and thinks that most of it was taken for this cascara bark, and after they peeled the bark off they threw the claim up, and all that government land was filed on along the line between Lincoln and Benton, about eight or nine years ago, and he does not think that there is any one of them living on those claims today. They were just simply vacated. He thinks only one man perfected his title. There is no one living on these homesteads taken in the last twelve or fifteen years. The homesteads were sold to timber syndicates." (Vol. VI, pp. 3060-3065 Transcript of Record)

DENNIS McCARTHY testified:

"The bulk of the holdings of the C. A. Smith Lumber Company is in the south-

western part of the county and he thinks this company owns about 70,000 acres in Coos County. Some of these lands are within the limits of the Oregon and California Railroad Company. The Simpson Lumber Company owns in Coos County about 24,000 acres. The Menasha Woodenware Company, of Menasha, Wisconsin, owns a large tract of timber formerly owned about 20,000 acres and has recently purchased another large tract there of about 70,000 acres, and it has pretty close to 100,000 acres there all together. These timber lands of that company are mostly all mountain lands, principally fir timber which is the principal tree in Coos County and western Douglas County, with a little scattering hemlock and cedar. Weyerhauser Timber Company is the next largest owner of timber lands in Coos County, owns about 25,000 acres in that county. He does not know the extent of its holdings in Douglas County. It has a large tract there. The holdings of the Weyerhauser Timber Company in Coos County are all heavily timbered land. He has cruised part of the unsold lands of the Oregon and California Railroad Company in Coos County. He thinks they have cruised about 60,000 acres of them up to this time. His knowledge of the balance of these lands is just a general knowledge. He has been

through the townships in which they are situated but has not cruised these townships yet. He has been sufficiently over them to be able to state, in a general way, the general character of the rest of these lands. So far as he has been through the unsold lands of the Oregon and California Railroad Company in Coos County, they are mostly high lands, heavily timbered lands, as far as he has seen them and he has actually cruised about 60,000 acres of them and these were all heavily timbered lands, and as to these that he has not specifically cruised but traveled through or over, they were chiefly timber and most high and all high mountain land. These unsold lands are nearly all steep mountain slopes, gulches and generally rough country. In their present state, he would not consider, that any of it would be available for agricultural or horticultural purposes and it is so heavily timbered that it would not be practical to clear the timber and cultivate it. It would not pay, he thinks, any part of it, to clear the heavy timber off of it and cultivate it and their chief value is timber. . . . .

Q. Suppose that a settler would come to the company and say, "Here, I want to pay not to exceed $2.50 an acre for 160 acres of that land out there, and I want to make a home on it—I want to settle on it," and the

company should sell it to him, from your knowledge of this grant, I wish you would state to the court whether or not such settler would be able, confining himself to the particular quarter section, however he might select it, to support himself and his family, make settlement there, by any means, either for grazing what few stock he might have on it, or devoting it to agricultural or horticultural or any other useful purpose?

Q. You may answer.

A. I don't know of any that would be available or practicable for a settler to go on and make a living.

Witness testified that there is very little settlement on the even sections within the limits of the grant in Coos County. There is scarcely any settlement on the lands. There is very little evidence of any settlement. Most of that land has been taken under the timber and stone act with scrip. The title, after it passed to the entryman, has most all passed into the hands of some of the large timber holders. These even sections that have been thus entered are all heavily timbered lands. . . . Most of these even sections within the limits of this grant in Coos County have nearly all been taken under some law of the

United States, mostly under the timber and stone act and when the entry was completed and title vested in the entrymen the lands have all passed substantially to timber investors. . . . The land's chief value, as far as he has seen, in Curry County was for timber. He could not see any that was available for agricultural purposes. He has been cruising for Coos County four years to arrive at the valuation of the lands for assessment purposes, to classify and value the lands as for assessment purposes."

(Vol. VI, pp. 3071-3076 Transcript of Record.)

ASSIGNMENT OF ERRORS

OF THE OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE, (Vol. XV, pp. 8222-8267, 8138-8183, 8077-8122).

Each of said Defendants-Appellants respectively made and filed Assignment of Errors, mutatis mutandis the same, the material portions whereof each now relies upon as next hereinbelow.

"1.—The Court erred in overruling the demurrer of this defendant to the bill of complaint herein.

2.—The Court erred in overruling and in not sustaining the following grounds of the joint and several demurrer of the defendants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, to the bill of complaint of complainant herein:

As against the said defendants and each of them the said bill of complaint is without equity and cannot be maintained as to the "East Side Grant," so-called in said bill of complaint and subject thereof.

3.—The Court erred in overruling and in not sustaining the following grounds of the joint and several demurrer of the said defendants to the bill of complaint of complainant herein:

As against the said defendants and each of them the said bill of complaint is without equity, and cannot be maintained as to the "West Side Grant," so-called in said bill of complaint and subject thereof.

4.—The Court erred in overruling and in not sustaining the following grounds of the joint and several demurrer of the said defendants to the bill of complaint of complainant herein:

As against the said defendants and each of them the said bill of complaint is without any equity whatsoever.

5.—The Court erred in overruling and in not sustaining the following grounds of the said joint and several demurrer of the said defendants to the bill of complaint of complainant herein, and in not holding and deciding that:

As against the said defendants, and each of them, the said bill of complaint does not set forth or show any matter, equity or cause, entitling complainant to:

Any relief as to the "East Side Grant," so-called in said bill of complaint, and subject thereof, or because of or arising out of any facts, particulars, transactions, matters or things in the said bill of complaint set forth or shown about, relating to, or concerning the said "East Side Grant."

6.—The Court erred in overruling and in not sustaining the following grounds of the said joint and several demurrer of the said defendants to the bill of complaint of complainant herein, and in not holding and deciding that:

As against the said defendants, and each of them, the said bill of complaint

does not set forth or show any matter, equity or cause, entitling complainant to:

Any relief as to the "West Side Grant," so-called in said bill of complaint and subject thereof, or because of or arising out of any facts, particulars, transactions, matters or things in the said bill of complaint set forth or shown about, relating to, or concerning the "West Side Grant."

7.—The Court erred in overruling and in not sustaining the following grounds of the said joint and several demurrer of the said defendants to the bill of complaint of complainant herein, and in not holding and deciding that:

As against the said defendants, and each of them the said bill of complaint does not set forth or show any matter, equity or cause, entitling complainant to:

A decree declaring or adjudging forfeiture of all or any of the lands or estates in lands described or referred to in paragraph 1 of subdivision First of the prayer of the bill of complaint herein.

8.—The Court erred in overruling and in not sustaining the following grounds of the said joint and several demurrer

of the said defendants to the bill of complaint of complainant herein, and in not holding and deciding that:

As against the said defendants, and each of them, the said bill of complaint does not set forth or show any matter, equity or cause, entitling complainant to:

A decree quieting the title to all or any of the lands or estates in lands described or referred to in paragraph 1 of subdivision First of the prayer of the bill of complaint herein:

9.—The Court erred in overruling and in not sustaining the following grounds of the said joint and several demurrer of the said defendants to the bill of complaint of complainant herein, and in not holding and deciding that:

As against the said defendants, and each of them, the said bill of complaint does not set forth or show any matter, equity or cause, entitling complainant to:

A decree or order requiring the defendants or any of them to surrender unto complainant possession or control of lands or estates in lands described or referred to in paragraph 1 of subdivision First of the prayer of the said bill of complaint herein.

10.—The Court erred in overruling and in not sustaining the following grounds of the said joint and several demurrer of the said defendants to the bill of complaint of complainant herein, and not holding and deciding that:

As against the said defendants, and each of them, the said bill of complaint does not set forth or show any matter, equity or cause, entitling complainant to:

The, or any, injunction requiring the said defendants, or any of them, to do or perform any of the acts or things set forth or mentioned in paragraph 3 of subdivision First of the prayer of the bill of complaint herein.

11.—The Court erred in overruling and in not sustaining the following grounds of the said joint and several demurrer of the said defendants to the bill of complaint of complainant herein, and in not holding and deciding that:

As against the said defendants, and each of them, the said bill of complaint does not set forth or show any matter, equity or cause, entitling complainant to:

The, or any, injunction or restraining order or decree asked for in the Second

subdivision of the prayer of the bill of complaint herein.

12.—The Court erred in overruling and in not sustaining the following grounds of the said joint and several demurrer of the said defendants to the bill of complaint of complainant herein, and in not holding and deciding that:

As against the said defendants, and each of them, the said bill of complaint does set forth or show any matter, equity or cause, entitling complainant to:

The, or any, injunction or restraining order asked for or mentioned in the Fifth subdivision of the prayer of the bill of complaint herein.

13.—The Court erred in overruling and in not sustaining the following grounds of the said joint and several demurrer of the said defendants to the bill of complaint of complainant herein, and in not holding and deciding that:

As against the said defendants, and each of them, the said bill of complaint does not set forth or show any matter, equity or cause, entitling complainant to:

Any relief whatsoever.

14.—The Court erred in holding that the United States, complainant herein, was entitled to the relief prayed for in its complaint herein, or to any relief, and in not holding that the said complaint of said complainant should be dismissed.

15.—The Court erred in holding that the complainant had any right, title or interest in or to the lands described in the decree herein, or any part thereof.

16.—The Court erred in holding that the complainant is the owner in fee simple, or in the possession of said lands, or any part thereof, or entitled to the possession of the same, or any part thereof.

17.—The Court erred in holding that the defendant, the Oregon and California Railroad Company, was not the owner in fee simple and in the possession, and entitled to the possession of said lands, and the whole thereof.

18.—The Court erred in holding that the allegations in said bill of complaint were sustained by the evidence, and in not holding that said bill should be dismissed.

19.—The Court erred in holding that the lands or any thereof, described in the decree, were and had been forfeited to the complainant, and that a decree be entered

forfeiting said lands, or any thereof, to the complainant.

20.—The Court erred in holding that the lands and estates in lands in the said decree described, either in whole or in part, have become or now are forfeited to, or that the title to the same or any part thereof, has reverted to and now is revested in the United States of America, or that the same or any part thereof now are the absolute property of the United States of America, or are free from any or all claim or claims of right, title or interest or lien in, to, or upon the same or any part thereof by or in favor of this defendant, or the defendant Southern Pacific Company, or the defendant Stephen T. Gage, individually or as trustee, or the defendant Union Trust Company, individually or as trustee, or any party or parties claiming under them, or either or any of them.

21.—The Court erred in holding that the title of complainant to the said lands, or any thereof, should be quieted.

22.—The Court erred in holding that the title of the United States of America to all or any of said lands or estates in

lands be or is by said decree quieted or confirmed, or be or is so quieted or confirmed, particularly as to any or all claim or claims of right, title, interest or lien in, to, or upon the same, or any part thereof, by or in favor of this defendant, or the said Southern Pacific Company, or the said Stephen T. Gage, individually or as trustee, or the said Union Trust Company, individually or as trustee, or each or every party or parties claiming under them, or either or any of them.

23.—The Court erred in holding that complainant was entitled to recover its costs and disbursements herein, and that a decree should be entered to that effect.

24.—The Court erred in holding that the complainant herein was or is entitled to any injunction or restraining order in this cause.

25.—The Court erred in holding that this defendant, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or said Union Trust Company, individually or as trustee, or the officers or agents of tehm, or any or either of them, be, or that they, or any or either of them

be, or that they, or any or either of them by said decree are or is forever, or at all, enjoined or restrained from claiming or asserting, or from claiming or asserting in any manner any right, title, interest or lien in, to, or upon the said lands, or estates in lands, or any part thereof, or from in any manner selling, conveying, leasing or disposing of any of said lands or estates in lands, or any interest therein, or from negotiating, executing, or recording any document or instrument, or from doing any other act or thing which shall in any manner affect or encumber the title to said lands or estates in lands or any part thereof, or from going upon said lands, or any part thereof, or from cutting, removing or in any manner using or injuring any timber or other natural products thereof, or from committing in any manner trespass upon said lands, or any part thereof, or from using or interfering with in any manner said lands or estates in lands, or any part thereof, or the title or possession thereof, or from contracting with, inviting or inducing, or permitting, or in any manner whatsoever permitting others, or any party to do any of the things aforesaid.

26.—The Court erred in holding as to all or any lands which may hereafter revert, as in paragraph IV of said decree set forth, to this defendant, or to said Southern Pacific Company, or to said Stephen T. Gage, individually or as trustee, or to said Union Trust Company, individually or as trustee, that this defendant, or the said Stephen T. Gage, or the said Union Trust Company, or any or either of them, shall within sixty days, or any other period of time, from the date that any of said lands shall so revert to said defendants, or any or either of them, or at all, execute or file with the clerk of said court, or otherwise, or at all, any deed of conveyance in due or legal form, or at all, conveying or confirming unto the United States of America all or any of said lands, free from any or all claim or claims of right, title, interest or lien in, to, or upon the same, or any part thereof, in favor of said defendants, or either or any of them, or otherwise or at all, or that in the event that said defendants, or any or either of them, shall fail to execute or file any such deed or deeds of conveyance, said decree shall operate or shall have the same force

or effect as such deed or deeds of conveyance.

27.—The Court erred in holding that within sixty days or any other time, from the date of said decree, or otherwise or at all, this defendant, or said Union Trust Company, or said Stephen T. Gage, or any or either of them, shall execute or deliver to the clerk of said court, or otherwise, or at all, a deed of conveyance in due or legal form, or at all, conveying and confirming unto the United States of America, all or any of said lands situated in the State of Washington, free or clear from any or all claim or claims of right, title, interest or lien in, to, or upon the same, or any part thereof, in favor of said defendants, or any or either of them, or otherwise, or at all, or that in the event that said defendants, or any or either of them, shall fail to execute or file any such deed of conveyance, said decree shall operate or shall have the same force or effect as such deed of conveyance.

28.—The Court erred in holding that the above mentioned defendant, Union Trust Company, had no lien on said lands

or any part thereof, and in holding that the lien of said defendant evidenced by deed of trust of date July 1, 1887, was of no avail and without force or effect and did not express or constitute any right, charge or lien in or upon the said lands, or any part thereof, and should be set aside and cancelled.

29.—The Court erred in holding that the above mentioned defendant, Stephen T. Gage, as trustee, or the said Southern Pacific Company, had no lien on said lands or any part thereof, and in holding that the lien of said defendant, Stephen T. Gage, as trustee, evidenced by deed of trust of date June 2, 1881, was of no avail and without force or effect and did not express or constitute any right, charge or lien in or upon the said lands, or any part thereof, and should be set aside and cancelled.

30.—The Court erred in holding that said Union Trust Company, of New York, as trustee for the owners and holders of bonds issued under and by virtue of trust mortgage of July 1, 1887, was not entitled to the rights, or to all or any of the rights of an innocent purchaser for value.

31.—The Court erred in holding that whatever interpretation might be given to the proviso touching actual settlers of said act of April 10, 1869, or whether the same created a condition subsequent or not, said Union Trust Company, of New York, was not entitled to a lien upon the right of way and the whole land grant of the said act of July 25, 1866, as security for the sum of twenty million dollars, as provided in its mortgage of July 1, 1887, and in holding that said Union Trust Company was not entitled to have said lien impressed upon said right of way and said entire land grant to be satisfied first and before forfeiture or reversion to the complainant, or said United States of America, if forfeiture or reversion should be decreed.

32.—The Court erred in holding that the right to forfeiture for breach of condition subsequent is not a right that may be waived, and in holding that in this case, as to said Union Trust Company, said right, if it ever existed, was not waived by said complainant and said United States of America, and in holding that said complainant and said United States of America is not estopped to allege a breach of such condition or to

pray or have forfeiture as against said defendant, said Union Trust Company of New York.

33.—The Court erred in holding that the paramount and primary purpose of Congress touching the land grant under the act of Congress of July 25, 1866, mentioned in the bill of complaint and entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, Oregon," or any amendment thereof, is expressed by the proviso as to sale to actual settlers, contained in the act of Congress of April 10, 1869, referred to in said bill, and entitled "An act to amend an act entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon'."

34.—The Court erred in holding that the paramount and primary purpose in making the said land grant was other than to aid in the construction of a railroad, as expressed in the said act of July 25, 1866.

35.—The Court erred in holding that the paramount and primary purpose of

Congress touching the land grant under the act of Congress of May 4, 1870, mentioned in the bill of complaint, and entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," was other than to aid in the construction of a railroad as expressed in said last mentioned act.

36.—The Court erred in holding that this defendant, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or said Union Trust Company, individually or as trustee, or any or either of them, had at any time violated any provision of said act of July 25, 1866, or of said act of April 10, 1869, or of said act of May 4, 1870, or more particularly any clause or provision either in said act of April 10, 1869, or in said act of May 4, 1870, relative to actual settlers.

37.—The Court erred in holding that in respect to the said land grants, or either of them, there had been any application thereof by the grantees of the same, or either of them, or their successors in interest, or by this defendant, or

said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or said Union Trust Company, individually or as trustee, or any or either of them, other than in fulfillment of and compliance with the paramount and primary purpose of Congress in making the said land grants, or either of them.

38.—The Court erred in holding that the application of the land grant under the said act of July 25, 1866, denominated by way of distinction the East Side Grant, to the construction of the railroad contemplated therein, by way of a mortgage or deed of trust of said land grant to raise funds, or refund the same, for the construction of such railroad, was a violation of any congressional intent or legislation in the premises, or other than a fulfillment of and compliance with the intent and legislation of Congress.

39.—The Court erred in holding that the application of the said East Side Grant to the construction of the railroad contemplated in said act of July 25, 1866, by way of a deed of trust or mortgage of said land grants to raise funds or to refund the same, for the construction of

such railroad, was in subjection and subordination to, and restricted by, the proviso in said act of April 10, 1869, relative to actual settlers.

40.—The Court erred in holding that any sale or sales of lands forming part of said East Side Grant, pursuant to the mortgage or mortgages, deed, or deeds of trust of said grant for the purpose of raising such construction funds, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness, so secured or refunded, constituted any departure from or violation of any purpose, or enactment of Congress in the premises, or were other than a fulfillment of and compliance with, the policy, intent and legislation of Congress.

41.—The Court erred in holding that the lands of said East Side Grant, or any part thereof, had been sold in breach or violation of any provision of the said act of July 25, 1866, or of said act of April 10, 1869.

42.—The Court erred in holding that the grantee of said East Side Grant, or its successors in interest, or this defend-

ant, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or said Union Trust Company, individually or as trustee, or any or either of them, had dealt, or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same or any part thereof, in breach of any act of Congress or otherwise than in fulfillment of and compliance with the policy, intent and legislation of Congress in the premises.

43.—The Court erred in holding that the application of the land grant under the said act of May 4, 1870, denominated by way of distinction, the West Side Grant, to the construction of the railroad therein contemplated, by way of a mortgage or deed of trust of said grant to raise funds, or to refund the same, for the construction of such railroad was in breach of any provision of said last mentioned act, or in violation of any congressional intent or legislation in the premises, or other than a fulfillment of and compliance with the intent and legislation of Congress.

44.—The Court erred in holding that the application of the said West Side

Grant to the construction of the railroad contemplated in said act of May 4, 1870, by way of a mortgage or deed of trust of said grant to raise funds, or refund the same, for the construction of such railroad, was in subjection and subordination to and restricted by anything in said last mentioned act as to actual settlers.

45.—The Court erred in holding that any sale or sales of lands forming part of said West Side Grant, under any mortgage or deed of trust of said grant, for the purpose of raising such construction funds, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness so secured or refunded, constituted any departure from or violation of any purpose or enactment of Congress in the premises, or were other than a fulfillment of and compliance with the policy, intent and legislation of Congress.

46.—The Court erred in holding that the lands of said West Side Grant, or any part thereof, had been sold in breach of any provision of the said act of May 4, 1870.

47.—The Court erred in holding that the grantee of said West Side Grant, or its successors in interest, or this defendant, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or said Union Trustee Company, individually or as trustee, or any or either of them, had dealt, or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same or any part thereof, in breach of said act of May 4, 1870, or otherwise than in fulfillment of and compliance with the policy intent and legislation of Congress, in the premises.

48.—The Court erred in not holding that the proviso in the Act of Congress of April 10, 1869, to-wit, 'That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents ($2.50) per acre,' is void for uncertainty.

49.—The Court erred in not holding that the said proviso is a purely directive. regulative covenant.

50.—The Court erred in not holding that the said proviso is unenforceable by the United States, because its interest is purely nominal.

51.—The Court erred in not holding that the said granted lands, East Side and West Side, both or either, are timbered in character and were and are not capable of actual settlement.

52.—The Court erred in holding that the provision in said act of July 25, 1866, as to the filing of assent had not been done away with by the act of Congress of June 25, 1868, mentioned in the bill of complaint and entitled, "An act to amend an act, entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon'."

53.—The Court erred in holding that the provision in said act of July 25, 1866, as to the filing of assent had not been waived by said act of June 25, 1868.

54.—The Court erred in holding that said provision as to the filing of assent had not been repealed by said act of June 25, 1868.

55.—The Court erred in holding that said provision as to the filing of assent had not been discharged and extinguished by said act of June 25, 1868.

56.—The Court erred in holding that said provision as to the filing of assent had not been discharged and extinguished by said act of June 25, 1868, in connection with the designation of the Oregon Central (East Side) Railroad Company, by the legislature of Oregon, on October 20, 1868.

57.—The Court erred in holding that said provision as to the filing of assent had not been discharged and extinguished by said act of June 25, 1868, in connection with the construction work, previous thereto, of the Oregon Central (East Side) Railroad Company, and with the subsequent designation of said last named company by the legislature of Oregon, on October 20, 1868.

58.—The Court erred in holding that said provision as to the filing of assent attached itself to any right, title or interest of the grantee of said East Side Grant, or its successors in interest, or this defendant, or said Southern Pacific

Company, or said Stephen T. Gage, individually or as trustee, or said Union Trust Company, individually or as trustee, or any or either of them, by or through any estoppel, consent, legislative obligation, covenant, condition or otherwise, because of the action of said East Side Company in filing written assent on June 30, 1869, or at any other time, or in taking any step or steps to bring the attention of Congress to the matter of such assent, or to procure any action by Congress in that behalf, if any such step or steps were taken, or in applying to Congress, if such application there was, for leave to file such assent, or otherwise, or at all.

59.—The Court erred in holding that said provision as to the filing of assent in respect to said East Side Grant, was a condition, either precedent or subsequent.

60.—The Court erred in holding that the proviso in respect to settlers in said act of April 10, 1869, was a question in the case requiring judicial determination.

61.—The Court erred in holding that any imposition by Congress under said

proviso of any qualification, restriction, limitation, or burden upon the estate granted under said act of July 25, 1866, was within the power of Congress to enact, or other than a nullity.

62.—The Court erred in holding that any imposition by Congress under said proviso, of any qualification, restriction, limitation or burden upon the estate granted under said act of July 25, 1866, was within the power of Congress to enact, or other than a nullity, regard being had to the rights of the California and Oregon Railroad Company, a California corporation, under said act of July 25, 1866, and to the vested interests, accruing under said act to said last named corporation in virtue of its acceptance of said act, and its conduct, construction and expenditures thereunder and pursuant thereto.

63.—The Court erred in not holding that the act of Congress of July 25, 1866, pleaded in the bill of complaint in this cause, was and is a single grant, of the lands described therein, to the California and Oregon Railroad Company organized under the laws of California and to such company organized under

the laws of Oregon as the legislature of the latter state should thereafter designate for the purpose of aiding the said companies in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon.

64.—The Court erred in not holding that the said grant under said act of Congress was entire and not severable, and upon the filing of assent to said act in the Department of the Interior by either of said companies within one year after the passage thereof and the completion of the first section of twenty miles of said railroad and telegraph line within two years after the passage thereof, the said act became operative and vested in the company complying therewith an interest in the entire grant.

65.—The Court erred in not holding that the California and Oregon Railroad Company filed its assent to said Act in the Department of the Interior within one year after the passage thereof and completed the first section of twenty miles of said railroad and telegraph line within two years after the passage thereof, and that thereupon said act became

operative and vested in said California and Oregon Railroad Company an interest in the entire grant.

66.—The Court erred in not holding that when the California and Oregon Railroad Company filed its assent to said Act of Congress of July 25, 1866, in the Department of the Interior within one year, and completed the first section of twenty miles of said railroad and telegraph line, within two years after the passage of the said act, Congress was without lawful authority to annex a new condition, by amendment or otherwise, to the land-grants.

67.—The Court erred in not holding that had the legislature of Oregon failed to designate a company to construct said railroad and telegraph line in Oregon, the California and Oregon Railroad Company, upon compliance with the provisions of said act of July 25, 1866, had the right and it was authorized by said act to construct the entire railroad and telegraph line from the Central Pacific in California to Portland in Oregon and thereby earn, and become entitled to, the entire land grant under said act.

68.—The Court erred in not holding that the said act of Congress of July 25, 1866, authorized the California and Oregon Railroad Company to construct any part or all of the said railroad and telegraph line provided the legislature of Oregon failed to designate a company as provided by said act, or such company failed to file its assent to said act.

69.—The Court erred in not holding that the said act of Congress of July 25, 1866, was, as to said California and Oregon Railroad Company, a grant in presenti, of the odd-sections of lands within the limits therein specified, along the line of said railroad from the Central Pacific Railroad in California to Portland in Oregon.

70.—The Court erred in not holding that at the time of the passage of the act of Congress of April 10, 1869, pleaded in the bill of complaint herein, the California and Oregon Railroad Company had fully complied with all of the terms of said act of July 25, 1866, as amended by the act of June 25, 1868, which were required to be performed up to the time of the passage of said act of April 10, 1869.

71.—The Court erred in not holding that prior to the passage of said act of April 10, 1869, pleaded in the bill of complaint herein, the California and Oregon Railroad Company had acquired a vested interest in the whole of the lands granted by said act of July 25, 1866, and the said act of April 10, 1869, annexing a condition to the entire grant was void.

72.—The Court erred in not holding that the said grant under the said act of Congress of July 25, 1866, being single and entire and said act of April 10, 1869, being void as to the California and Oregon Railroad Company, as to the whole of said grant, it is void as to the portion of said grant situated in the State of Oregon.

73.—The Court erred in not holding that the said act of Congress of April 10, 1869, was void in that it requires that the interest acquired by the California and Oregon Railroad Company in the lands granted by said act of July 25, 1866, shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and at a price not exceeding two dollars and fifty cents ($2.50) per acre, as a condition of an

extension of time to the company designated by the legislature of Oregon, to file its assent to said act of July 25, 1866.

74.—The Court erred in not holding that the said act of Congress of July 25, 1866, did not require that both of the companies mentioned therein should file assent to said act or construct said railroad and telegraph line, but said act was satisfied and became operative if either of the said companies filed its assent in the Department of the Interior within one year, after the passage of said act, and completed construction of its said railroad and telegraph line within the time provided in said act and the act of June 25, 1868, amendatory thereof.

75.—The Court erred in not holding that after performance by the said California and Oregon Railroad Company, of all conditions imposed by the act of July 25, 1866, and the same as amended by the act of June 25, 1868, required to be performed prior to April 10, 1869, it acquired and possessed a vested right in the whole of said land grant and Congress was thereby deprived of the power and was without authority to 'add, to, alter, amend or repeal' the said act of July 25,

1866, in any way that would tend to embarrass, delay or defeat the construction of either or any portion of said railroad and telegraph line, or in any way that would tend to interfere with any vested rights in said grant.

76.—The Court erred in holding that the said proviso in respect to settlers in said act of April 10, 1869, was a condition precedent.

77.—The Court erred in holding that the said proviso in said act of April 10, 1869, was a condition subsequent.

78.—The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of said proviso.

79.—The Court erred in holding that any provision in said act of May 4, 1870, touching sales to actual settlers, was a condition precedent.

80.—The Court erred in holding that any provision in said act of May 4, 1870, touching sales to actual settlers, was a condition subsequent.

81.—The Court erred in holding that the consequence and penalty of forfeiture

was attached by Congress to a breach, should such there be, of any provision in said act of May 4, 1870, touching sales to actual settlers.

82.—The Court erred in holding that there was any cause of action or foundation of jurisdiction in respect either to said East Side grant, or to said West Side grant, or any part thereof.

83.—The Court erred in holding that there was any cause of action or foundation of jurisdiction in respect to either of said grants, in any re-entry for breach of condition, or legislative equivalent thereof, or in any legislative declaration of forfeiture.

84.—The Court erred in holding that there was jurisdiction in the Court on the equity side of the cause or subject matter of this suit, and in not dismissing the bill of complaint.

85.—The Court erred in holding that there was jurisdiction in the court on the equity side to enforce a forfeiture of said East Side grant for the breach of an assumed condition subsequent, if such breach there was, in said proviso of said act of April 10, 1869.

86.—The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture for the breach of an assumed condition subsequent, if such breach there was, in any provision of said act of May 4, 1870.

87.—The Court erred in holding that the complainant was entitled to a decree quieting its title to either of said grants against this defendant, said Southern Pacific Company, said Stephen T. Gage, individually or as trustee, and said Union Trust Company, individually or as trustee, or any or either of them, or any party to the cause.

88.—The Court erred in holding that as foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant, Oregon and California Railroad Company, or its grantees, if such there were, did not have the legal title to such grants.

89.—The Court erred in holding that as foundation for a suit to quiet title to either of said grants, or any part

thereof, the complainant was in possession of the said grants, or either of them, or any part thereof; and in holding that the Oregon and California Railroad Company, or its grantees, if such there were, did not have possession of the same.

90.—The Court erred in holding, as foundation for a suit by complainant to quiet title to the said grants, or either of them, or any part thereof, that the same had not been reduced to possession and were unoccupied and vacant, and not in possession of said defendant, Oregon and California Railroad Company.

91.—The Court erred in holding that at the time of the filing of the bill of complaint herein and ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company, or its grantees, if such there were, did not have possession of the said grants, or either of them.

92.—The Court erred in not holding that at the time of the filing of the bill of complaint herein, and ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company had legal title and the

possession of all the lands of which forfeiture is sought by said bill of complaint against this defendant, and said Southern Pacific Company and Stephen T. Gage, individually and as trustee, and against said Union Trust Company, individually and as trustee.

93.—The Court erred in holding that the said proviso of said act of April 10, 1869, or any provision of said act of May 4, 1870, touching actual settlers in anywise or at all affected the title to the lands, or any part thereof, either of said East Side grant or of said West Side grant.

94.—The Court erred in holding, on the assumption of a condition subsequent, in respect to the said proviso, or on the assumption of any cause of forfeiture in respect to said East Side grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture had not been waived by Congress, and complainant.

95.—The Court erred in holding, on the assumption of a condition subsequent, in any provision of said act of May 4,

1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to the said West Side grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture had not been waived by Congress and complainant.

96.—The Court erred in holding, on the assumption of a condition subsequent, in respect to the said proviso, or on the assumption of any cause of forfeiture in respect to said East Side grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture, had not been acquiesced in by Congress and complainant.

97.—The Court erred in holding, on the assumption of a condition subsequent in any provision of said act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to said West Side grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture had not been acquiesced in by Congress and complainant.

98.—The Court erred in holding on the assumption of a condition subsequent, in

respect to the said proviso, or on the assumption of any cause of forfeiture in respect to the said East Side grant, that as to any breach of such assumed condition subsequent, or assumed cause of forfeiture, the complainant herein was not estopped to assert the same.

99.—The Court erred in holding, on the assumption of a condition subsequent, in any provision of said act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to said West Side grant, that as to any breach of such assumed condition subsequent, or any assumed cause of forfeiture, the complainant herein was not estopped to assert the same.

100.—The Court erred in not holding, on the assumption that the said proviso in the said act of April 10, 1869, or said provision in said act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by acquiescence in the many deeds of conveyance made by the defendant, Oregon and California Railroad Company, with the knowledge of Congress and complainant.

101.—The Court erred in not holding, on the assumption that the said proviso in the said act of April 10, 1869, or said provision in said act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by acceptance and use of the said railroad.

102.—The Court erred in not holding, on the assumption that the said proviso in the said act of April 10, 1869, or said provision in said act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by annual issuance of patents to said lands from 1871 down to 1906.

103.—The Court erred in not holding, on the assumption that the said proviso in the said act of April 10, 1869, or said provision in said act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by the passage by Congress of the Forfeiture Acts of January 31, 1885, and September 29, 1890.

104.—The Court erred in not holding that this suit as to all lands patented

prior to October, 1902, was and is barred by the Acts of Congress of March 3, 1891, and March 2, 1896.

105.—The Court erred in not holding that all causes of action presented by the bill of complaint herein are barred by laches and the Statutes of Limitations.

106.—The Court erred in holding that the primary and controlling purpose of Congress in the act of July 25, 1866, and acts amendatory thereof, was to provide for the sale of the granted land to actual settlers, or in that behalf, that said lands were capable of actual settlement.

107.—The Court erred in not holding that the primary object of the act of April 10, 1869, was to extend the time for the construction of the said railroad and not to impose a condition or trust upon the grant already made.

108.—The Court erred in not holding that the proviso for the sale of the lands granted to actual settlers, contained in the act of April 10, 1869, and the provision as to settlers in the act of May 4, 1870, are, and each of them is, void because the same is repugnant to the grant

and tends to defeat and destroy the primary purpose and intent of Congress in making the said grants in aid of the construction of the said railroads and telegraph lines.

109.—The Court erred in not holding that the said proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, for the sale of said lands to actual settlers, was intended only to apply to such actual settlers as were, at the dates of the acts of July 25, 1866, and May 4, 1870, in actual possession of said portions of said granted lands or who might become actual settlers before the filing of the map of survey.

110.—The Court erred in not holding, on the assumption that the said provisions in the said acts of April 10, 1869, and May 4, 1870, for the sale of said granted lands to actual settlers, were conditions subsequent, that Congress and complainant waived any breach of said provisions or right to forfeiture by:

(a) Permitting the said grants to be administered by the grantees and their successors for a period of over thirty-eight years prior to the passage of the

joint resolution of April 3, 1908, and prior to the commencement of this suit on the 4th day of September, 1908, with the knowledge of Congress and complainant; and

(b) The passage of the act of June 25, 1868; and

(c) The passage of the forfeiture act of January 31, 1885; and

(d) The repeated refusal of Congress to pass any other forfeiture act than the general statute on that subject; and the forfeiture act of September 29, 1890; and

(e) The continuous and regular issuance by complainant of patents to said granted lands.

111.—The Court erred in not holding, on the assumption that the act of July 25, 1866, constituted and was a single grant, and so as to the West Side grant, both or either, that a waiver on the part of Congress and the complainant of any breach of the proviso or clause as to sales to settlers in said grants, or either of them, and of forfeiture on account there-

of, as to a portion of the same, with knowledge on the part of Congress and the complainant, was a waiver as to the entire grants, both or either.

112.—The Court erred in not holding, on the assumption that the proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, as to sales of said granted lands to actual settlers, are conditions subsequent, that each of said conditions subsequent is void for the following reasons.

(a) It is retroactive and its effect would be to divest the title of defendant, Oregon and California Railroad Company; and

(b) It is in restraint of and prohibits alienation except as to a particular class of persons; and

(c) The restraint on alienation is inconsistent with the purpose of the grant and the estate granted; and

(d) The said condition does not fix a definite time within which any of the lands shall be sold to actual settlers; and

(e) The said condition does not define who is an actual settler; and

(f) The sale of said lands is wholly dependent upon there being actual settlers thereon, an uncertain event, and the restraint contained in said provision amounts to a perpetuity; and

(g) Because said conditions do not contain any clause of re-entry or forfeiture for a violation thereof.

113.—The Court erred in not holding that the complainant by its conduct in relation to the lands granted by said acts of Congress has waived, and is estopped from claiming, a forfeiture thereof.

114.—The Court erred in not holding that the grantees under said acts of Congress or their successors, associates or assigns, had the right to mortgage the whole, or any part, of said land grant to obtain money wherewith to construct the said railroad and telegraph line.

115.—The Court erred in not holding that under the terms and provisions of said act of Congress of April 10, 1869, and of May 4, 1870, the grantee or grantees mentioned in said land grants cannot and could not perform the said provisions as to the sale of the lands

granted to actual settlers, and by reason thereof, performance of said provisions was excused and the said granted lands vested in said grantees absolutely and discharged of said conditions.

116.—The Court erred in not holding that the proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, as to the sale of the lands granted by said acts to actual settlers was and is unilateral and void in that actual settlers are not bound to purchase and the grantees under said grants could not compel settlers to purchase any portion or portions thereof.

117.—The Court erred in not holding that the grantee or grantees under said land grants in any event were required to sell to actual settlers only during the construction of the said railroad.

118.—The Court erred in not holding that during the period of construction of said railroad there were no actual settlers on any portion of said land grants and for that reason a sale thereof could not be made to actual settlers in any quantity, and by reason thereof the said grantee or grantees under said land

grants took the same, discharged of any provision for the sale thereof to actual settlers.

119.—The Court erred in not holding that during the construction of said railroad it was impossible for the said grantee or grantees under said land grants to sell any portion of said grants to actual settlers, and that by reason thereof such sale was excused and the title to said granted land in Oregon and the whole thereof vested in the said defendant, Oregon and California Railroad Company.

120.—The Court erred in not holding that the proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, if and when operative, was directive to the Oregon and California Railroad Company to sell to actual settlers only, land in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents ($2.50) per acre, and did not prohibit the sale of said granted lands to persons other than actual settlers in any quantity and at any price.

121.—The Court erred in not holding that the purpose of the said proviso in the act of April 10, 1869, and the provision in the act of May 4, 1870, for the sale of said granted lands to actual settlers in quantities not exceeding one quarter section to each purchaser and at a price not exceeding two dollars and fifty cents ($2.50) per acre, was to give to actual settlers an option to purchase lands in said grants on said terms and not intended to prohibit the said Oregon and California Railroad Company from selling the lands in said grants to others than actual settlers in any quantity and at any price.

122.—The Court erred in not holding that Congress, in passing the act of April 10, 1869, and the act of May 4, 1870, contemplated two classes of persons to whom said granted lands would be sold in aid of the construction of said railroad, namely, actual settlers in possession of some portion of said grant, and persons who are not actual settlers and who are not in possession of any portion of said grant.

123.—The Court erred in not holding that the said proviso in the act of April

10, 1869, and the provision in the act of May 4, 1870, are, and each of them is, in restraint of alienation and void in that:

(a) It limits the time during which the property can be held by the grantee.

(b) It provides for the alienation to a limited class of persons.

(c) It limits the amount of land which may be sold to any one person.

(d) It limits the price at which it can be sold.

124.—The Court erred in holding that the said land grants did not become operative until the Railroad Company filed its assent to the terms and conditions of Section Six of the act of July 25, 1866, as amended April 10, 1869.

125.—The Court erred in holding that issuance of patents to said lands by the land department was not a waiver on the part of the complainant of the right to insist upon the performance by the Railroad Company of the provisions in said grants as to the sale of lands to actual settlers.

126.—The Court erred in holding that the act of Congress of April 10, 1869, was a renewal or revival of the grant under the act of Congress of July 25, 1866, or that the said act of April 10, 1869, was other than a waiver of the right of forfeiture on account of any of the conditions in said grant.

127.—The Court erred in holding that at the time of the passage of the said act of Congress of April 10, 1869, the said land grant under the act of Congress of July 25, 1866, had lapsed.

128.—The Court erred in not holding that this suit cannot be maintained as one to enforce forfeiture nor to quiet title, because—

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture has not been adjudicated by a court of law; and

(c) The defendant, Railroad Company, holds the legal title to and the possession of said granted lands.

129.—The Court erred in not holding that the said defendant, Oregon and California Railroad Company, was entitled

to a trial by jury of the issue as to whether or not any of the conditions of said grants, or either of them, had been breached.

130.—The Court erred in not holding that the complainant and Congress had knowledge of all the alleged breaches of the provisions in each of said land grants for the sale of the granted lands to actual settlers; and that the complainant and Congress acquiesced in said breaches, with the knowledge thereof and complainant is estopped to claim a forfeiture of said land grant, or any part thereof.

131.—The Court erred in not holding that during the year 1879, down to and including the year 1903, reports were regularly and semi-annually made of the transactions of the land department of said defendant, Oregon and California Railroad Company, to the Auditor of Railroad Accounts created by the act of Congress of June 19, 1878, showing the total cash receipts from all sales of the said granted lands to the date of said report; the average price per acre for all sales to the date of said report, and the average price per acre for all sales during the half year; the average price

per acre for all purchases to the date of said report; the maximum price per acre from sales (not town lots); the minimum price per acre from sales (not town lots); the maximum price per acre asked at the time of making such report; the minimum price per acre asked at the time of making such report; and that the Auditor of Railroad Accounts, pursuant to the provisions of the said act of Congress of June 19, 1878, made like annual reports during the whole of said period to the Secretary of the Interior, and that annually during the whole of said period the Secretary of the Interior transmitted the said reports to Congress, and that said reports showed that during the year 1879, down to and including the year 1903, the said defendant, Oregon and California Railroad Company, sold some of said granted lands at a price in excess of two dollars and fifty cents ($2.50) per acre; also in quantities exceeding one hundred and sixty (160) acres; and that Congress and complainant, with the knowledge of the said matters and things contained in said reports, acquiesced therein and permitted the said defendant railroad company to take action accordingly and to alter its position

and to continue to so administer said grant, and that complainant was, and is, therefore, estopped from claiming a breach of any of the conditions, if such there be, in said grant, or a forfeiture on account thereof, and has waived said alleged breaches and acquiesced therein.

132.—The Court erred in not holding that the complainant was estopped by the acts of the Secretary of the Interior in approving, as bases of lieu land selections, deeds conveying property sold in alleged violation of the said provisions in said grants as to the sale of said granted lands to actual settlers only.

133.—The Court erred in holding that the 'East Side Company,' so-called, by accepting the grant under the Act of Congress of July 25, 1866, as amended by the act of April 10, 1869, was estopped from denying the right or power of Congress to pass an Act imposing any conditions repugnant to the original grant.

134.—The Court erred in not holding that the Act of Congress of July 25, 1866, granting the lands therein described to aid in the construction of a railroad and telegraph line, without any direction

as to the manner of sale or disposition thereof, to aid in such construction, said railroad company had the right to sell or mortgage the whole of said granted lands for such purpose.

135.—The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

136.—The Court erred in not holding that the evidence in this cause is insufficient to support or sustain the decree rendered herein.

137.—The Court erred in not holding that the evidence in the above entitled cause was wholly insufficient to sustain and support the decree rendered in said cause, in that there is no evidence in the record showing any breach or violation of the proviso in the act of Congress of April 10, 1869, or of any of the provisions of the act of Congress of May 4, 1870, as to the sale of said granted lands to actual settlers only, in quantities not exceeding one hundred and sixty (160) acres to one purchaser and at a price not exceeding two dollars and fifty cents ($2.50) per acre.

138.—The Court erred in not holding that the evidence in said cause was insufficient to support the decree rendered herein or any decree in favor of complainant in that there is no evidence in this cause showing any breach or violation of the proviso in the act of Congress of April 10, 1869, or of any of the provisions of the act of Congress of May 4, 1870, as to the sale of the said granted lands to actual settlers.

139.—The Court erred in not holding that the evidence in this cause was wholly insufficient to sustain the decree rendered herein or any decree in favor of complainant, in that there was no evidence on which to base a decree of forfeiture of the lands or estates in lands described in the bill of complaint herein, for any alleged breach of any condition in either of said acts of Congress.

140.—The Court erred in rendering the judgment and decree herein against the said defendant, Oregon and California Railroad Company, forfeiting the lands and estates in lands described in the said decree, or any of said lands, in that there is no evidence whatever in the record in this cause showing that the said

defendant violated or breached any condition in either of the said acts of Congress of July 25, 1866, June 25, 1868, or April 10, 1869, or May 4, 1870.

141.—The Court erred in holding that the patents issued in respect to the said land grants, or either of them, or any part thereof, were not conclusive against complainant as to any breach of assumed condition subsequent, or any forfeiture resulting therefrom, or from any cause whatever.

142.—The Court erred in holding that the title to so much of either of said grants as had been patented was not concluded against complainant herein by the acts of Congress of March 3, 1891, and March 2, 1896.

143.—The Court erred in holding that the title to so much of either of said grants as had been patented prior to October, 1902, was not concluded against complainant herein, and that the alleged cause of action had not been barred and the title to such patented lands made absolute.

144.—The Court erred in holding that the grant of lands under the act of July 25, 1866, had lapsed at the time of the

passage of the act of Congress of April 10, 1869; and at the same time holding that the proviso in said act of April 10, 1869, for the sale of said granted lands to actual settlers, is a condition subsequent, and in not holding in such behalf that a condition subsequent must attach to a title or grant previously existing, or to a title or grant created at the same time the condition subsequent is imposed.

145.—The Court erred in not holding that a condition subsequent which may defeat a grant, if breached, must be imposed in the same act creating the grant, or if imposed in a subsequent act, then the act creating the grant must reserve the right to impose or annex such condition.

146.—The Court erred in not holding that the act of Congress of April 10, 1869, was not a new grant or a revival of the old grant, but a waiver of a right to forfeiture of the grant already made under the act of July 25, 1866.

147.—The Court erred in not holding, assuming the said 'actual settler clause' in each of said acts of Congress to be a condition subsequent, and certain, and definite, so as to be enforceable that it was repugnant to the grant and is void.

148.—The Court erred in not holding that if actual settlers did not apply to purchase the granted land and if they were not sold by or before the time following completion and acceptance of the road, then, and thereafter the said 'actual settler' clause in each of said acts became inoperative and whether the words of the 'actual settler' clause created a covenant or condition, the railroad company took an estate in the unsold lands absolute and unconditional.

149.—The Court erred in not holding that it is the duty of the land department of the United States to administer the land laws thereof and to determine in the first instance who are 'actual settlers'; and that the proviso in the act of April 10, 1869, and the provisions in the act of May 4, 1870, in that regard, are and each of them is void, and that it was beyond the power of Congress to impose upon the railroad company a function belonging exclusively to the land department of the United States.

150.—The Court erred in not holding that the said provisions in the act of April 10, 1869, and the provisions in the act of May 4, 1870, as to the sale of such

lands to actual settlers are and each of them is void, in that no method or procedure is provided in either of said acts whereby it can be determined who are actual settlers within the meaning of either of said provisions; and the question as to who are actual settlers upon such granted lands is a question committed by the laws of the United States to the land department thereof."

CONCLUSION.

These appellants now submit, upon the case as made on the facts, that error is well assigned to the action of the District Court, requiring a reversal of the decree. The points and authorities of these appellants are stated and set forth in the brief of the law filed herewith on behalf of these appellants.

Respectfully submitted,

WM. F. HERRIN,
P. F. DUNNE,
WM. D. FENTON,

Solicitors and Attorneys for Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee,

Defendants and Appellants.

F. C. CLEARY,
Of Counsel.

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No. 679.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, a corporation, et al.,
Defendants and Appellants,

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief on Behalf of Appellants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage.

JOSEPH H. CALL,
Of Counsel for said Appellants.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 679.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, a corporation, et al.,
Defendants and Appellants,

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants,

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STATEMENT.

The purpose of this brief is to press upon the attention of the Court three particular points, in addition to what may have been suggested in the opening brief for the appellants. The facts are stated in appellant's opening brief and will not be herein repeated.

FIRST

The "Sinking Fund Act" of Congress of May 7th, 1878, *Ratified the Transfer of the California and Oregon Railroad and its Land Grants in California to the Central Pacific Railroad Company, and Operated to Abrogate the "Settler's Clause" Contained in the Acts of April* 10, 1869 *and May* 4, 1870.

On August 20, 1870, the Central Pacific Railroad Company and the California and Oregon Railroad Company and other railroad companies consolidated, and they were all merged into one company to be thereafter known as the Central Pacific Railroad Company, and by the same instrument the land grant of the California and Oregon Railroad was transferred to the Central Pacific. (Record Vol. 4, 1652-1662.)

On June 22, 1870, a similar consolidation was made between the Central Pacific Railroad

Company and the Western Pacific Railroad Company, merging two companies into a new company known as the Central Pacific Railroad Company. (Record Vol. 4, pages 1640-1651.)

The declaration and enactment of Congress in the act of May 7, 1878, that,

"Said Western Pacific Railroad Company has since become merged in and consolidated with said Central Pacific Railroad Company, under the name of the Central Pacific Railroad Company, whereby said Central Pacific Railroad Company has become liable to all of the burdens, duties and obligations before resting upon said Western Pacific Railroad Company; *and divers other railroad companies have been merged in and consolidated with said Central Pacific Railroad Company.*"

had reference to the articles of consolidation dated August 20, 1870, between the Central Pacific Railroad Company, the California and Oregon Railroad Company, and divers other railroads. These articles of consolidation were of record in the various public offices in the State of California, and the fact of consolidation had been duly reported to Congress in the annual reports of the Central Pacific Railroad Company, and this was the only consolidation made by the Central Pacific Railroad Company with divers railroad companies other than that

of the Western Pacific, referred to in that act of Congress. These articles of consolidation between the Central Pacific and California and Oregon Railroads are found in the record, Vol. 4, pages 1652 to 1662, and declared as follows:

"ARTICLE FIRST

Said parties do hereby amalgamate and consolidate themselves a new corporation under the name and style of the 'Central Pacific Railroad Company' which new corporation shall continue in existence for the period of fifty years from the date of these articles; and they do further *consolidate and amalgamate their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights, titles, privileges, claims and demands* of every kind whatsoever, as well in possession as expectancy, at law or in equity, *and do grant, convey and vest the same in said new corporation* as fully as the same are now severally held and enjoyed by them or either of them subject however to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims and charges thereon, or in any wise affecting the same." * * *

"ARTICLE SIXTH

Said new corporation shall assume and perform all the contracts, agreements, covenants,

duties and obligations of what kind soever of each of the said parties, and shall pay and discharge all debts, claims, and demands, existing against either and all of said parties;"

* * *

On May 7th, 1878, (20th Stat. 56) Congress passed the "Sinking Fund" act, in and by which the various consolidations of railroads with the Central Pacific Railroad Company were acknowledged and declared to have been made, and the new company was accepted with all its increased assets and credits as the chief debtor of the Government, and the act went on to provide that certain moneys received by the Central Pacific Railroad should be set apart into a sinking fund to secure the debts due to the United States. In those consolidations the Central Pacific Railroad Company not only received all of the railroads, franchises and land grants, but assumed and obligated itself to pay all of the debts of the constituent corporations, including the debts of the Western Pacific Railroad and of the California and Oregon Railroad. The following extracts are made from the act of May 7th, 1878.

"Whereas said Western Pacific Railroad Company has since become merged in, and consolidated with, said Central Pacific Railroad Company, under the name of the Central Pa-

cific Railroad Company, whereby said Central Pacific Railroad Company has become liable to all the burdens, duties, and obligations before resting upon said Western Pacific Railroad Company; *and divers other railroad companies have been merged in and consolidated with said Central Pacific Railroad Company.* * * *

Whereas the total liabilities (exclusive of interest to accrue) to all creditors, including the United States, of the said Central Pacific Company, amount in the aggregate to more than $96,000,000, and those of the said Union Pacific Railroad Company to more than $88,000,000; * * *

Sect. 2. That the whole amount of compensation which may from time to time, be due to said several railroad companies respectively, for services rendered for the government, shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking-fund hereinafter provided, for the uses therein mentioned." (20 Stats.56)

In sinking fund cases 99 U. S. 700, 730, the Court mentions the fact that the Western Pa-

cific Railroad and the Central Pacific Railroad had become lawfully consolidated.

It is stipulated that the Central Pacific Railroad Company took over the Oregon and California Railroad, and its congressional grant and constructed the railroad so far as not completed in 1870, and that the Central Pacific made its annual reports to the Government, and that the Government examined the sections of the railroad built by the Central Pacific between Chico and the south boundary of Oregon.

One of the stipulations in the present case is as follows:

"It was stipulated that the Central Pacific Railroad Company completed the construction and equipment of the California and Oregon Railroad from Chico to the south boundary line of Oregon in several sections, all on or before June 20, 1888; that the said entire constructed railroad was examined by commissioners appointed for the purpose and favorably reported on by them; that such report was submitted by the Secretary of the Interior with his favorable recommendations to the President, and such recommendations approved by the President, all on or before November 8, 1889. (Vol. V, pages 2530-1, Record)"

See certificate U. S. Circuit court of appeals, page 171.

It is also stipulated as follows: (Certificate of U. S. Circuit court of appeals, pages 66-67)

From (August 22, 1870) date of filing of the last mentioned articles of amalgamation and consolidation until July 29, 1899, the said Central Pacific Railroad Company remained the owner of all lands of the three several land grants just mentioned, (July 1, 1862; July 2, 1864; July 25, 1866) which were unsold at the date of filing these articles and were not thereafter from time to time prior to July 29, 1899, sold by the said Central Pacific Railroad Company". (R. Vol 4, Page 1568)

That the entire land grant of the California and Oregon Railroad was sold and transferred for a valuable consideration, and in good faith, to the Central Pacific Railroad in 1870, and that by the act of May 7, 1878, Congress declared that the Central Pacific Railroad had consolidated with divers railroads, and that the Central Pacific went on and completed the railroad, and that the Government and all of its departments recognized the fact that such transfer and consolidation, are not open to dispute in this case.

The act of Congress, approved April 10, 1869, (16 Stat. 47) to amend the act of July 25,

1866, to aid in the construction of the railroad from the Central Pacific Railroad in California to Portland in Oregon, contained the so-called "settler's clause," declaring that the lands should be sold to actual settlers only in quantities not greater than one quarter section to one purchaser and for a price not exceeding $2.50 per acre.

When the entire grant of the California and Oregon Railroad was transferred to the Central Pacific Railroad in 1870, it became impossible for the California and Oregon Railroad to sell the lands for $2.50 per acre or for any other price, or to sell it to settlers or in quantities of not more than 160 acres, for the reason that the company had parted with its title to the entire grant and this was recognized, approved and validated by the United States.

If the learned and intelligent counsel for the Government had first brought an action or bill to declare forfeited to the United States the lands in *California* for breach of the alleged conditions subsequent, contained in the settler's clause, they would at once have been met with the insurmountable obstacle that the entire grant had been transferred in 1870 and that the Government had recognized and validated such transfer.

But is the situation altered in any way by bringing suit first for lands in Oregon when we have this solemn declaration of Congress approved by the various departments of the Government that the so-called "settler's clause" was not intended to stand in the way of a transfer of the land grant and passing of a good title, both as to the lands in Oregon as well as those in California.

The settler's clause, referred to, contained in the act of 1869, applied to the lands in California as well as to the lands in Oregon.

We submit that this legislation of Congress and concurrent action of all of the departments of the Government for the last thirty-five years is a declaration of the most solemn character that the settler's clause was not intended to be, and is not, a condition subsequent, and that it has been entirely abrogated by said legislation and acts of the Government, in and by which the Government has had the benefit of the roads as actually built by the companies to whom the land grants had been transferred.

That act of July 25, 1866, was a single act granting lands both in California and in Oregon and all of the amendments to that act treated the act as an entirety. It would be most unreasonable to suppose that Congress

when it had abrogated the settlers clause as to lands in California intended to leave the act operative as to the settlers clause as to lands in Oregon.

We submit that by wiping out the settlers clause as to lands in California through the legislation of 1878, ratifying the consolidation mentioned, necessarily showed the intention of Congress to also modify or abrogate that clause as to the lands in Oregon.

Congress intended that the railroad from the Central Pacific to Portland, Oregon, should be a continous and uninterrupted line, constructed and operated in the same manner, and to secure that end provided by section 6 of the act of July 25, 1866, as follows:

"That the said companies shall file their assent to this act in the department of the interior within one year * * * and the said railroad shall be of the same gauge as the Central Pacific Railroad of California, and be connected therewith."

And by section 7, Congress provided:

"That said companies named in this act are hereby required to operate and use the portions or parts of said railroad and telegraph mentioned in section 1, of this act for all pur-

poses of transportation, travel and communication so far as the Government and public are concerned as one connected and continuous line." * * *

The national purpose as evidenced by these acts of Congress was to construct a railroad from the Missouri river to the Pacific Ocean, with a branch line connecting in California, thence to Portland, Oregon.

Manifestly, Congress did not intend by the act of July 25, 1866, to provide that the lands along the route should be used in aid of construction for a part only of the railroad and not for the remainder of the line.

A somewhat similar question was involved in the case of the United States vs Stanford, 161 U. S. 412-431, in which it was contended that there was a stockholder's liability against the stockholders of the Central Pacific Railroad, a California corporation, which did not exist as to the stockholders of the Union Pacific Railroad, but the Court declared that it was not the intention of Congress to create a stockholder's liability for a part of the road and not for the other part, and referring to the acts of Congress the Court said:

"its enactments disclose an intention to grant national aid to the corporations named

upon terms and conditions applicable alike to all of them, we cannot impute to it the purpose to make a discrimination against one part of that line that would necessarily have retarded the accomplishment of the important public object which it had in view. * * * But the imposition of liability upon the stockholders of the California corporation for the debt of that corporation arising out of the bonds it received from the United States when no such liability was imposed upon the stockholders of the Union Pacific Railroad corporation on account of like bonds received by it, would be inconsistent with that equality in terms and conditions which Congress prescribed for the corporations that were invited or permitted to participate in the grants, rights, benefits, privileges and immunities granted by the general Government to the corporation created by it."

To hold that Congress intended to release the lands in California from the settler's clause by ratifying the consolidation of land grants and franchises between the California and Oregon railroad and the Central Pacific so that those lands in California could be freely sold or mortgaged to secure the construction of the railroad in California and to hold that such lands are restricted as to sales in Oregon for the remainder of the line so that they could not be mortgaged as a whole or freely sold would

show an intention to abandon the construction of the railroad in Oregon and probably would have resulted only in building that part of the line in California.

There was ample consideration for this transfer to the Central Pacific because that company assumed to pay all of the debts and obligations of the California and Oregon Railroad, amounting to many millions of dollars in bonds, which had been issued to construct the railroad.

That such a transfer based upon valuable consideration is a transfer to a *bona fide* purchaser is thoroughly established by the decisions of this court.

In the United States v Des Moines Navigation Company, 142 U. S. 543-546, the question before the court was whether the defendant company was a *bona fide* purchaser of the Des Moines river land grant.

It appears that the transfer of title to the Des Moines River lands was made through the State of Iowa to the Des Moines Navigation Company in consideration of improvements to be made by the company, and it was contended that the company had spent as much as $330,000 on such improvements.

Now the Des Moines river grant contained a provision that those lands should not be sold for less than the minimum price of other public lands ($1.25 per acre) and contained other provisions as to how the lands should be disposed of and how the proceeds of sale should be applied, and it was vigorously contended that these so-called conditions were not affected by the transfer to the Des Moines Navigation Company, but in that case the court said: (142 U. S., 543, 545, 546.)

"But it is earnestly contended that the navigation company was not a *bona fide* purchaser that while it claimed to have expended $330,000 on the improvement, in truth it had not expended half that amount; that by means of its false representations, and by threats of bringing suit against the State and obtaining damages against it, it induced the legislature to pass the resolution of 1858, offering terms of settlement that the work of improving the river was unfinished, not more than one-tenth of the work necessary therefor having been done; and that the State has wholly abandoned the undertaking.

With respect to the last two allegations it is not perceived how, if true, they can affect the title of the navigation company to lands deeded by the State to it in payment of work done.

Surely the title to lands which the State conveyed at the inception of the undertaking, either for cash or for work done thereon, cannot fail because the State failed to complete the improvement. No land could have been sold if the purchaser's title had depended upon such a condition. * * *

The work done by the navigation company was open to inspection. It was done along the line of the principal river in the State. It was in fact made a matter of examination and report; and, while the amount expended by the navigation company might not have been known to the exact dollar, yet, in a general way, the cost of what had been done could easily have been ascertained, and must have been known. But if no lack of good faith can be imputed to the State, the party making the offer of settlement, does it not follow necessarily that none can be imputed to the navigation company, the party accepting the offer; for how can fraud be imputed to one who simply accepts terms of settlement voluntarily offered by another? And if this settlement was made in good faith and without fraud, is it not clear that the navigation company, taking the lands which the State offered in payment for the work which it had done, took those lands as a *bona fide* purchaser, and, therefore, comes within the letter and spirit of the resolution of

1861? And here the significance of this resolution is evident. It was passed by Congress after the settlement, proposed by the Iowa legislature in 1858, had been accepted by the navigation company, and deeds had passed in accordance therewith. Its passage imports full knowledge of antecedent facts upon which it is based. * * * and, if we broaden the inquiry to all the facts disclosed by the testimony, it is clear beyond doubt that the navigation company was a *bona fide* purchaser within the meaning of the resolution of 1861, and intended as a beneficiary thereunder."

So, also, in the present case, fraud and wrong doing cannot be imputed to Congress. When Congress recognized the consolidation of the various railroads with the Central Pacific in 1878 its good faith in that regard cannot be questioned.

Neither is it pretended that there was any bad faith on the part of the Central Pacific Railroad Company in acquiring the title to these lands, and it is not claimed that the consideration agreed to be paid was not fully paid. The debts and obligations appear to have been fully met, and most of the road was actually constructed by that company, and has been used by the Government for more than

a quarter of a century to transport the mails and troops, and for other purposes.

SECOND

This Cause of Action is Barred and the Title to the Lands Sought to be Forfeited has been Transferred to the Defendants by Virtue of Section 1047, United States Revised Statutes.

The bill of complaint in this case declares that it is brought to enforce an alleged forfeiture of some three millions of acres of lands on account of a breach of a condition subsequent, contained in the grant made by the United States to the defendant railroad or its predecessors in interest. The bill among other things prays that,

"Said lands * * * have been and are forfeited to and the title of all of said lands and estates in lands has been and is reverted to and re-invested in * * * your orator, the United States of America." Record pp. 77-78.

The decree of the trial court declares as follows:

"That all of those certain lands and estates in lands hereinafter described have become and now are forfeited to, and the title to all of said lands and estates in lands has reverted to, and

now is re-invested in, the United States of America. * * * " Record 1296.

The opinion of the district judge attempts to justify the decree entered in his court forfeiting these lands upon the theory that this is a judicial proceeding, brought by the United States to declare a forfeiture of lands for breach of condition subsequent, and maintains the position that such a decree may be obtained in a court of equity with like effect as a proceeding at common law by way of inquest.

It is admitted on all hands that Congress has never undertaken to pass an act to declare a forfeiture of these lands for breach of any condition subsequent, and that there has been no judicial inquiry to foreit the lands other than by this proceeding in equity.

Concerning the right of forfeiture for breach of the condition this court said in Atlantic and Pacific Railroad vs. Mingus, 165 U. S. 413-431;

"But where the grant is a public one, this court has held in a series of cases that the remedy of the Government is by an inquest of office or office found, a judicial proceeding but little used in this country or by a legislative act directing the possession and appropriation of the land," and the court reviewed many authorities sustaining this proposition.

Whether the forfeiture might be declared by a suit in ejectment, in a suit in equity to quiet title, or directly by act of Congress, it still is a proceeding or suit judicial or quasi-judicial in its nature to determine the right and title of the plaintiff. In Atlantic and Pacific Railroad vs Mingus, 165 U. S. 434, Supra, the Court said:

"But while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised, or that the grantee may not set up in defense any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the Government nor with the constitutional rights of the grantee, to hold that the Government by an arbitrary act might divest the latter of his title when there had been no breach of the conditions subsequent, or when the Government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture."

The limitation provided by Congress for suits and prosecutions to recover penalties or

forfeitures is contained in section 1047, Revised Stats., as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."

This statute not only bars *prosecutions* which are of a criminal nature, but also bars all *suits* within the purview of the act, and the definition of the word "suit," which has frequently been used in the constitution, has been so often defined as being either an action at law or a proceeding in equity or any other judicial proceeding that it is deemed needless to cite authority to that effect.

What Congress then prohibited was any *suit*, either legal or equitable, or otherwise, having for its object and purpose the recovery of a penalty *or of a forfeiture*. It may be assumed that a penalty is recovery by way of punishment for some infraction of the law, but a forfeiture is not the same as a penalty. Forfeitures are generally of a civil nature, and arise out of some breach of a contract, or some violation of a statute.

The Government in this case through its learned counsel, is not able to sustain this jurisdiction of the lower court in this case, or sustain the decree which has been entered without arguing and contending that the object of this suit was to secure a forfeiture of this land grant against the railroad company.

The provisions of section 1047 R. S., have been on the statute books for more than fifty years, and there have been very few references to it in either this court or in the courts below, and it is believed that the reason why there has been so little judicial construction of this section is because of its plain and unambiguous nature. A statute which prohibits the maintenance of any suit or prosecution for any penalty or any forfeiture after five years from the date when such forfeiture or penalty accrued is too plain to require learned discussion as to its interpretation.

Judge Shiras said about this statute, in Wells vs. Graves, 41 Fed. 459-67, concerning the forfeiture of bank franchises for violation of certain legal requirements:

"The doing the prohibited act is cause for a forfeiture which accrues under the provisions of the laws of the United States, and is there-

fore subject to the limitation of five years, enacted by section 1047."

The provisions of 1047 embrace forfeiture of a pecuniary nature, and "otherwise." The act on its face shows that suits for forfeiture may be in the nature of suits *in personam,* or *in rem.*

So far as the act prohibits maintenance of suits *in rem* or for the forfeiture of particular property, the act not only bars the remedy but bars the right, and operates to transfer the title to the property as effectually as any other statute of limitations concerning property.

In *Leffingwell* vs *Warren,* 2 Black, 599-605, the Court said:

"The lapse of the time limited by such statutes not only bars the remedy but it extinguishes the right and vests a perfect title in the adverse holder."

to the same effect see:

Croxall vs *Shererd,* 5 Wall. 289.
Dickerson vs *Colgrove,* 100 U. S. 578-583.
Bicknell vs *Comstock,* 113 U. S. 149-152.
Campbell vs *Holt,* 115 U. S., 620-625.
Winona R. R. vs *U. S.,* 165 U. S. 483.
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U. S. vs *Chandler, etc., Co.,* 209 U. S. 447.
Burk vs *So. Pac. R. R.,* 234 U. S. 669-693.
Davis vs *Mills,* 194 U. S. 457.

In *Campbell* vs *Holt,* 115 U. S. 620-625, this court pointed out the distinction between statutes of limitation as a defense in suits *in personam,* and those statutes relating to real or personal property, as vesting a title, and the court said:

"The distinction between the effect of statutes of limitation in vesting rights to real and personal property and its operation as a defense to contracts is well stated in *Jones* vs *Jones,* 18 Ala. 248. See also Langdell's Equity Pleading, sections 118 et seq."

The original grantee of the United States under the act of 1866 was the Oregon Central Railroad Company, (East Side Company) to which company a grant was made to aid in building the railroad from the Central Pacific Railroad in California to Portland, Oregon. The Oregon Central Railroad was designated by the legislature of Oregon to receive the land grant named in the act of Congress, July 25, 1866. On March 28th, 1870, the Oregon Central Railroad Company duly executed a deed to the Oregon and California Railroad Company for all of the railroads, property, lands, land grants and franchises belonging to the Oregon Central Railroad in Oregon, and in consideration of such deed the Oregon and California Railroad assumed to pay all of the

debts and obligations of the Oregon Central Railroad, which included the obligation to complete the construction of the road. (Record Vol. 1, pp. 93-125.)

The railroad was built as contemplated by the act of Congress, and the Oregon and California Railroad by virtue of this deed received patents from the United States from time to time, and it received patents for about three millions of acres of land in Oregon.

If the so-called "settler's clause," requiring that none of these lands should be sold by the grantee railroad, except in quantities of 160 acres to actual settlers, and for not over $2.50 per acre, was in force, and if it was a condition subsequent for which a forfeiture could be enforced by the United States, that right accrued as to all the lands embraced in the grant for the railroad from the Central Pacific to Portland, Oregon, *on the 28th day of March,* 1870, and the right to maintain any kind of suit for a forfeiture became barred on March 28th, 1875, or thirty-nine years ago. There was nothing to prevent the Government from beginning a suit in 1870 of the same character as that which has just been brought.

We maintain that section 1047 is not only a limitation, but a statute of repose and not only

bars the remedy but extinguishes the right and goes to the very question of title.

On October 6, 1880, the so-called West Side Company or first organized Oregon Central Railroad Company, holding the franchises and land grant of May 4, 1870, for the railroad from Portland to Astoria and McMinnville, in Oregon, executed a deed of all of the lands and rights to lands, railroads and franchises, which it owned in the State of Oregon and which operated to convey to the Oregon and California Railroad Company all of said lands, railroads, franchises, land grants and rights to lands owned by the grantor in the State of Oregon. (Record Vol. 1, pp. 126-133.)

If there was any right on behalf of the United States to maintain any suit or proceeding for the forfeiture to the Government of these West Side lands it accrued in 1880, when the deed was made from the "West Side Company" to the Oregon and California Railroad.

The deed to the Oregon and California Railroad by the West Side Company in 1880 was similar to that of 1870 by the East Side Company, and under both of these conveyances the Oregon and California Railroad assumed all the debts and obligations of the grantor company, and assumed to build the railroads which

it did do, with some small omitted sections. It is, therefore, submitted that as to the lands embraced in the so-called west side grant that this suit was barred in 1885, and that section 1047 has operated to confirm the right and title of the Oregon and California Railroad Company to these lands; that said section was intended to be, and is, a statute of repose to put an end to what otherwise would be a never-ceasing series of litigations to embarrass the railroad company in negotiating sales of its properties.

THIRD

The Act of Congress of March 2, 1896, *Confirmed the Title of the Oregon and California Railroad to All of the Lands in Suit So Far As Patented.*

The West Side Company in Oregon, sold and transferred all of its lands and land grants to the Oregon and California Railroad on October 6th, 1880, (R. 126-133) and the East Side Company otherwise known as the Oregon Central Railroad, sold and transferred all of its lands to the Oregon and California Railroad on March 28, 1870. (R. 93-125.)

The consideration for each of these sales ran into millions of dollars, and the grantee company expended many millions under each of these conveyances in constructing the rail-

roads or otherwise carrying out the acts of Congress.

It cannot be fairly denied that the Oregon and California Railroad Company is a *bona fide* purchaser of these lands within the definition given by this court in U. S. v Des Moines Navigation Company, 142 U. S., above cited.

The largeness of the transaction in no case affects the bona fides, nor is the act confirming the title of *bona fide* purchasers limited as to the quantity so sold and transferred.

The act of Congress of March 2, 1896, amending the act of March 3, 1891, is as follows:

"Be it enacted, &c., That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to.

But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but

the right and title of such purchaser is hereby confirmed."

This court has frequently decided that the act of March 2, 1896, is remedial in its nature and to be liberally construed.

U. S. vs *So. Pacific Railroad,* 184 U. S. 49;

U. S. vs *Winona R. R.,* 165 U. S. 463;

Winona R. R. vs *U. S.,* 165 U. S. 483, see also,

Burk vs *So. Pacific R. R.,* 234 U. S. 669-693;

U. S. vs *Chandler W. Co.,* 209 U. S. 447.

U. S. vs *Cal. Land Co.,* 148 U. S. 38.

The statute provides no patent to any lands held by a bona fide purchaser shall be vacated or annulled but the right and title of such purchaser is hereby confirmed. In *U. S.* vs *So. Pacific R. R.,* 184 U. S. Supra, the court held that the railroad adjustment act of 1887, which is *in pari materia* with the acts of 1891 and 1896, was prospective in its operations; that it embraced not only sales made to bona fide purchasers before the passage of the act, but also those made after its passage.

Of the lands which the Government desires by this bill to forfeit about three millions of acres of them have been patented by the United States to the Oregon and California Railroad

Company, and all of those lands were sold to a bona fide purchaser, to-wit, the Oregon and California Railroad Company, and the title of that company was confirmed in 1896 to all of the lands then patented and is also confirmed as to all lands patented since that date.

The act of 1896 does not purport to be limited to lands patented and sold to bona fide purchasers prior to its date, but prohibits any patent from being vacated or annulled which is held by a bona fide purchaser and confirms the title of all such purchasers.

In conclusion it is submitted that the decree of the District Court should be reversed with instructions to dismiss the bill.

Respectfully submitted,

JOSEPH H. CALL.

Of Counsel for Appellants,

Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage.

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No. 679.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, a corporation, et al.,
Defendants and Appellants,

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

MINNESOTA STATE LIBRARY

Brief of the Law on Behalf of Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, Individually and as Trustee, Defendants and Appellants.

WM. F. HERRIN,
P. F. DUNNE,
WM. D. FENTON,
Solicitors and Attorneys for said Defendants and Appellants.

FRANK C. CLEARY,
of Counsel.

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Point I. The Act of Congress of July 25th, 1866, was passed for the primary purpose, not of promoting the settlement of the public lands, but of aiding in the construction of a railroad from a point on the Central Pacific Railroad in the State of California to Portland, in the State of Oregon; and any provision in the later act of April 10, 1869, for the benefit of settlers, must be taken in subordination to this primary purpose	319 et seq.	2-55
Point II. The settlement clause of the amendment of April 10, 1869, is not a condition subsequent	319 et seq.	55-197
Point III. Congress was without lawful authority on April 10, 1869, (16 Stat. 47) to annex a new condition, by amendment, or otherwise, to the land grant made by the Act of July 25, 1866, (14 Stat. 239) as amended by the Act of June 25, 1868, (15 Stat. 80) for the following reasons:		
(1) The California and Oregon Railroad Company filed its assent within one year and completed the "first section of twenty miles of said railroad" within two years after the passage of the Act of July 25, 1866.		
(2) The Oregon Central Railroad (East Side) Company was not in default on April 10, 1869	320 et seq.	198-246
Summary of the evidence to be considered in support of this contention	320-333	
Point IV. Under Point IV of Points and Authorities, infra, pages 246-301, the contention is made that the so-called "actual settler" clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, construed so as to give effect to the primary policy of Congress, and to carry out the purpose of the granting acts in the light of long continued, contemporaneous, and permitted construction of these acts, as evidenced		

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by the record, and subsequent legislation of Congress relating to land grants and public lands, did not create a condition subsequent	333 et seq.	246-301
Summary of evidence in connection with this contention	333-362	
Point V. Under Point V of Points and Authorities, infra, pages 301-523, the defendants-appellants contend that the United States cannot in equity, as suitor, enforce the "actual settler" clause, assuming that its words create a condition subsequent, because, (1) The United States has waived its right by long continued acquiescence and affirmative action, with full knowledge of continued breaches by the company, from the earliest administration of the grants, to the passage and enforcement of the Act of August 20, 1912. (So-called Innocent Purchasers Act.) (2) The United States is estopped, in view of all the facts and circumstances, to attempt to enforce the same	362 et. seq.	301-523
Summary of the evidence in support of this contention	362-404	
Point VI. Under Point VI of Points and Authorities, infra, pages 523-624, the contention is made that a condition subsequent must be not only express or implied, but legal, definite, and certain, and reasonably possible of performance, and not repugnant to the nature of the estate to which it is annexed. In the absence of express limitation a condition subsequent must be capable of performance within a reasonable time, and continually and regularly kept thereafter. If, therefore, within a reasonable time after the title vested in the company to any part of these lands, it could not sell these lands to "actual settlers," for the price named, in the quantities specified, the condition became impossible of performance, and was thereby discharged. The same result would follow where performance of the condition was rendered impossible, or its performance by the company made practically		

	Brief of Facts	Brief of Law
impossible, by legislation enacted by the United States. The proof shows that there was at no time since the title vested in the company, practical ability, or possibility, to sell these lands to "actual settlers" for the price named, in the quantities specified. The character of the granted lands, their situation and location, rendered them unfit for disposition under the settlement laws, in accordance with the terms of the condition. Proof of these facts, to the satisfaction of the court, by the voluminous record, is competent and convincing to show that even though the language used shall be construed as a condition subsequent, such condition was impossible of performance. The proof also shows that the even sections within the limits of the grants, were of the same character, and that they were unfit for disposition under the settlement laws in effect on April 10, 1869, and on May 4, 1870, and in recognition of this, Congress, on June 3, 1878, (20 Stat. 81) passed the Timber and Stone Act, and on March 3, 1891, (26 Stat. 1097) repealed the Pre-emption Law of 1841, and all other laws allowing appropriation of the public lands, and on September 29, 1890, (26 Stat. 496) passed the General Forfeiture Act, and on August 20, 1912, enacted the so-called Innocent Purchasers Act, (37 Stat. 123) based upon the report of the House Committee on Public Lands, to the effect that these lands sold in alleged violation of the "actual settler" clause, were chiefly valuable for timber, and were not adapted to appropriation under the settlement laws. The proof also shows that the even sections within the limits of these grants, have been mainly appropriated by entrymen under the Timber and Stone Act, or in fraudulent evasion of the Homestead Act, and as soon as title had been obtained, the entrymen conveyed the lands to timber investors	404 et seq.	523-624
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Point VII. Under Point VII of Points and Authorities, infra, pages 625-635, the contention is made that if the terms of the "actual settler" clause be so indefinite and uncertain as that the company could not, under its terms, fairly construed, ascertain the legal measure of its duty so as to perform the same, and if the law, thus fairly construed, is not enforcible as a covenant or a trust, or contract, for the benefit of "actual settlers," it is clearly and for the same reasons not enforcible as a condition subsequent. There can be no condition subsequent, whether created by contract between private parties, or by grant by deed, or by legislative grant of public lands, to a private party, assenting to and accepting such grant, which is not clear, definite and certain in its terms. No breach can arise or be assigned upon a contract, deed, or grant, or legislative grant, which is so indefinite or uncertain in its terms as that it does not clearly and necessarily appear exactly what the grantee must (not *may*) do; in what manner the thing required to be done shall (not *may*) be done; for whom or what person it *shall* be done. If the act to be performed is not required to be done in some definite and certain way, by a definite and certain class of persons, and for a definite and certain part of the lands granted, within a certain and definite time, under certain and definite rules and regulations prescribed by law defining the "actual settler," the time and conditions of settlement, and the proof of same,—there can be no assertion of any breach by the grantor, nor re-entry by legislative declaration of forfeiture, or otherwise. The grantor cannot forfeit the estate granted, for breach of a condition the terms of which cannot be specifically and definitely found in the language of the condition. As a covenant, trust, or contract, the "actual settler" clause is not enforcible, and the court below has so held. (Opinion, Vol. II, pp. 696-791-818, Transcript

of Record. As a condition subsequent it is likewise not enforcible. The grantee is not obligated to write into the statute rules and regulations by which the Pre-emption or Homestead Laws could be executed as to these lands, nor does the statute adopt such rules or regulations as to procedure, or make the Pre-emption or Homestead Act a part of the "actual settler" clause .....

Point VIII. Under Point VIII of Points and Authorities, infra, pages 635-639, the contention is made that if the "actual settler" clause be a condition subsequent certain, and definite, so as to be otherwise enforcible, then it was repugnant to the grant, and could not have been enforced without destruction of the primary and dominant purpose of Congress, to aid in construction of road. If the land thus subject to sale could not have been so sold in time to give the aid intended, the condition was destructive of the fee intended to be granted, and the condition must give way as repugnant to the grant.....

Point IX. Under Point IX of Points and Authorities, infra, pages 639-711, the contention is made that the "actual settler" clause contemplated that the sales of land, and construction of road, should be concurrent. It was the intention of Congress that the lands granted should be "applied to the building of the road," and this application could only be made by sales of the land, when made pending construction. In that view, it must have been assumed that "actual settlers" would apply to purchase, and that the company would sell to such applicants all these lands, before such construction should be completed. Only by sales in that way could the road be built. It follows, therefore, as a necessary corollary to this primary purpose and intention of Congress, that if for any reason "actual settlers" did not apply to purchase these lands, and if they were not sold by or before the final completion

of the road and the acceptance of such completion by the United States, as in performance of the grant, then and thereafter the "actual settler" clause would become inoperative, and whether the words of the "actual settler" clause created a covenant or condition, the estate of the company in the lands unsold, would become absolute and unconditional. It is not alleged by the United States that in sales of the lands there was violation of this clause prior to the completion and acceptance of the road, and no breach on account of any such sale is assigned. 625-635

The fact that no provision is made for the payment of taxes which may be assessed upon these lands, as belonging to the grantee companies, shows that the "actual settler" was such person as may have been upon the land when the grant was made, or as may have entered upon the land as such prior to completion and acceptance of the road, and issuance of patent by direction of the President, for the lands opposite to and coterminous with the constructed portion of the road. It shows that the title to the lands thus occupied or applied for by the "actual settler" prior to issuance of patent, was regarded as public land, as to assessment and taxation, and that until such patent issued, or the president had directed its issuance, the grant was held in trust for such "actual settler," and that jurisdiction over such land remained with the Land Department, for the benefit of such "actual settler" who could establish his settlement, residence, and cultivation, and the fact that he was a bona fide "actual settler." Under such circumstances the land thus applied for and occupied by such "actual settler" was quasi public land, and as such not subject to assessment and taxation, and hence the statute made no provision for payment of any sum other than the flat double minimum price of $2.50 per acre..... 635-639

Point X. The lands involved in suit were mainly pat- 639-711

ented more than five years prior to the commencement of this suit, and these patents were all issued by the United States with full knowledge upon the part of the Government of continuous breaches of the so-called "actual settler" clause. The cause of suit, or action, to recover these lands, and to assert the breach, arose when each breach occurred, and the United States, as to all breaches occurring prior to issuance of patents, is necessarily barred after the expiration of five years following the date of patents issued prior to March 2, 1896, and after six years following the date of patents issued after that date. The Act of March 3, 1891, (26 Stat. 1095), with the Act of March 2, 1896, (29 Stat. 42) read in connection with the Act of September 29, 1890, (26 Stat. 496) as also Rev. Stat. Sec. 1047, is more than a mere statute of limitations, **it is title in fee simple, without condition or possibility of reverter,** and if the United States is to be deemed a formal party in aid of the interest of settlers, the general defenses of laches and limitation are open.

(2) The Oregon and California Railroad Company, on March 29, 1870, by its deed of that date, became the purchaser, for value, of all the lands granted by the Act of July 25, 1866, to the East Side Company, and on October 6, 1880, by its deed of that date, for value, became purchaser of all the lands granted by the Act of May 4, 1870, to the West Side Company, and the Oregon and California Railroad Company has been ever since said dates respectively, the bona fide owner and in possession of the lands so granted, and as such, patents issued to it, and, as such, the Oregon and California Railroad Company is a bona fide purchaser, and has been recognized as such by the United States, continually, since the dates of said deeds, respectively .....

The taxes paid from April 1st, 1870, to April 30th,

1911, were $1,827,234.10, and from April 30th, 1911, to April 30th, 1914, $930,859.97, a total of $2,758,094.07.

Point XI. (1) The United States may, as sovereign, impose restraints upon alienation of its lands, but it cannot delegate or impose upon a private party such as a citizen, or a railroad company, the substantive administration of sales of its lands, or the administration of its settlement laws. If in granting the fee to the company, under these Acts, the United States imposed a condition which, if enforcible, required the company, in making sales, to usurp the functions and duties of the Land Department of the United States, and administer the settlement laws, and if the United States did not thereby reserve, in some way, the right to enforce or administer its land laws applicable thereto, the condition attempted to be created, is void, and the title is unaffected thereby. The estate vested, absolutely, unaffected by the attempted condition. The intended beneficiaries, if the condition was to be valid and effective, were entitled to require that the United States should retain jurisdiction of the grant, and administer the same. The beneficiaries were entitled to go before a tribunal having jurisdiction and authority, to hear and determine the facts, as to each settlement, which would bring each "actual settler" into a legal and effective relation to the parcel upon which he had settled. The railroad company could not be constituted, and is not, by the settlers clause, made such tribunal. Under the settlers clause neither the United States nor the assumed beneficiaries, the actual settlers, could compel the railroad company to act as such administrative tribunal, nor would its voluntary action bind any contesting claimant, nor could any court give any defeated contestant any relief, or afford him any remedy. The statute gives no remedy, provides no tribunal, and defines no procedure. It is therefore void.

711-714

	Brief of Facts	Brief of Law
(2) The title to these granted lands having passed from the United States to the Oregon and California Railroad Company by patents, the land having been earned by construction of roads, the estate vested in the company in fee simple. This is conceded by the United States. There is therefore no room for the application of the doctrine that a public grant will be strictly construed in favor of the grantor. Such rule of construction does not apply where the United States seeks to defeat the estate granted, whether by means of a condition subsequent, or other acts that would render the estate defeasible.		
(3) The estate once having passed, the law of the state in which the property is situated, as determined by the Supreme Court of that state, will be followed, as a rule of property, in determining whether the language of the so-called "actual settler" clause is a condition subsequent, or a covenant		747-770
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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 679.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, a corporation, et al.,
Defendants and Appellants,

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Oregon and California Railroad Company, Southern Pacific Company, Stephen T. Gage, individually and as trustee, upon the Law of the Case.

I

The Act of Congress of July 25th, 1866, was passed for the primary purpose, not of promoting the settlement of the public lands, but of aiding in the construction of a railroad from a point on the Central Pacific Railroad in the State of California to Portland, in the State of Oregon; and any provision in the later Act of April 10, 1869, for the benefit of settlers must be taken in subordination to this primary purpose.

The Pacific Railroad Acts are a familiar chapter in the history of this country. Under the Union Pacific Act of July 1, 1862, (12 Stat., 489) the Union Pacific Railroad was constructed from the Missouri river to Ogden, and in continuation of this railroad line, and under the same act, the Central Pacific was constructed from Ogden to the bay of San Francisco. The Union Pacific act is entitled in terms—"An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes." The construction of the Union Pacific-Central Pacific Railroad gave the country a transcontinental line between the Missouri river and San Francisco, California.

The Oregon and California railroad act of July 25th, 1866, on which this case turns, was a sequel and a natural extension of the Union Pacific Act, strictly in pari materia, and designed to make the Union Pacific-Central Pacific Trunk Line serve as well the State of Oregon, with Portland for the terminus, as the State of California with a terminal at San Francisco. This was to be accomplished by extending the Union Pacific-Central Pacific line from "some point on the Central Pacific Railroad in the Sacramento Valley, in the State of California," (Sec. 1, Act of July 25, 1866, 14 Stat., 239.) through the State of California to the Oregon boundary, and thence Northerly through the State of Oregon to Portland.

If *the primary purpose* of the *Union Pacific* Act was, as the title of the act says it was, to aid in the construction of a railroad, it is not easy to see why the *Oregon and California Act, which says the same thing,* does not *mean the same thing, and express the same primary purpose.* In the opinion of the Supreme Court of the United States in U. S. against Union Pacific R. R. Co., 91 U. S., 79, it was said "Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly

construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then

settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise.

"This enterprise was viewed as a national undertaking for national purposes; and the public mind was *directed* to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento rivers *which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property.* With its construction, the agricultural and mineral resources of this territory could be developed, *settlements made where settlements were possible,* and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way

of building it were great, and by many intelligent persons considered insurmountable.

"Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was, *that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.*

"The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this

was not so, reasons of economy suggested that it were better *to enlist private capital and enterprise in the project by offering the requisite inducements.* Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

"It is true, the scheme contemplated profit to individuals; for, without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the government had incorporated a company to advance private interests, and agreed to aid it on account of the supposed *incidental advantages which the public would derive from the completion of the projected railway.* But the *primary object* of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end,—the *securing a road which could be used for its own purposes.* The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history.

"It has been observed by this court, that the title of an act, especially in congressional legislation, furnishes little aid in the construction of it, because the body of the act, in so many cases, has no reference to the matter specified in the title. Hadden v. The Collector, 5 Wall, 110. This is true, and we have no disposition to depart from this rule; but the title even, of the original act of 1862, incorporating the appellee, seems to have been the subject of special consideration, for it truly discloses the general purposes of Congress in passing it. It is "An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure for the government the use of the same for postal, military, and other purposes." That there should, however, be no doubt of the national character of the contemplated work, the body of the act contains these significant words; "And the better to accomplish *the object of this act,*—namely, *to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes,*—Congress may at any time, having due regard for the rights

of said companies named herein, add to, alter, amend, or repeal this act." 12 Stat., p. 427. Indeed, the whole act *contains unmistakable evidence,* that, if Congress was put to the necessity of carrying on a great public enterprise by the instrumentality of private corporations, it took care that there should be *no misunderstanding about the objects to be attained,* or the motives which influenced its action."

Laying the titles of the two acts—Union Pacific Act and Oregon and California Act—one along side the other, the Union Pacific Act is entitled:

"An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes;"

And the Oregon and California Act is entitled:

"An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California to Portland in Oregon."

Indeed, the Oregon and California Act, supplementary, as it is, to the Union Pacific Act, is, if anything, *more specific and concrete*

in its title touching this precise matter of the land grant; for, whereas the Union Pacific Act is said to be, generally "an act to aid in the construction of a railroad and telegraph line," now the Oregon and California Act is said to be "an act *granting lands* to aid in the construction of a railroad and telegraph line." The language of the Supreme Court in the Union Pacific Case is full and instructive to the point of the military and economic purposes of the government in aiding the construction of this transcontinental road from the Missouri river to San Francisco and Portland. What the government was aiming to secure was a road to subserve these purposes. *It was not passing a homestead law or a preemption act. It was passing a railroad construction act.* "The primary object of the government", as the Union Pacific Case says, "was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end,—the *securing a road which could be used for its own purposes.*"

The Act itself of July 25, 1866, the body of it in distinction from the title reads:

"Sec. 2. And be it further enacted, That there be, and hereby is, granted to the said companies, their successors and assigns, *for the purposes of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the*

mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line;"

Now, in the Union Pacific Case, supra, the Supreme Court says: "Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private capital alone. It was a national work, originating in national necessities, and requiring national assistance."

If the building of the road could not be worked out by private capital alone"—if it was "a national work, originating in national necessities, and requiring national assistance",—then the Act of July 25, 1866, is a scheme of national assistance for the building of a railroad. But the assistance was a land grant, that and nothing more; how was this land grant to be made good as an aid to the construction of the road? It took money to get a road bed, lay rails, find engines and cars to run on them, and provide terminal and intermediate facilities. Money must be

gotten out of the land grant—but when and how?

Of course, the company was not to build the road first and look for the money afterwards. The money had to come first—no money, no road. How to make the land grant yield in the first instance—that was the real question. What was the mind of Congress on that point?

Did Congress think and intend that the Railroad Company, as a corporation on paper, and before it had any railroad, should go into the market with its three million acres of granted land, get somebody to buy that territory, and build the railroad with the purchase money? Was that the mind of Congress in respect to "a vast unpeopled territory", which "was practically worthless without the facilities afforded by a railroad for the transportation of persons and property?" (Union Pacific Case, Ubi supra) How about construction bonds, secured by a mortgage of the land grant, and distributed in varying quantities among a number of bondholders? Congress, by main strength and awkwardness, might have put a prohibition in the granting act against mortgaging; "it might originally have prohibited the borrowing of money on mortgage;" (Sinking-Fund Cases, 99 U. S.,

p. 721); but it did not. That would not have been a sane thing to do. "Railroads are a peculiar species of property, and railroad corporations are in some respects peculiar corporations. A large amount of money is required for construction and equipment, and this to a great extent is represented by a funded debt, which, as well as the capital stock, is sought after for investment, and is distributed widely among large numbers of persons." (Sinking-Fund Cases, supra, p. 722)

An instance in point, to go back to the comparatively early date of 1832;—Congress had granted to the State of Indiana "certain lands to aid in the construction of a canal designed to unite the waters of Lake Erie with those of the Wabash River." (Trustees of Canal Company v. Beers, 2 Black, U. S., 448) On June 7th, 1832, the State Legislature authorized the Canal Commissioners to borrow Two Hundred Thousand Dollars for construction purposes, and provided, in the fifth section of the Enabling Act, as follows: "That for the payment of the interest, and redemption of the principal of the sums of moneys which may be borrowed under the authority of the General Assembly, for the construction of said canal, to the extent of the estimated cost thereof, in the first section

of this act stated, there shall be and are hereby irrevocably pledged and appropriated, all the moneys in any manner arising from the lands, donated by the United States to this State, for the construction of said section of said canal, the canal itself, with the said portion of land thereto appertaining, or as much thereof as will realize by sale the sum borrowed, and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls collected on said canal, or any part thereof, as finished."

The theory and practice then, under this land grant of 1832, was to issue bonds secured by the granted land, and to appropriate all moneys "in any manner arising from the lands," to the redemption of the bonds. The same thing was done under the Union Pacific-Central Pacific land grant of July 1, 1862. This is pointed out in Francoeur v Newhouse, 40 Fed., p. 621, decided on December 9th, 1889. "These lands," said the court, "soon after the grant, were conveyed, in trust, under authority of the law, as security for the bonds issued, out of the proceeds of which, the road was constructed; *and the proceeds of these sales are devoted by the trustees to the redemption of the bonds.*" The right to mortgage the granted land was a necessity

of the case; in no other way could the land grant be availed of in aid of construction; and "the right to mortgage includes a right in the mortgagee to have a sale of the land in satisfaction of the obligation for which the mortgage was given." (Estate of Pforr, 144 Cal., p. 126)

The Railroad Company in Oregon did, with its land grant, just what every other Railroad Company did—what the Central Pacific Railroad Company did, what the Union Pacific Railroad Company did; it mortgaged the land to secure its construction bonds, and it appropriated the sales of the granted land to the redemption of those bonds. There is nothing in the Pacific Railroad Act, either in terms or by implication, from which the somewhat astonishing deduction can be made, that the line to San Francisco, California, could mortgage its land grant for construction money, but the line to Portland, Oregon, could not. The Oregon Act, the Act of July 25, 1866, was amended by the Act of June 25, 1868, but that was an amendment to Section 6 of the original Act, extending the time for the completion of the first twenty miles of the road eighteen months from the date of the amendment, June 25, 1868, and allowing two years instead of one year for each successive section of twenty miles, and requiring

final completion on or before July 1st, 1880, instead of July 1st, 1875. There is nothing in this amendment inconsistent with, or germane to, the right to bond the land for construction money. (15 Stat., 80)

On April 10, 1869, nearly three years after the land had been granted in aid of railroad construction by the original Act of July 25, 1866, another amendment was made to Section 6 of the Granting Act. The original Act had in contemplation a California corporation to do the railroad building in California from a point on the Central Pacific Railroad near Sacramento, California, northward through California to the Oregon boundary, and an Oregon corporation to do the railroad building in Oregon from Portland, southward to the California line. Section 6 enacted, "that the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof." The Act of 1866, committed to the Legislature of Oregon the designation of the Railroad Company to do the construction work in Oregon. The so-called Westside Company, under a claim of designation by the Legislature filed in the Department of the Interior, within one year after the passage of the Act of 1856, its assent to that Act. But according to the bill of complaint in this case, the

so called Westside company never became—to use the words of Section 1, of the Act of 1866—"a company organized under the laws of Oregon"; as the bill of complaint has it, on October 6, 1866, "certain persons *attempted* to organize;" four days later, on October 10th, 1866, the State Legislature designated this "attempt" at corporate organization. On April 22nd 1867, as the bill sets forth, certain residents of Oregon, "contending that said Westside Company was never lawfully incorporated or organized, and designing to secure the several grants, franchises and other benefits of said act of Congress approved July 25th, 1866, in that behalf caused certain proceedings to be had intended to organize, under the general incorporation law of the State of Oregon," a corporation bearing the same corporate name as the Westside Company, namely, Oregon Central Railroad Company. The bill explains that "said last mentioned Oregon Central Railroad Company projected its line of railroad on the easterly side of the Willamette river"—hence it came to be known as the Eastside Company in distinction from the "attempted" organization known as the Westside Company.

On October 20th, 1868, the Legislature of the State, with the subsequent approval of the Governor, made its finding that when the

attempted Westside Company got the later legislative designation in the joint resolution of October 10th, 1866, "no such company as the Oregon Central Railway Company was organized or in existence, and the said joint resolution was adopted under a misapprehension of facts as to the organization and existence of such company; and the designation of the company to receive the lands in the State of Oregon granted, and the benefits and privileges conferred, by the said act of Congress, yet remains to be made." It was thereupon resolved that the Eastside Company be designated, and the designation was accordingly made.

"Such Company organized under the laws of Oregon as the Legislature of said State shall *hereafter* designate," (Sec. 13, Act of July 25, 1866) not having been organized under the laws of Oregon until April 22nd, 1867, the date of the organization of the Eastside Company, and not having been designated by the Legislature of Oregon until October 20th, 1868, the date of the legislative designation of the Eastside Company, it follows that the original requirement of Section 6 as to the filing by the California Company and the Oregon Company of their assent to the Act of 1866 within one year after the passags of that Act, was impossible of perform-

ance by "such company organized under the laws of Oregon as the Legislature of said State shall *hereafter designate;*" for such company was not designated within one year after the passage of the act, nor until October 20th, 1868. It is of course settled law, now beyond the need of any discussion, and it was determined by this court in respect to this very Act of July 25, 1866, (Bybee vs O&CRCo, 139 U S 663) that the Act of Congress operates a grant *in praesenti,* with the obvious consequence that any conditions therein are subsequent, and that the title of the grantee, upon the filing of the map of definite location, acquires precision in respect to the parcels specifically ascertained as of that time, and such title, other things being equal, relates back to the date of the Granting Act.

But in the case of the Eastside Company other things were not equal, and to this extent: that the corporation, as of the date of the Granting Act, had not been organized, and the grantee in contemplation was to be a corporation thereafter designated by the state legislature. Such designation, in view of the action of the legislature of a sovereign state, and of the consistent and responsive action thereafter of the granting authority, and in the absence of controlling judicial determina-

tion to the contrary, must be conclusively taken to have been made as of October 20, 1868, in favor of the Eastside Company. That point of time—October 20, 1868,—was the point of time at which, as this court has held, the grant to the Eastside Company must be deemed to have taken effect. (Hall vs Russell, 101 U S 509, 510.) When the title, therefore, vested in the Eastside Company as of October 20th, 1868, the condition subsequent of the filing of assent, possible of performance only within the year ending July 25th, 1867, had become impossible of performance, and therefore the grantee took the land discharged of the condition. (Hughes v Edwards, 9 Wheat. p. 492.) No formal acceptance in writing of the grant was now necessary. It is quite consistent with the bill, and it is the historical fact, that the Eastside Company began construction prior to April 10th, 1869, and as early as April 16, 1868 (Vol. X, p. 4939) Its acceptance of the grant, as being a grant to a corporation in anticipation of its organization, would be presumed from the fact of the organization. (Wharf Company v Judd 108 Mass., 227) The engagement by the Company in construction work as early as April 16, 1868, established the fact of its acceptance. (Bank v. Danbridge, 12 Wheat., p. 71; Ry. Co. v. Greenalgh, 139 U. S., p. 22)

It was not within the competency of Congress, therefore, by the amendment of April 10, 1869, to burden or impair the vested rights of the Eastside Company by requiring it to file its assent to the Act of 1866 within one year from the passage of the amendment or at all; indeed, in this point of view, the amendment was simply permissive; nor was it competent to Congress, in this same amendment, to work any impairment of the vested rights of the Company by the enactment of the proviso, "that the land granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre." If the fee simple had vested in the Company prior to the amendment, Congress had no power to attach to a vested estate this ex post facto proviso. (Morgan v Rogers 79 Fed., p. 580) The circumstance that the Eastside Company, whether inadvertently, or in error, or prudentially, did file an assent under the amendment of April 10th, 1869, is not in derogation of its vested estate and works no estoppel against it. (Bybee v Oregon and California Railroad Company 139 U. S. 663; same case, 26 Fed., 591.)

The East Side Company, then, under the Act of July 25, 1866, responding to the status

of "such Company organized under the laws of Oregon as the legislature of said State shall *hereafter* designate;" and having been so designated on October 20th, 1868; the condition imposed by Sec. 6 of the same Act, requiring the designated Company to file its assent to the Act within one year after July 25, 1866, became, as to the designated Company, impossible of performance, and when the Company took a vested estate as of October 20th, 1868, it took that estate discharged of the condition. But there is more behind. It was on June 25th, 1868, that Congress first amended Sec. 6 of the original Act by extending the period of construction. It was well known, at the time of this amendment, by the public and by Congress, a fact of notoriety, that two companies, West Side and East Side, were competing for the grant. The East Side Company had been organized on April 22nd, 1867. Its articles of incorporation (Vol. IV, p. 1630) made plain its purpose to earn the grant. On May 1st, 1868, it issued and distributed generally a public notice and circular that such was its purpose. (Vol. X, p. 5158.) It actually began construction work on April 16, 1868, (Vol. X, p. 4939.) Its West Side rival began competitive construction only the day before. (Vol. IX, p. 1760.) Indeed, on April 29, 1868, the East Side Company adopted a resolution accepting the grant

of July 25, 1866 and empowered A. M. Loryea to present a copy, duly certified by the Secretary of the Company, to the proper authorities to be filed (Vol. XIV, pp. 7454-5.) This acceptance was transmitted by Loryea in his letter of July 16, 1868 to Secretary Browning (Vol. XIV, p. 7454.) and was acknowledged by the Secretary under date of July 17, 1868. (Vol. XIV, p. 7440.) It thus appears that, with the exception of the correspondence between Loryea and the Secretary, all these proceedings, on the part of the East Side Company, of corporate action and actual railroad construction, were prior in point of time to the passage of the amendment of June 25, 1868, extending the period of construction. The situation was plain enough to Congress when this amendment was passed. Two companies were in the field and at work. The East Side Company, in its public circular, had denied the corporate organization of the West Side Company, and in its own articles of incorporation and in this same circular, and by its corporate action, and by actual and open construction work, had signalized its purpose to gain legislative designation as the company indicated by the original granting act, and as such company to take and earn the grant. Congress, as the amendment of April 10, 1869 shows on its face, and, as appears very clearly from the report of the

Senate Committee on Public Lands (Brief of the Facts, p. 281), was not arbitrating or resolving the controversy between the two competing companies, or seeking to prejudge the merits as between them. When it passed the amendment of June 25, 1868, it was extending the time for construction, as much for the benefit of one company as the other. But Congress could not effectively or at all extend the time for the benefit of the East Side Company, if the original requirement as to the filing of assent was to be insisted upon; for the East Side Company could not then file an assent within a period of time—one year from July 25, 1866—which had already gone by. The amendment of June 25, 1868, must be held to be a dispensation of the East Side Company from the necessity of filing such a written assent as had been contemplated by the terms of Sec. 6 of the original Act. The terms of the later amendment of April 10, 1869, amending the original act "so as to allow any railroad heretofore designated by the legislature of the State of Oregon in accordance with the first section of said Act, to file its assent to such Act in the department of the Interior within one year from the date of the passage of this Act", is obviously permissive. Indeed, it is claimed by the Government that it proceeded from the initiative of the East Side Company

itself. Whether that company had doubts of the validity or certainty of its own title, in the absence of a written assent, filed within the first year, or was acting out of abundant precaution, or was inadvertently confessing an infirmity of title which it sought to cure —it remains that if its rights had actually vested, prior to April 10, 1869, no impairment of those rights would be made by this permissive feature of the amended act, nor would any estoppel be raised against the company by its subsequent act of filing a written assent. (Bybee case, 26 Fed. 591; 139 U. S. 663.)

The proviso, therefore, in the amendment of April 10th, 1869, does not go in impeachment of the Railroad Company land grant, and its right to mortgage the granted land for construction money, because the Railroad Company is not bound by the proviso, and it was not competent to Congress, ex post fact to burden the estate with that proviso. But there is another reason why the power of the company to mortgage the land grant, and the rights of innocent bond holders who have advanced in good faith, some twenty millions of money, to build a railroad, should not be defeated by this proviso. And that reason is this: that if the requirement of the proviso, as to sales to actual settlers be deemed to have been competent to Congress

to exact, yet it is not the meaning or construction of the Acts of Congress of 1866, 1868 and 1869, read fairly and as a whole, that this incidental proviso, found as an after thought in the last amendment to a single section of the original granting act, should operate to defeat the paramount purpose of the Legislature, namely, the construction of a railroad, and to put in place of the primary purpose of Congress, something which, at the best, was secondary and subsequent in its nature and design. Nor will this court imply and impute to Congress, in passing this proviso, an intent to make futile and abortive the right to mortgage the grant in aid of construction —a right the impairment of which is not so much as hinted at in the proviso, and a right which belongs in a different legal category from that of a sale, and to which a sale is incidental and ancillary only.

It cannot seriously be imputed as the intent of Congress that the construction money for the railroad should be raised by selling these lands to actual settlers, in quantities not to exceed one hundred and sixty acres to the settler, and at not more than two and a half an acre. It is not serious argument, or a sensible construction of the law, to imagine a host of actual settlers marching across "the vast unpeopled territory" (Union Pacific

case, supra) between the Missouri River and the Pacific Coast, pioneering their way into the Oregon timber forests, taking up quarter sections or less, making a clearing, and finally settling down on an agricultural basis——all this in advance of any railroad—paying two dollars and a half an acre for the land, and waiting there for the railroad that was to be financed with the two dollars and a half an acre. As this Court said in the Union Pacific case, supra, the land would be "practically worthless without the facilities afforded by a railroad for the transportation of the persons and property;—with its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased." (91 U. S. p. 80.)

This land grant, then, was mortgaged; it has been mortgaged from the beginning. The present mortgage, made July 1st, 1887, of which the Union Trust Company of New York is trustee and by which twenty millions of bonds are secured, is the latest expression in the refunding of the obligations which date back to the original lien.

These bonds were used in refunding and retiring the earlier construction bonds secured by the mortgages of June 1, 1881, and May

26, 1883, aggregating about $5,000,000, and in procuring the moneys necessary to complete the construction of the railroad. They were largely negotiated abroad. Seventeen million, seven hundred and forty-five thousand dollars of these bonds are now outstanding, and most of them are held abroad. (See Items 16-22 of Subdivision VI of Stipulation as to the Facts; Volume 4, pp. 1552, 1731, Transcript of Record; Brief of the Facts, pp. 159-160.)

Now, the present mortgage, by which the outstanding bond holders are secured, Exhibit H to the bill, bears date July 1st, 1887, and was acknowledged by the Oregon and California Railroad Company and the Union Trust Company of New York on January 3rd, 1888. No sales of the granted lands have been made since this mortgage, or under this mortgage, except in redemption of the security from the lien of the construction bonds—as the court said in Francoeur v Newhouse, 40 Fed. p. 621, in speaking of the mortgage of the Central Pacific land grant, "the proceeds of these sales are devoted by the trustees to the redemption of the bonds." This appears from the terms of Exhibit H to the bill, which reads: "In case the party of the first part, or its successors shall contract to sell and dispose of any of the lands

granted by the United States and covered by this mortgage at prices which are assented to by the party of the second part, or its successors in this trust or its or their agent or agents on that behalf, then and in that event the party of the second part, or its successors in the trust, or any agent or agents on its or their behalf authorized so to do, shall execute such releases and conveyances as may fully discharge the lands so contracted to be sold from the lien of these presents. Provided, however, that in all cases the purchase money or price be paid to and received by the party of the second part or its successors in the trusts, or its or their duly authorized agent. For the purpose of facilitating such sales the Trustee hereunder may, from time to time either concur with the party of the first part or its successors in appointing an agent to make such sales and execute such releases as its attorney in fact, or may appoint an agent of its own to execute such releases and conveyances as its attorney in fact, and it may delegate to any such agent all its powers and duties in respect to the sale of lands. The proceeds of lands so sold shall be applied by the said party of the second part or its successors in the trust to the redemption and cancellation of the bonds to be issued hereunder."

The pledge and appropriation of the proceeds of the sales of granted lands, in redemption of railroad construction bonds, is recognized by Congress in the Act, approved May 4th, 1870, making a land grant to the West Side Company "to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon." Indeed, Sec. 5 of this Act not simply empowered but required the Company to do this very thing. But the construction mortgage required by the Act of 1870 is, in express terms, referred to a specified part of the grant, namely, "the road depots, stations, side tracks, and wood-yard." If Congress, in the East Side grant of 1866, had contemplated a similar restriction, it would have said so. Reading the two acts together, that of 1866 granting lands to the East Side Company and that of 1870 granting lands to the West Side Company, the conclusion is not to be avoided that Congress, as well in the earlier as in the later grant, had in mind the application of the land to the redemption of construction bonds; but whereas the bonds are limited as to the security in the later act, no restriction will be found in the earlier act upon the power of the Company to make a general railroad mortgage of the granted land, redeemable by the application to the construction bonds of

the proceeds of sales of the lands which underlay the bonds as security.

The Union Pacific Act of 1862 uses the expression "sold or disposed of by said company," in respect to the granted lands. The Supreme Court of the United States, in giving meaning to the term "disposed of", found it to include the right of the company to make a construction mortgage; and this meaning, the Court evolved from the necessities of the situation. In the view of the Court, a construction mortgage was the only available way of making use of the grant in aid of the construction of a railroad; and the right of the company to make such a mortgage was the natural and reasonable significance to be attached to the term "disposed of". Every consideration and every argument urged by the Supreme Court in the case of the Union Pacific grant, making for the right of the company to issue construction bonds secured by a mortgage of the grant, is just as apposite to the case of the Oregon land grant to the East Side Company. Platt v Union Pacific Railroad Company, 99 U. S. 48, is the case.

The Union Pacific Act of 1862, in Sec. 3, after granting the odd numbered sections "for the purpose of aiding in the construc-

tion of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon," goes on with this proviso

"Provided, that all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 per acre to be paid to said company."

It was provided in the Union Pacific mortgage (Platt case, supra, p. 52) "that the lands shall be under the management and control of the company, to be by it sold or contracted to be sold for such prices and on such terms of payment as shall be mutually agreed upon by the company and the trustees; that the trustees shall, upon payment of the purchase money of the several tracts which may be sold, receive and apply the same, and the proceeds of all sales made by them of lands so conveyed to them, to the

sole and exclusive purpose of the payment of the said coupon bonds, until the same and the whole thereof shall be fully paid and satisfied, and thereafter to re-convey to the company the residue of said lands remaining unsold." The similarity between this provision and the corresponding one in the East Side Company's mortgage to the Union Trust Company of New York, will be noticed.

Upon a preemption entry, filed September 21, 1878, William H. Platt brought his bill in equity on September 28, 1878, to enjoin the Union Pacific Railway Company from prosecuting an action of ejectment which it had commenced against him five days previously for the recovery of a quarter section of land in Hall County, Nebraska, of which Platt was in possession claiming equitable title. The case went off on the sufficiency of Platt's bill in equity. The language of the Supreme Court in deciding the case is very instructive.

"The railroad and telegraph line", says the Court, "was entirely completed before July 1, 1874 (if not in 1869), and patents for all the lands granted were directed to be issued to the company in November of that year. By force of the grant, however, and by the definite fixing of the route of the road, and

the filing the map thereof in the Interior Department, as required by law, together with the completion of the road westward and beyond the tract claimed by the complainant, the title to that tract had become vested in the company before April 16, 1867. On that day the company, for the purpose of raising money necessary to continue and complete the construction of their road, issued their coupon bonds for the sum in the aggregate of $10,400,000, bearing seven per cent interest, and payable in twenty years from their date. On the same day, for the purpose of securing the payment of the bonds, the company executed a mortgage or deed of trust to trustees of all and several the several sections of land granted to them by the said acts of Congress, including the tract claimed by the complainant. The instrument, we think, though in form a deed of trust, was substantially a mortgage. It was delivered to the trustees, and duly recorded. The bonds were sold in different markets to bona fide purchasers, and they are now outstanding, about $7,000,000 still remaining unsatisfied. All this was before the entire road was completed, and before the first step was taken by the complainant to obtain his pre-emption right."

"In view of these facts, we are to determine whether the mortgage was a disposition of the lands granted to the company within the meaning of the last clause of sect. 2 of the act of 1862. If it was, the tract of land claimed by the complainant was not open to settlement and pre-emption when he entered thereon, nor has it been at any time since. That clause declared that 'all the lands granted by the section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption,' &c. Was the mortgage a sale or disposition of the lands as understood by Congress? *That the company had power to mortgage the lands admits of no reasonable doubt.* It may be conceded that a railroad company has not power either to sell or mortgage its franchise, or perhaps the road which it has been chartered to build, without express legislative authority, and this has in some cases been decided. The reason is that such a sale or mortgage tends to defeat the purposes the legislature had in view in the grant of the charter. The adventurers who obtain the charter and who accept it undertake to construct and maintain the public work. Their undertaking is the consideration of the grant, and without legislative consent they cannot throw off the obligation

they have assumed. But the reason is inapplicable to a sale or mortgage of property which is not a part of the road and in no way connected with its use. Parting with such property or incumbering it in no degree interferes with the performance of the duties of the company to the public. Railroad companies are not usually empowered to hold lands other than those needed for roadway and stations, or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must include the ordinary incidents of ownership, —the right to sell or to mortgage. Especially is this so when, as in the present case, the lands have been granted to the company by the legislature that granted the charter, without any restriction of their use."

The court now goes on to make a clear distinction between a sale and a mortgage, and in contradistinction from the word "sold" as used in the statute, to attribute to the expression "or disposed of", also used in the statute, and as furnishing a meaning for that expression, the right which the Company had, by force of a reasonable construction of the statute, to mortgage the granted lands in aid of construction. Speaking of the purpose and policy of the Act of 1862, the court says:

"What that is, may be seen very plainly when the whole act of 1862 is examined. We are seeking for the intention of Congress, and to discover that we may look at the paramount object which Congress had in view, as well as the means by which it proposed to accomplish that object. Congress addressed itself to the work of securing a railroad from the Missouri River to the western boundary of the Territory of Nevada, and thence to the Pacific Ocean. The work was vast, beyond the reach of private capital or enterprise. It could be accomplished only by the bestowal upon a corporation of very large governmental aid. The proposed road ran over mountains and through what was known to be an uninhabited desert, for more than a thousand miles. *The lands through which it must pass were supposed to be almost worthless, and quite unsalable, until they should be made, by the construction of a railroad, accessible to settlers and to Eastern markets.* The construction of a railroad through such a region was most uninviting to private capitalists. To induce them to embark in the enterprise was the overshadowing motive that dictated the act of 1862. This is apparent in almost every line of the act. For this reason the grants of land were made the rights of way and of taking materials were given, and the subsidy bonds were

loaned, to be repaid only at the expiration of thirty years, with interest payable only at the expiration of that period. Even this was not enough. No association and no persons were found willing, with all this proffered assistance, to undertake the construction of the road. But so earnest was Congress to induce the corporators to attempt the work, that in 1864 additional aid was proffered, the grant of lands was doubled, and new privileges were conferred. We do not now attempt to portray the earnestness—the all-absorbing earnestness—with which Congress sought to secure the construction of the road by private enterprise. It was well exhibited in United States v. Union Pacific Railroad Co. (91 U. S. 72), to which we refer. Suffice it to say, the purpose of Congress, above all others, was to obtain the construction of the railroad by the corporation it created to undertake the work. For that alone the subsidy bonds were given. Only for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise. We do not say that other incidental considerations were not kept in mind, but what we do assert as plainly manifest in the legislation is, that the paramount intention of Congress was to give such assistance to the company as to induce them to build the road.

Every other consideration was subordinate to that."

The court continues: "All will concede that in construing the act of 1862 we are to look at the state of things then existing, and in the light then appearing seek for the purposes and objects of Congress in using the language it did. And we are to give such construction to that language, if possible, as will carry out the congressional intentions. For what particular purpose, then, was the grant of lands made? The statute itself answers, 'for the purpose of aiding in the construction of the railroad and telegraph line', and securing governmental transportation, &c. The lands were granted to be used in furtherance of such construction. But Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon the construction of the road. Purchasers could not have been reasonably expected, certainly few, for immediate settlement. The obvious mode, therefore, of using the lands for the construction of the road (not for paying debts incurred in the construction, but for immediate need as the construction was progressing) was to hypothecate them as security for a loan. Many persons might be

willing to advance money on the faith of the prospective value of the lands, if the railroad was built, who would not be willing to buy when it was doubtful whether the company would ever be able to raise the money necessary to build the road and thus render the lands salable. Congress must have been blind, indeed, if it did not foresee this, and intend to authorize the use of the lands to raise money by mortgage for the object it had so much at heart. This, we think, was what was intended by the phrase 'or dispose of', as distinguished from 'sold'. Some of the lands might be sold as the work was progressing, and others could be used in aid of the construction only by pledging them to persons who might be willing to advance money on the faith of their prospective value. But whether sold or used as security for money loaned to advance the construction of the road, they were equally employed for the purpose for which they were granted. The words 'disposed of' are undeniably apt words to indicate a transfer by mortgage. If land be conveyed to A. to enable him to raise money for a particular purpose, nobody would doubt that a mortgage would be a disposition of the land for that purpose; and the grant made by the third section of the act of 1862 was obviously made, as we have suggested, with the intent of giving present assistance

to the company in the construction of the road. It was not intended to be available only after the company had raised all the money necessary for the work. Then the time of need for the purpose mentioned would have gone by. The act declares it to have been 'to aid in the construction of the road', not to reimburse expenditures made in the construction. *Hence it must have been intended that the company might use or dispose of the land in some other way than by a sale. But in what other way? Not by gift; for that would not have been in aid of the construction, and the grant was intended for that. Nor by leases. They could have brought little money. And no other mode of disposition except by mortgage has been suggested which could furnish the requisite aid for building the road. No other is conceivable.* The conclusion would seem, therefore, to be almost inevitable, that Congress, when speaking of a disposition of the lands other than a sale, contemplated making them available for the purposes of the grant by mortgage."

The difficulty of financing the construction of the Oregon Railroad by a limited use of the land grant, at a limited price per acre, in limited quantities, among a limited and uncertain class of settlers—the impracticability, in a word, of turning the construction of the

road on actual settlement of the granted land —has been dwelt upon, and it is reinforced by the vigorous language of the Supreme Court in the Union Pacific case, 91 U. S. 78. A like difficulty presented itself in the Platt case. If the mortgage of the land grant, in the Platt case, was subordinate and inferior to a pre-emption right accruing three years after the completion of the road, this impairment and shrinkage in the value of the grant as a security to bond-holders, would offer serious difficulty in the way of raising construction money; and the interpretation of the granting act with such consequences, would not be reasonable or practical. The Supreme Court, holding that there was a right to mortgage, went on to say:

"And if so, it is hard to believe that only a limited interest in the lands was allowed to be hypothecated. Twelve years were designated as the period within which the road was required to be completed, and lands not sold or disposed of within three years thereafter were to be open to pre-emption. Moreover, under the provisions of the act, the title to the lands could be perfected in the company only as the work of construction advanced; that is, as each section of forty miles was completed. The company might not become entitled to some until July

1, 1874. If, therefore, a mortgage could only bind the lands unsold until the expiration of three years after that date, it would have been an hypothecation for a term of years, and as to some of the lands, for a term of only three years. Was that the aid proffered by Congress to stimulate and render possible the completion of an enterprise in which it felt so deep an interest? If so, it was a barren gift. Looking at the character of the lands and their remoteness from settlements, it must have been evident enough that money could not have been raised on the credit of such a mortgage. The power of disposition given for the express purpose of enabling the company to raise money for the construction of the road, by such an interpretation of the act is made of no value. The interpretation, therefore, defeats the manifest intention of Congress, and for that reason it cannot be accepted."

The court says further: "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. We may now think it quite possible the lands could all have been sold before July 1, 1877. The unforeseen success of the enterprise and the unprecedented rush of emigration along the line of

the railroad have shed new light upon the value of the grants made to the company. But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances. Guided by this rule of construction, as well as by others universally recognized, we have been led unhesitatingly to the conclusion that the deed of trust or mortgage executed by this company in 1867 was a disposition of the lands granted by the third section of the act of 1862, within the meaning of that act."

And further: "We do not say that any mortgage, however small, or manifestly made to evade a bona fide execution of the purposes for which the grants were made, or made to defeat the policy of the government which encourages the sale of public lands to private settlers, and guards against the accumulation of large bodies in single hands, would be a disposal as understood by Congress. It may be conceded it would not be, for it would be in conflict with the avowed object of the grant. The present is no such case. By the pleadings it appears that the mortgage of 1867 was made 'for the purpose of raising

money necessary to continue and complete the construction of the railroad, in accordance with the act of Congress'. Nor are we now called upon to decide whether the lands covered by the mortgage will not be open for pre-emption, if they shall remain unsold after mortgage shall be extinguished. That question is not now before us."

Was the Union Pacific Act, under consideration in the Platt case, a railroad construction act or a settlement act? Was it passed primarily to subserve a governmental policy of allotting the public domain in small proprietorships for actual settlement; or was the thing in mind, first and foremost, to get a railroad built, and that purpose accomplished, to distribute what was left of the grant, as a secondary policy, among settlers? The court meets this question full-face:—

"The principal objection", says the court, "urged against the interpretation we have given to the words 'sold or disposed of' is, that it is repugnant to the governmental policy of guarding against monopolies of public lands by large corporations or single individuals. It must be admitted that Congress had that policy in view when it declared that the lands not sold or disposed of within three years after the entire road should be com-

pleted should be subject to settlement and pre-emption, at a price not exceeding $1.25 per acre. But this policy was manifestly subordinated to the higher object of having the road constructed, and constructed with the aid of the land grant. No limitation was set to the quantity of land which the company might sell to single associations, or single persons. It was left at liberty to sell, if it could, to any land association or private purchaser, the entire body of the lands or any lesser quantity, regardless of the general legislative policy. It was allowed to sell or dispose of the grant at its pleasure, for the purpose of raising money to aid in the road construction, provided thus raising the money was done within the limited period. With that power no pre-emptor was authorized to interfere. Whatever contingent rights he had were postponed and subordinated to it. If, as we think it manifest, the leading primary policy of the act was to place the lands in the hands of the company, to be used for the completion of the road, as this work progressed, any secondary policy that government may also have had in view ought not to be allowed to embarrass or defeat that which was primary. It is evident Congress thought there might be remnants of the grant, not used in aid of the construction of the road, either because other resources of the

company might prove sufficient, or because it might be found impossible to dispose of them in time to furnish such aid, and those remnants it undertook to open to settlement and pre-emption. This appears to us to have been what was intended, and all that was intended. The construction contended for by the appellant restricts the power of disposition, denies the authority of the company to utilize, except partially, for the purposes of the grant, the land granted, and might have impaired and possibly defeated the leading purpose of the grant. It subjects the paramount to the subordinate, and postpones the primary object to the secondary. On the other hand, utilizing the lands, by raising money upon them through a mortgage, or, in other words, disposing of them by mortgage, did not defeat the policy of opening the remnants not used to pre-emption."

It is true, as just quoted from the Platt case, that the railroad company there "was left at liberty to sell, if it could, to any land association or private purchaser, the entire body of the land or any lesser quantity, regardless of the general legislative policy. It was allowed to sell or dispose of the grant at its pleasure, for the purpose of raising money to aid in the road construction, provided thus raising the money was done within

the limited period. With that power no pre-emptor was authorized to interfere. Whatever contingent rights he had were postponed and subordinated to it." But the court had pointed out the impracticability of the land grant as an aid to railroad construction, by the method of sales. "The lands," the court had said, "were granted to be used in furtherance of such construction. But Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon the construction of the road. Purchasers could not have been reasonably expected, certainly few, for immediate settlement. The obvious mode, therefore, of using the lands for the construction of the road (not for paying debts incurred in the construction, but for immediate need as the construction was progressing) was to hypothecate them as security for a loan. Many persons might be willing to advance money on the faith of the prospective value of the lands, if the railroad was built, who would not be willing to buy when it was doubtful whether the company would ever be able to raise the money necessary to build the road and thus render the lands salable. Congress must have been blind, indeed, if it did not foresee this, and intend to authorize the use of the lands to

raise money by mortgage for the object it had so much at heart." The right to mortgage was not deduced from the use of the words "disposed of"; but the meaning, significance, and purpose of those words, was deduced from the right to mortgage; and that right to mortgage was worked out by the court as being inherent in the necessities of the situation. The Platt case is a clear and strong holding that the right to mortgage in aid of railroad construction is primary and paramount; the policy of settlement is relatively secondary and subsequent.

It is also a clear holding to the point that, whatever the policy of the Government may have been in respect to the settlement of the public lands, and whatever limitations may have been intended on the right of the railroad to make sales of those lands, none the less, in distinction from a sale of the lands, the railroad company had the clear and necessary right to mortgage the grant for construction purposes; and any sales by way of redemption of the mortgage lien and in aid of the purpose of construction are not to be confused with primary and out-and-out sales, such as the proviso must be held to have contemplated—for such a confusion would simply mean the destruction of the grantee's right to mortgage, and the utter defeat of the

policy of Congress to aid in the construction of the road.

A construction which excludes from the operation of the proviso those redemption sales which are incidental to the right to mortgage, and without which the right to mortgage would be a mere futility, still leaves room for the application of the proviso to sales made otherwise than by way of redemption from the construction lien.

This court is not called upon to defeat any settlement purpose or policy of the legislation in question, much less the primary purpose of the Government to aid in the construction of the railroad. The residue of the grant, "not used in aid of the construction of the road, either because other resources of the company might prove sufficient, or because it might be found impossible to dispose of them in time to furnish such aid,"—Congress, in the settlers clause of the Act of April 10, 1869, "undertook to open to settlement". (Platt case, ubi supra). Every sale made under the mortgage, in redemption of the construction bonds, went in accomplishment of the primary purpose. The higher the prices at which the redemption sales were made, the sooner the lien would be discharged, and the larger the residue for actual settle-

ment. If the settlers' clause of the amendment of April 10, 1869, is inadequate as a scheme for settling the residue, if it is lacking in machinery for making the secondary purpose workable, Congress, by the Twelfth section of the original granting act of July 25, 1866, had reserved the power "to add to, alter, amend, or repeal this act". (Sinking Fund cases, 99 U. S. 700).

There is nothing in the Acts of Congress which requires the railroad company affirmatively to go forth and find settlers and to make sales at the statutory price and within the statutory quantities to such settlers, if it should find them. At most, the obligation of the proviso is a negative covenant, namely, that the railroad company, in exercising its right to sell, its original right to make sales of the granted lands, shall not sell to anybody except actual settlers. The proviso, in a word, is prohibitive but not compulsory, and this has been the position of the Government itself, as will appear from the argument of counsel for the Government in the court below (Government Brief, p. 154):

"The terms of this proviso," say the counsel for the Government, in speaking of the proviso in the Act of April 10, 1869, "are prohibitive, and not compulsory; that is, it

prohibits sales except within the maximum limitations imposed. Each of the limitations is in the negative form—'actual settlers', 'quantities not greater', prices 'not exceeding'." The breach of such a negative covenant may be enjoined by a court of equity.

In the case of Singer vs. Union Embroidery Co., 22 Fed. Cas. 12904, the court said:

> "If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."

"Courts of equity", as said by the Supreme Court of Illinois, (Andrews vs. Kingsbury, 212 Ill. 97, 102) "will, and frequently do, interpose by injunction, thereby indirectly enforcing the performance of negative covenants by prohibiting their breach; and where there is an express negative covenant, courts of equity will entertain bills for injunction to prevent their violation, even though the

same will occasion no substantial injury, or though the remedy be adequate at law." (See also Chicago R'y. Co. vs. New York, etc., R'y. Co., 24 Fed. 516, 521-2, and cases cited therein.)

The suggestion that the Government has not been damaged by a breach of the negative covenant, and is therefore without remedy from that point of view, does not affect the intervention of a court of equity; and "stronger reasons apply when the suit is brought by the Attorney-General to enforce a public right." (Attorney-General vs. Algonquin Club, 153 Mass. 447, 454-5.)

"The very ground of the difficulty in proving damage" is a basis for the equitable interference by injunction. (Brown vs. Kling, 101 Cal. 295, 302.)

Notwithstanding the mere absence of pecuniary damage to the Government, yet, "Where the peculiar circumstances make a proper case for the intervention of a court of equity, it is justified, if necessary to the preservation of right and for the purpose of declaring the rights and the obligations of suitors." (Langan vs. Supreme Council, 174 N. Y. 266, 271.) See also Nichols vs. Southern Oregon Co., 135 Fed. 233, stated and explained at pages 524-5 *infra,* this brief.

We have, then, an unqualified right in the grantee to mortgage the land-grant for construction purposes. We have in the proviso a qualified right of sale—of sale, as distinguished from mortgage, and not of sale so qualified as to annul the right of mortgage and defeat the primary purpose of the grant. The right of mortgage, and as well the qualified right of sale, may both be preserved and harmonized by a reasonable construction of the statute. Redemption sales should not be confused with the qualified sales intended by the proviso. The maintenance of the proviso as a negative covenant may be enforced by equitable intervention and injunction, and the public right, if such there be, may be thus declared and maintained.

Without derogation, therefore, of the original and paramount purpose of the Granting Act, a construction is open which gives full faith and value to the construction mortgage, and at the same time gives meaning and effect to the Settlers' proviso of April 10, 1869.

The position of the government, in asking a forfeiture of this grant and its resumption into the public domain, must, it is believed, give the court pause. The right of the railroad company to mortgage in aid of construction, would seem to be denied, and the re-

demption sales are declared to be a cause of forfeiture. The settlement of the land is virtually argued to be the sole purpose, and the actual settlers are made to be the prime beneficiaries, of the statute. The forfeiture of this grant does not end with the destruction of the rights of the railroad company and of the security of the bondholders whose money built the road; it goes beyond this, takes the land out of entry and settlement and back into the public domain, extinguishes the rights and hopes of the settlers, and defeats what is claimed to be the policy of the act. By the imputed wrong of a railroad company, in making forbidden sales, for which the settlers are not responsible, and over which the settlers have no control, the rights of the settlers, now said to be the favored ones of the law, and as well the rights of the railroad company and of the bondholders, who are purchasers in good faith, go down in a common ruin.

II.

The settlers' clause or proviso is not in any view a condition subsequent.

Disregarding now, for the sake of argument, the primary and necessary right of the railroad company to mortgage the grant in

aid of construction, and disregarding likewise the distinction between a construction mortgage on the one hand, and original and direct sales, as such, of the land on the other, it is submitted that the so-called Settlers' Clause or proviso is not in any view a condition subsequent, entailing the consequence of forfeiture.

It will be convenient to set the amendment out: *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section six of an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said Act, to file its assent to such Act in the Department of the Interior within one year from the date of the passage of this Act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act: *Provided,* That nothing herein

shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land: *And Provided, Further,* That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre."

The introduction of the settlers' clause by the word "provided" will not be taken as decisive, nor would the expression "on condition", if it had been used. "Mere words should not be, and have not usually been, deemed sufficient to constitute a condition, and to entail the consequences of forfeiture of an estate; unless from the proof such appears to have been the distinct intention of the grantor, and a necessary understanding of the parties to the instrument." (Post vs. Weil, 115 N. Y., 366.) In the Post case, the clause ran: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public-house of any kind." The Court of Appeals of New York said:

"Although the words of the clause in question are apt to describe a condition subsequent reserved by the grantor, we are in no wise obliged to take them literally. In the consideration of what, by the use of these words, was imported into the conveyance, we are at liberty to affix that meaning to them, which the general view of the instrument and of the situation of the parties makes manifest. Whether they created a condition, or a covenant, must depend upon what was the intention of the parties; for covenants and conditions may be created by the same words." Chancellor Kent is quoted as follows: "Whether the words amount to a condition or a limitation or a covenant, may be matter of construction depending on the contract. The intention of the parties to the instrument when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument." And further: "The distinctions on this subject are extremely subtle and artificial, and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case."

The stress upon the intent of the parties is, if anything, weightier in the case of a legislative grant—at once a law and a conveyance. "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress." (Hall vs. Russell, 101 U. S., p. 509.) Courts will not willingly impute the intent to impose a condition subsequent with its consequences of forfeiture. In Wright vs. Morgan, 191 U. S., p. 58, the Supreme Court of the United States speaks "of the extreme unwillingness of courts to admit the existence of a common law condition, even when the word condition is used."

In Stanley vs. Colt, 5 Wall., 119, 121, the will of William Stanley, of Hartford, Connecticut, contained this provision: "After the decease of my said sister, Abigail Whitman, I give and devise the whole of my real estate, of every kind and description, except which is hereinbefore given unto my niece, Elizabeth Whitman, unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Society and their successors forever; Provided that said real estate be not ever hereafter sold or disposed

of, but the same be leased or left, and the annual rents or profits thereof applied, to the use and benefit of said Society, and the letting, leasing, and managing of said estate to be under the management and direction of certain trustees hereinafter named by me, and their successors to be appointed in manner as hereafter directed." The question was, whether the sale of this real estate, made some fifty years after the Ecclesiastical Society came into enjoyment of the property, was a breach of condition subsequent, for which the heirs of Stanley could re-enter, as for a forfeiture.

"It is true," said the Supreme Court of the United States, (Stanley vs. Colt, supra, p. 166) "that the word proviso is an appropriate one to constitute a common law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust." This same thought is expressed by the Supreme Court of the State of Oregon in City of Portland vs. Terwilliger, 16 Or. pp. 469-470, where the court says, among other things, "that if there

is any other reasonable construction which can be given to a deed so as to avoid a forfeiture, it ought to receive such construction."

Now, in Stanley vs. Colt, supra, the Supreme Court of the United States, on a consideration of the will, found it to be "quite clear that the trustees are clothed with the legal estate." But the intent of the testator, as the court saw it from the whole instrument, was to benefit the members of the Ecclesiastical Society. They were the "settlers" whom he had in his mind and in his policy as the beneficiaries of the land. While the trustees, like the Oregon Railroad Company, got the legal title in the first instance, Stanley, in the proviso, had subjected that title to certain qualifications, which the Supreme Court enumerated as follows:

"1. The estate is not to be sold or disposed of, but to be leased by trustees, and the rents paid over to the society.

"2. The leases are not to exceed thirty years in any one term.

"3. The estate is not to be divided in the event of a division of the society; and

"4. It is to be managed and directed exclusively by trustees who are appointed in

the will, and by their successors; the surviving trustees to appoint when a vacancy happens."

Was it Stanley's intent that a sale of this land by the trustees, clothed as they were with the legal title, should work a forfeiture against the objects of his bounty, the members of the Ecclesiastical Society? Did he intend, in passing the legal title to the trustees, to put it in their power, by a breach of the clause against sales, to extinguish the rights of the society? It was the benevolent intention of Congress, we are now told, to forbid the sales of the Oregon land grant, except to actual settlers—they were the exclusive beneficiaries of the statutory policy; the land was intended and was to be kept, for them. Did Congress intend that the railroad company, by making sales of the land to people who were not settlers, should have it in its power to cause a forfeiture of the grant, and, by consequence, to destroy any interest or expectations of innocent and helpless settlers? Was Congress writing a condition subsequent into the settlers' clause, and thereby frustrating its own purpose and policy? Or was Stanley, in the will which embraced the Ecclesiastical Society within its policy and bounty, imposing a condition subsequent when he forbade a sale of the land by the holders of the legal title?

"The question is," said the Supreme Court in speaking of the terms of Stanley's will, "whether these are strict common law conditions annexed to the estate, a breach of which, or of any one of them, will work a forfeiture, defeat the devise, and let in the heir; or, whether they are regulations for the guide of the trustees, and explanatory of the terms under which he intended the estate should be managed, with a view to the greatest advantage in behalf of the society?

"The difference between the two interpretations and the consequences flowing from them, is very material. As we have seen, a condition, if broken, forfeits the estate, and forever thereafter deprives the society of the gift; and not only this, but the heirs become seized of the first estate, and avoids, of course, all intermediate charges or incumbrances, and takes also free and clear all the expenditures and improvements that may have been laid out on the property.

"On the other hand, if these limitations are to be regarded as regulations to guide the trustees, and explanatory of the terms upon which the devise has been made, they create a trust which those who take the estate are bound to perform; and, in case of a breach, a court of equity will interpose and enforce

performance. The estate is thus preserved and devoted to the objects of the charity or bounty of the testator, even in case of a violation of the limitations annexed to it."

And the court concludes, "that the construction, urged by the plaintiffs, of the will, importing a condition, a breach of which forfeits the devise is not well founded."

But there is more against the asserted condition in the settlers' clause, than there was in the Stanley case. Congress, in the amendment of April 10, 1869, was not committing itself on the merits of the dispute between the east side and the west side company. It was according permission, not to the east side company, eo nomine, but to "any railroad company heretofore designated by the legislature of the State of Oregon in accordance with the first section of said Act (Act of July 25th, 1866) to file its assent to such Act in the Department of the Interior within one year from the date of the passage of this Act." Then follow the two provisos— not alone the proviso in respect to the settlers, but two provisos. We set them out just as they are printed in the amendatory Act:

"*Provided,* That nothing herein shall impair any rights heretofore acquired by any

railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land: *And Provided, Further,* That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre."

This court will not be asked to say that the word provided, used twice in the same sentence, should be given two different meanings. It was not necessary to use it twice at all. It could have been used once just as well, and the sentence would then have read: "Provided, That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land, and that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre."

Does the word "provided" import a condition in that context? Does it mean "on condition"? The amendatory Act, after giv-

ing permission to "any railroad company heretofore designated," in the language already quoted, to file its assent in the interior department, goes on to say: "And such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act." Then come the two clauses beginning with the word provided. Substitute the phrase, "on condition," for the term "provided," and see how the statute reads:

"And such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act: On condition, That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land: And On Condition, Further, That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre."

No congressman, or lawyer, or man on the street who could speak and write English, would have used the phrase "on condition," as introductory to the recital "that nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land." There is nothing like a condition subsequent here. It is plain enough that the introductory word "provided," actually and correctly used in the statute as written, carries here no implication of a condition subsequent. Is a different meaning or purpose to be ascribed to it in the next clause of the same sentence?

In the Act of May 4th, 1870, by which a grant was made in terms to the West Side line, there is also a settlers' clause, but the word "provided" will not be found in that clause, nor any other artificial or technical term available and usual in the expression of a condition subsequent—nothing beyond a simple declaration that the granted land shall be sold only to actual settlers, in the limited tracts, at the specified prices. Section 4, the one in view, reads:

"*And be it further enacted,* That the said alternate sections of land granted by this

Act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding Two Dollars and Fifty Cents per acre."

Congress did not intend that the settlers, under the East Side grant, as amended on April 10, 1869, should be better off, or, for the matter of that, worse off, than the settlers under the West Side grant of May 4, 1870. If the word "provided" was put into the amendment of April 10, 1869, in aid and expression of the intent of Congress to impose a condition subsequent, why not also, or some equivalent term of art, in the Act of May 4, 1870?

There is nothing in the settlers' clause of April 10, 1869, nor, indeed, in the settlers' clause of the West Side grant of May 4, 1870, giving the right to re-enter for condition broken. "It may be noted," says the Court of Appeals of New York, speaking of the deed in Post vs. Weil, 115 N. Y., p. 371, "that there is no clause in the deed giving

the right to re-enter for condition broken. While the presence of such a clause is not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor or his heirs to re-enter, yet its absence, to that extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-entry clause might make certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance, in connection with the circumstances of the case and the intent to be fairly presumed therefrom."

More than this, wherever, in the grant of July 25, 1866, Congress intended to attach the penalty of forfeiture and reverter to the breach of a condition subsequent, it said so in express terms; it did not, as in the settlers' clause, omit to say so, and where Congress intended some penalty, other than the reverter of the estate, for the breach of a given requirement of the grant, like the requirement for the upkeep of the road after completion, it provided, in that event for a temporary sequestration of the railroad and its income, or for the assessment of a pecuniary responsibility not to exceed the value

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of the granted lands. Sections 6 and 8 are the illustrative sections.

It is enacted in Section 6 that the companies, the California company and the Oregon company, shall file their assent within one year from July 25, 1866, shall complete the first twenty miles within two years, and at least twenty miles in each succeeding year —final completion to be made on or before July 1, 1875. Here are two requirements,—one, the filing of the assent; and the other, the construction of the road within the stipulated time. Section 8 takes up these two requirements, and for a failure to keep them, avoids the grant and forfeits all unpatented lands to the government. This same section deals with the upkeep of the road after completion, and for a delinquency in that regard attaches a penalty, likewise express in terms but less drastic in quality—the temporary sequestration of the road and its income, and the assessment of a pecuniary responsibility on the company. The language of Section 8 is as follows:

"Sec. 8. *And be it further enacted,* That in case the said companies shall fail to comply with the terms and conditions required, namely by not filing their assent thereto as provided in section six of this act, or by not

completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act."

The West Side grant of May 4, 1870, is also instructive, in conditioning the estate upon the completion of the construction work within the period designated, and only upon that. Section 6 of this Act reads:

"Sec. 6. *And be it further enacted,* That the said company shall file with the Secretary of the Interior its assent to this Act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of

twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date."

Whatever restriction, therefore, upon the generality of the grant may be carried by the settlers' clause, the grants to the two companies show, by express terms, the intent of Congress not to revoke the grants except for failure to complete the work within the designated period, and, in the case of the East Side grant, for failure to file the assent within the year. If Congress had intended to attach the same consequence and forfeiture to the settlers' clause, it would have said so. That it did not say so, while saying this very thing industriously and expressly in respect to the failure to construct, makes an apt case of *expressio unius*. The internal evidence of the granting acts themselves is irresistible. In Deseret vs. Tarpy, 142 U. S. p. 248, the Supreme Court of the United States said:

"In Wisconsin Central Railroad Co. v. Price County, 133 U. S., 496, 507, referring to the different acts of Congress making grants to aid in the construction of railroads, we stated that they were similar in their general provisions, and had been before this Court for consideration at different times,

and of the title they passed we said: 'The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by Congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant.' "

To the point, also, is the recent decision of the Supreme Court of the United States in Green County vs. Quinlan, 211 U. S., 582, 594, 595. "It frequently has been the case," says the court, "that the word condition has been used in written instruments in a looser and broader sense than the law attaches to it. In ascertaining the true meaning of instruments in writing courts do not confine their attention to single words, phrases, or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals. This general rule of interpretation often makes it manifest that that which is called a condition is really but a covenant or agreement, to be performed independently of the counter obligation with which it is associated. When such an intent is discovered the courts have no difficulty in giving it effect, though the

result be to disregard the technical meaning of the word condition." Speaking, now, of the omission from one phase of the instrument of language which had been used in another connection to impose a condition subsequent, the Supreme Court used this language: "A consideration of the vote of the county leaves no doubt that that part of it which prescribed the nature of the railroad construction was not a condition. It would have been easy to have postponed the obligation to pay the bonds until the construction had been completed, as desired by the county. Such a provision as that in Provident Life and Trust Company vs. Mercer County, 170 U. S. 594, would have been enough. Indeed, the draftsman need not have looked afield. Nothing need have been done except to use the same language with reference to construction which he used in this vote with reference to exoneration from the prior subscription to the stock of another railroad. There he said that the subscription should be 'upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest' until the exoneration had happened. *The studied omission of this apt, clear and emphatic language from the part of the vote dealing with the construction of the Cumberland & Ohio Railroad is of controlling significance.* If

the question rested upon the comparison of language alone, it would be quite enough to warrant the inference that it was not intended that the condition which was imposed in the one case should be equally imposed in the other."

It would seem unnecessary to labor the point further, but reasons multiply against the condition subsequent. Nichols vs. Southern Oregon Co., 135 Fed., 233, was the case of a land grant by Congress (15 Stat., 340, March 3, 1869) in aid of the construction of a military wagon road from Roseburg, Oregon, to the navigable waters of Coos Bay. The grant was made in the same year in which the East Side grant was amended by the introduction of the settlers' clause. But whereas, in the East Side grant, the settlers' clause is not said to be a condition, either in terms or in effect, now, in this wagon road grant to the State of Oregon, the settlers' clause, introduced by the word "provided" is declared to be "upon the condition" that the land shall be sold to any one person only under the statutory restrictions. The precise language is: "Provided, further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and at a price not ex-

ceeding $2.50 per acre." The omission from the settlers' clause in the amendment of April 10, 1869, of the expression "upon the condition," when that expression had been industriously and studiously inserted in the proviso of a land grant made just a month before, is significant. But the Nichols case goes to another point—that the grantee of the lands was not, by force of the grant, or under the proviso, compellable to make sales of the land at all or to anyone. Nichols contended "that the grant in question is in effect an offer to sell the granted lands, to aid in building the road mentioned, in quantities of not more than one-quarter section to any one person, at $2.50 per acre, and that the title acquired by the state was upon this trust." The court said: "The grant was not a law for the sale of the granted lands. It did not offer them for sale. That was left to the state, subject to restrictions as to the price at which they should be sold and the quantity that should be sold to any one person. These restrictions were mere incidents of the grant, mere regulations that the state was required to observe in selling the granted lands, at such time after they were earned as the state should conclude to sell them. The object to be accomplished in no wise depended upon them. Whatever rights existed in respect to these restrictions belonged to the

United States. No interest was created in the complainant. He is not a beneficiary in the grant, and he has no standing to complain that the state has violated its conditions in the manner in which it has disposed of the granted lands. That is a matter that can only be taken advantage of by the United States."

In Los Angeles Terminal Co. vs. R. R. Co., 136 Cal. pp. 39-40, 44, 48, plaintiff's deed of land to a yacht club provided: "It is hereby covenanted and agreed by and between the parties hereto, that, in consideration of this conveyance, no saloon business or business of vending malt, vinous, or spiritous liquors, shall ever be carried on in said lot, neither shall said lot be used for any business or store purposes other than for hotel or lodging house or club purposes." The court took this to be a covenant, but not as requiring the yacht club actually to use the land for hotel or lodging house or club purposes. "The covenant," said the court, "was not that the yacht club *would* use it 'for hotel, lodging house, or club purposes,' for any time or at all." And again: "No easement in favor of other land of the plaintiff was created by the covenant. It compelled no use of the land by the covenantor for any purpose, and conferred no right upon the owner of other lands in respect to the land granted."

Indeed, while the government has argued for a special purpose in the Oregon land grant, looking to the distribution of the land, by sales in small parcels at low prices to settlers, it has not been argued by the government—to the contrary, it has been admitted and affirmed—that the railroad company was not compellable, under the settlers' clause, to make sales to settlers at all. Sales to settlers may be made by the railroad company, but they are not mandatory, the thing is optional and permissive to the grantee. The railroad company may or may not do that thing, but the grant has not been coupled with the necessity for doing it, and it is not made to depend upon it. These are not the features of a condition subsequent. In Stuart vs. Easton, 170 U. S., p. 401, the Supreme Court of the United States reviews the case of Methodist Church vs. Public Ground Co., 103 Pa. St. 608, and quotes therefrom the language used by Mr. Chief Justice Bigelow in a Massachusetts case, as follows: "We know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money or the doing of some act

by the grantee on which the grant is clearly made to depend."

And the settlers themselves—are they compellable to buy from the railroad company? That is for them entirely a matter of personal inclination and choice. If the railroad company should offer the land for sale along the lines of the settlers' clause, it is purely a matter of option with the settler whether to exercise his privilege or not; and if he fails to exercise it for a reasonable time—and the grant is now nearly half a century old—is the title to this land to be clogged indefinitely by an outstanding, unexercised privilege? In this same Pennsylvania case, reviewed by the Supreme Court of the United States, in Stuart vs. Easton, supra, the court said: "The obligation which the vendees assumed to furnish water to the vendor was, at the most, a covenant only. Whether they could ever be called on to fulfill it, depended on whether the vendor should avail himself of the privilege of erecting a hydrant. It was purely optional with him whether or not to exercise that right. If he failed to do so within a reasonable time, it would be against public policy to hold that his unexercised privilege should cast a clog on the title for an indefinite time."

Again, certain purposes are specified in the Oregon land grant, which inure specially to the benefit of the grantor—the United States government. Under Section 5 of the Act of July 25, 1866, the companies—California company and Oregon company—"shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit dispatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and the government shall at all times have the preference in the use of said railroad and said telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service."

Further, in Section 5, it is provided: "Said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States, and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States." And Section 8 provides: "In case the said road and telegraph line

shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the land granted by this act."

But the settlers' clause was put into the amendment of April 10, 1869, for the sake of the settlers; it inures peculiarly to their benefit—so much is clear, and such is the position taken by the government in this case. U. S. vs. Des Moines Navigation & Railway Co., 142 U. S. 510, 538, 539, 540, is illustrative. Congress, on August 8, 1846, made a land grant to the territory of Iowa, to aid in the improvement of the navigation of the Des Moines river. Subsequently, by conveyance of May 3, 1858, from the Governor of Iowa, then a state, title to something over 266,000 acres of the granted land passed to the Navigation and Railway Company. The validity of that title was affirmed by the Supreme Court of the United States. The court found "a concurrence of opinion on the part of the Supreme Court of Iowa and

this court for a quarter of a century in favor of the validity of the title acquired by the Navigation Company. It would seem as though the period of rest as to the question of the title ought by this time to have been reached."

The opinion by Mr. Justice Brewer proceeds: "But the government is the complainant, induced doubtless to bring this suit by the act of the legislature of March 28, 1888, which purports to relinquish for the State its trust and to reconvey to the United States all its right and title to these lands, as well as by the urgent appeals of the settlers, and the claim is, that its presence as a party introduces new questions into the litigation, questions not at all affected by the prior decisions. It is the original grantor, and its contention is that while the title of its grantee may be unassailable by other persons, it has the right to challenge it because the grant was made in trust for a specific purpose, and that trust has not been properly executed, nor the lands appropriated to the purposes thereof. That the proposition of law which underlies this claim is correct, cannot be doubted. The grantor of lands conveyed in trust may be the only party with power to complain of the breach of that trust, or on account of such breach to challenge the

title in the hands of the trustee or others holding under him; and the title conveyed, voidable alone at its instance, may be good as against all the world besides."

The court goes on: "While it is undoubtedly true that when the government is the real party in interest, and is proceeding simply to assert its own rights and recover its own property, there can be no defence on the ground of laches or limitation, United States v. Nashville, Chattanooga &c. Railway, 118 U. S. 120, 125; United States v. Insley, 130 U. S. 263; yet it has also been decided that where the United States is only a formal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the government is involved, the defence of laches and limitation will be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of private parties."

And finally: "We should be closing our eyes to manifest facts if we did not perceive that the government was only a nominal party, whose aid was sought to destroy the title of the navigation company and its grantees, in order to enable the settlers to perfect their titles, initiated by settlement and oc-

cupancy; and in that event, the delay of thirty years is such a delay as a court of equity forbids."

So far, then, as the settlers' clause is concerned, and any rights or privileges which it may imply, the government of the United States is a nominal party—the real parties in interest are the settlers, and they are here, in this record, by hundreds and thousands. If the proviso of April 10, 1869, is an invitation to settle, it is extended to the general public from whom the settlers are drawn; it inures to the benefit of the public generally. A proviso of that kind is not a condition subsequent.

In Greene vs. O'Connor, 18 R. I., 57, 59, 60, Clarke and Greene had granted a strip of land to the City of Providence, Rhode Island, by deed containing the following clause: "This conveyance is made upon the condition that the said strip of land shall be forever kept open and used as a public highway and for no other purpose."

"Nor do we think," says the Supreme Court of Rhode Island, "that the clause quoted created a condition subsequent. Conditions subsequent, as is well understood, are not favored in law. A deed will not be con-

strued to create an estate on condition unless language is used which according to the rules of law, *ex proprio vigore,* imports a condition, or the intent of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. If it be doubtful whether a clause in a deed be a covenant, or a condition, courts will always lean against the latter construction."

The court continues: "The clause in question is merely a declaration of the purpose for which the land conveyed was to be used and improved, to wit, as a public highway. It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not carried out, nor does it reserve to the grantors and their heirs the right, in that event, to reenter on the land and resume possession of it as of their former estate. Moreover, the purpose declared is in its nature general and public and not one enuring specially to the benefit of the grantors. Such a declaration does not create an estate on condition, but merely imposes a confidence or trust on the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified:

Finally: "It matters not that the statement of the purpose for which the land was

conveyed is, as in the present instance, in the form of a condition. The employment of apt words to create a condition does not necessarily and invariably have that effect; for these may give way to the intent of the party as ascertained by a construction of the instrument. Sohier v. Trinity Church, 109 Mass. 1, the clause in the *habendum* declaring the purpose of the conveyance was 'in trust, nevertheless, and upon condition always,' etc., and it was held that though the words 'upon condition' were appropriate to create a condition, they did not of necessity have that effect, and did not in that case."

It is now submitted, as beyond doubting, that the settlers' clause is not a condition subsequent. There is no room here to invoke the rule that, where a legislative grant is of doubtful scope (Ry. Co. v. Oregonian R. Co., 130 U. S., p. 26) a construction should be adopted favorable to the interests of the public. Nor would this rule help the case of the government. From whatever point of view, the Oregon land grant should not be subjected to illiberal construction at the expense of the railroad company. That was not the spirit or the consideration moving the grant. The difficulties and hazards of the enterprise are portrayed in the opinion of the Supreme Court of the United States in the

Union Pacific case, 91 U. S., 72, and in Platt vs. Union Pacific R. R. Co., 99 U. S., 48; and are realized to the full in the story of railroad construction in Oregon, as told by this record, a story of stormy and disastrous years to which the turning point is given by the intervention of the Southern Pacific Company. The Oregon land grant was not a donation or a charity. It was taken on valuable consideration and at tremendous risk; it wrecked fortunes and careers; it brought bankruptcies and reorganizations in its train. "Reasons of economy," said the Supreme Court in the Union Pacific case, "suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements." And again: "It is true, the scheme contemplated profit to individuals; for without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise." And still again: "The primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end,—the securing a road which could be used for its own purpose." In the Platt case, the Supreme Court said: "The adventurers who obtained the charter and who accept it undertake to construct and maintain the public work. Their undertaking is the consideration of the grant, and without

legislative consent they cannot throw off the obligation they have assumed." And again: "The construction of a railroad through such a region was most uninviting to private capitalists. To induce them to embark in the enterprise was the overshadowing motive that dictated the act of 1862. This is apparent in almost every line of the act. For this reason the grants of land were made, the rights of way and of taking materials were given, and the subsidy bonds were loaned, to be repaid only at the expiration of thirty years, with interest payable only at the expiration of that period. Even this was not enough. No association and no persons were found willing, with all this proffered assistance, to undertake the construction of the road. But so earnest was Congress to induce the corporators to attempt the work, that in 1864 additional aid was proffered, the grant of lands was doubled, and new privileges were conferred. We do not now attempt to portray the earnestness—the all-absorbing earnestness—with which Congress sought to secure the construction of the road by private enterprise. It was well exhibited in United States v. Union Pacific Railroad Co. (91 U. S. 72), to which we refer. Suffice it to say, the purpose of Congress, above all others, was to obtain the construction of the railroad by the corporation it created to undertake

the work. For that alone the subsidy bonds were given. Only for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise."

Beyond all this, we have called attention to the special purposes and considerations, expressed on the face of the granting Act in Sections 5 and 8, and inuring to the benefit of the government of the United States. (U. S. v. R. Co., 98 U. S., pp. 613-614) The railroad companies assumed all that obligation. As the Platt case says, "they cannot throw off the obligation they have assumed." And they are within the right of this case, on the broadest view of the matter, in appealing to the just and reasonable rule of the Supreme Court in the case of United States vs. Denver & Rio Grande Railway Company, 150 U. S. 1, 14:

"It is undoubtedly, as urged by the plaintiffs in error," says the court, "the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In Winona & St. Peter Railroad v. Barney, 113 U. S. 618, 625,

Mr. Justice Field, speaking for the court, thus states the rule upon this subject: 'The acts making the grants . . . are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together."

"Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court

a more liberal construction in favor of the purposes for which it was enacted."

In the case of public grants, "The construction is in favor of the State, *unless* the grant is based on a consideration moving from the grantee, in which case the grant is, it appears, construed as is a private grant—in favor of the grantee." (17 Am. & E. Enc. Law, p. 14.)

In Langdon vs. Mayor, 93 N. Y. 129, it is said in the opinion by Mr. Justice Earle:

> "But so far as I have discovered, this rule has never been applied—certainly not in its full extent, to grants made for the benefit of the sovereign upon adequate valuable consideration paid to the sovereign for the thing granted. In 2 Blackstone's Com. 347 it is said, 'A grant made by the King at *a suit of the grantee,* shall be taken most beneficially *for* the King as *against* the party; whereas the grant of a subject is construed most strongly *against the grantor.* Wherefore it is usual to insert in the King's grants that they are made not at the suit of the grantee, but *ex speciali gratia certa scientia et mero motu regis;* and then they have a more liberal construction.' The reason generally given for the rule

> is that in a grant proceeding from the application of the subject, the grantee ought to know what he asks, and if that does not appear, nothing shall pass from the King by reason of the uncertainty."

Judge Earle quotes from the Massachusetts case of the Charles River Bridge, 7 Pick. 344, as follows:

> "There are some legislative grants, no doubt, that may admit a different rule of construction, such as grants of lands on valuable consideration and the like. It is that, when the King's grants are upon a valuable consideration, they shall be construed favorably to the patentee for the honor of the King."

In this Massachusetts case just noted, when it came before this court Mr. Justice McLean said:

> "The general rule is that 'a grant of the King at the suit of the grantee is to be construed most beneficially for the King and most strictly against the grantee,' but grants obtained as matter of special favor of the King or on consideration, are more liberally construed."

Charles River Bridge vs. Warren Bridge, 11 Pet. 557.)

In the same case Mr. Justice Story says:

"It is a well-known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails in cases of grants by the King; for, where there is any doubt, the construction is made most favorably for the King, and against the grantee. The rule is not disputed; but it is a rule of very limited application. To what cases does it apply? To such cases only, where there is a real doubt, where the grant admits of two interpretations, one of which is more extensive, and the other more restricted; so that a choice is fairly open, and either may be adopted, without any violation of the apparent objects of the grant. If the King's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail; for the reason (says the common law), 'that it will be more for the benefit of the subject, and the honor of the King, which is

to be more regarded than his profit.' Com. Dig. Grant, G. 12; 9 Co. 131-a; 10 Ibid. 67-b; 6 Ibid. 6. And in every case the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the King. And if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced. The rule itself is also expressly dispensed with, in all cases where the grant appears, upon its face, to flow not from the solicitation of the subject, but from the special grace, certain knowledge, and mere motion of the crown; or, as it stands in the old royal patents, *ex speciali gratia, certa scientia, et ex mero motu regis.*" (See Arthur Legat's case, 10 Co. 109, 112-b; Sir John Moulin's case, 6 Ibid. 6; 2 Bl. Com. 347; Com. Dig. Grant, G. 12); and these words are accordingly inserted in most of the modern grants of the crown, in order to exclude any narrow construction of them. So the court admitted the doctrine to be in Attorney-General vs. Lord Eardly, 8 Price 39. But what is a most important qualification of the rule, it never did apply to grants made for a valuable consideration by the crown; for in such grants, the same rule has always prevailed, as in

cases between subjects. The mere grant of a bounty of the King may properly be restricted to its obvious intent. But the contracts of the King for value are liberally expounded, that the dignity and justice of the government may never be jeoparded by petty evasions and technical subleties."

In the 3rd Volume of Washburn's Treatise on Real Property (3rd Ed. 172), it is said:

"This strictness of construction in favor of the sovereign and against the subject applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant. Nor, as it seems, is the rule applicable where the grant is for a valuable consideration. In such cases the rule of construction between the government and the subject is the same as between private grantors and grantees."

Moon vs. Salt Lake County, 27 Utah 436, was the case of a railroad land grant, and the court there said:

"That all such legislation by Congress was designed to enhance the interest of the government as well as to aid such en-

terprises, is apparent from the terms of the various grants for railroad purposes. At the times when the several acts in aid of intermountain and transcontinental railroads were passed there were yet immense tracts of public lands unsettled and uncultivated—doubtless recognizing the fact that railroads are most powerful instruments to promote civilization and upbuild a country Congress intended to adopt a policy of liberality in enactments of the kind under consideration to induce capital to engage in the building of such roads over the public domain, and thereby reclaim and render habitable and productive a section of country hitherto almost valueless—little more than a barren waste. That the policy of the government has been productive of great public benefit can scarcely be doubted when it is considered that acres of the public domain have been rendered accessible by the railroads which obtained the grant, and constitute the homes of multitudes of citizens who add materially to the public revenues, and that postal, military and other government service may now be carried on in this intermountain region with the same facility as in other parts of the country. In construing acts making grants of such

> character offering inducements to individuals and corporations to engage in such expensive quasi-public enterprises, the courts will, without hesitation, look into the condition of the country, the circumstances existing at the time of their passage, and the purposes to be accomplished, and will give such construction as will carry out the designs of the law-making power."

It is submitted, then, in the first place, from the terms of the Settlers' Proviso itself, and from the internal and irresistible evidence of the Granting Acts, that the Settlers' Clause, without ambiguity and without doubt, does not import a condition subsequent; and, in the second place, that the grant in question was made upon a valuable consideration and must be construed accordingly, and therefore liberally. But the question here is of briefer compass. It is not a question of the general scope of the grant, of the consideration passing from the government to the grantee, and whether that consideration should be restricted in favor of the grantor, or liberally construed, in the special circumstances, in favor of the grantee. It is a later and an ulterior question, it is a question of condition subsequent. After this grant has been ascertained by the rules of

construction, whether liberal or illiberal, the question then comes up of forfeiting that grant, whatever it is and such as it has been found or made to be by construction. The benign, consistent, and settled rule then applies, that if, on any reasonable construction the estate, such as it is, can be saved from forfeiture, such interpretation will be indulged.

"We are of the opinion," says the Supreme Court of Iowa in Courtright vs. Railway Co., 35 Iowa 397, "that benefits to result to the Government from a particular construction must not determine the proper interpretation of the law. The Government would doubtless be benefited by restrictions and limitations upon the grant which would operate to defeat it, but this fact should rather weigh against such a construction than in its support. These views are not in conflict with the rule recognized in Dubuque & Pacific R. R. Co. v. Litchfield, 23 How., 66, cited by defendants' counsel, to the effect that in construing a legislative grant, if the words fairly admit of different meanings, that one must be adopted which is most favorable to the interests of the public."

In the case of New York Indians vs. United States, 170 U. S., pp. 25-6, it was said by the

Supreme Court: "But even if it were conceded that the rights of the Indians were subject to forfeiture by executive action, it is by no means certain that the contingency ever happened which authorized such forfeiture; or, if a forfeiture did result, it was not waived by the subsequent action of Congress. *A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him, and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture.* Jones on Real Prop. Secs. 678, 679."

This was the case of a public grant. But an attempt has been made to parry the force of the case by suggesting a new and special doctrine for conditions subsequent when imposed on Indians—a sort of differential tenderness of construction. The court does not say anything of that kind, it does not intimate it. Instead of putting Indian conditions into a class by themselves, it lays down, in general terms, the well-settled rule of a construction against forfeiture, and cites Jones on Real Property. The author, at the place

cited, uses this language, and it is the language carried word for word into the opinion of the Supreme Court:

"678. A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him and in favor of the grantee.

"679. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture."

Davis vs. Gray, 16 Wall., 203-4, 229-230, was also the case of a public grant, a land grant to a railroad company, and it was in speaking of such a grant that the Supreme Court of the United States said: "Conditions subsequent are not favored in the law." Morgan vs. Rogers, 79 Fed., 578, 579, was concerned with "the act of congress of May 21, 1872, to enable the city of Denver to purchase certain land in Colorado for cemetery purposes, and authorizing the mayor of the city of Denver to enter the designated 160 acres at the land office at the minimum price, to be held and used as a burial place by said

city and vicinity," and it was held that the Act of Congress "did not operate to annex any condition to the grant so authorized." The court said: "Conditions subsequent are not favored, and the terms used must clearly show that it was intended that the grant should be on condition, or they will not be construed to have that effect." When the question whether the Act of Congress in the Morgan case should be construed as a condition subsequent, came before the Supreme Court of the United States, that court again affirmed the general rule, without making any discrimination between a congressional grant and a private grant. "In view," said the Supreme Court, "of the extreme unwillingness of courts to admit the existence of a common law condition, even when the word condition is used, it needs no argument to show that there was no condition or limitation here." (191 U. S., 58)

Judge Cooley has expressed the rule admirably in Kiefer vs. German-American Seminary, 46 Mich., 640, a case of a legislative grant to a corporation in aid of construction. "The general rule," he says, "undoubtedly is, that public grants are to be construed strictly as against the grantees. U. S. v. Aredondo, 11 Pet. 544; Martin v. Waddell, 16 Pet. 367; Dubuque, etc., R. Co. v. Waddell,

23 How. 66; Baltimore v. Railroad Co., 21 Md. 50; Bradley v. Railroad Co. 21 Conn. 294; Richmond v. Railroad Co. 21 Grat. 614; Delaney v. Ins. Co. 52 N. H. 581; La Plaisance Bay Harbor Co. v. Monroe, Wall. Ch. 155; Pennsylvania R. Co. v. Canal Com'rs, 21 Pa. St. 22. The grantee shall take nothing which is not plainly granted, and as is said in the case last cited, 'every resolution which springs from doubt is against' him. But there is no question in this case in respect to the grant: its terms are clear and precise and its extent undisputed. The controversy arises upon the terms of a restraint imposed by the grant, and which is in the nature of a condition subsequent, and tends to a defeat of the grant by way of forfeiture. *If the grant is to be construed strictly as against the grantees, the condition is to be construed strictly against the state; and the state is entitled to enforce it only when a forfeiture would be fairly within the intent of the act whereby the grant was made.* The purpose of construction is to give effect to an instrument; not to defeat it, (Rice v. Railroad Co. 1 Black. 358; People v. Burns, 5 Mich. 114; Tabor v. Cook, 15 Mich. 322;) and in a public grant especially more than in any other, we should expect to find provisions looking to the permanent enjoyment of the right of property granted as against mere

technical breaches of contract or condition on the part of the grantee, not tending to defeat the general purpose."

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract"—and the grant here expresses the contract of the parties (U. S. v. R. Co., 98 U. S. pp. 613-614)—"is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done." (Ins. Co. v. Dutcher, 95 U. S. p. 273.)

The practical interpretation of the Oregon Land grant, what the parties have done under it, and for the better part of half a century, does not make the proviso of the settlers' clause into a condition subsequent. It appears from paragraph (e) of Item 8, SUBDIVISION VI of the "stipulation as to the facts" in the case at bar, that, prior to May 12th, 1887, the Oregon and California Railroad Company had sold 163,420.28 acres of the granted lands—in many instances in the allotments and at the prices of the settlers' clause. Prior also to May 12th, 1887, and between 1871 and 1877, as paragraph (a) of the same item shows, the government patented to the East Side Company, more precisely

to its successor, the Oregon and California Railroad Company, 323,078.68 acres of granted land, contiguous to the first 125 miles of railroad. It appears, in the same place, that no further patents, under the East Side grant, were issued until 1893, and, in the following subdivision of the same item, that no patents under the West Side grant were issued prior to 1895. From Item 2, Subdivision VIII of the stipulation, it appears that between 1893 and 1906 the government patented to the Oregon and California Railroad Company 2,422,708 acres of the East Side grant; and between 1895 and 1903, 128,618.13 acres to the same company, of the West Side grant. These patents, it appears from the same item, were not issued at one time, but from time to time between 1893 and 1906, and pursuant to applications made by the Oregon and California Railroad Company from time to time between 1876 and 1906, a period of thirty years.

While the sales made prior to May 12th, 1887, as just noted, to a large extent pursued the allotments and prices of the settlers' clause, it appears that from 1894 to 1903, (Item 4 Subdivision VIII) the Oregon and California Railroad Company sold some of its granted lands "to persons not actual settlers in quantities exceeding 160 acres to one

person, and at prices exceeding $2.50 per acre; and in several instances, between the said dates, the said Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one purchaser at prices ranging from $5.00 to $20.00 per acre, in one instance at $35.00 per acre, in one instance at $40.00 per acre, and in one instance a sale of 45,000 acres at $7.00 per acre was made by the said Company to a single purchaser."

From Item 5 of the same Subdivision, it appears: "The defendant Oregon and California Railroad Company has heretofore made approximately 5,306 sales of its land-grant lands, aggregating 820,000 acres; approximately 4,930 of which sales were for quantities not exceeding 160 acres to one purchaser, aggregating about 296,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres."

Item 6 stipulates as follows: "Substantially all of the said 524,000 acres were sold to persons other than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of $2.50 per acre; approximately 478,000 acres of which 524,000 acres were sold since the year 1897; and approximately 370,000 acres of the said

524,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser."

The transactions in these granted lands are multiplied by the circumstance that frequently the conveyance of the land was preceded by an executory contract, providing for serial, deferred payments. Item 7 of Subdivision VIII reads:

"Approximately three-fourths, in number, of all sales made since the year 1897, were made by Contracts providing for payment of purchase price in from five to ten equal annual payments, and execution of conveyance upon final payment; many of which sales were still pending under such Contracts on January 1st, 1903, the conveyances under which were executed from time to time after January 1st, 1903, and a considerable number of said Contracts were still pending when this suit was brought."

"Item 8. Of the total sales made as aforesaid, 4508 had been fully executed and conveyances given aggregating 740,002.45 acres at the time the said printed Joint and Several Answer was filed; and at said time 571 executory Contracts were still pending, aggregating 81,684.31 acres."

When the Joint and Several Answer was filed in this case, "there remained (Subdivision IX, Item 1) unsold of said granted lands, 2,360,492.81 acres, of which 2,075,616.45 acres were theretofore patented unto the Oregon and California Railroad Company under the said land-grants, and 284,876.36 acres thereof at that time remained unpatented; all of which unsold lands are claimed by the said Oregon and California Railroad Company under and by virtue of the said land grants."

This is what the parties have done under the grants. It is a story of mortgages and sales, executory contracts and conveyances, and a stream of government patents flowing in between. These things were known of all; they were matters of common knowledge, of notoriety, of public record; the railroad knew them, the people knew them, the government knew them. The mortgaging, and the public record of that transaction, was plain notice to the government that the lands were being held for sale, and were covenanted to be sold in quantities and at prices satisfactory to the trustee for the bondholders, and that the proceeds of these sales were to be applied in redemption of the construction mortgage. Public and record notice of that provision was conveyed to the government upon the

face of the mortgage of 1887, to the Union Trust Company of New York, given to refund the construction debt and complete the road, and to secure outstanding bondholders who advanced, in good faith, $17,745,000 (Subdivision VII, Item 19) and whose rights of lien are sought to be forfeited and confiscated in this proceeding. Can the government or did the government "close its eyes to manifest facts" (U. S. v. Navigation & Railroad Co., 142 U. S. p. 540)—to the mortgages and the sales, the executory contracts and the conveyances of these granted lands, extending over the greater part of fifty years? Was Congress unaware of the action of the President and of the Land Department in consistently patenting these lands all along to the railroad company? "Undoubtedly," said the Supreme Court of the United States in U. S. v. Northern Pacific R. Co., 177 U. S. 441, 442, "there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approved of the same. *It is not, as put by the counsel of the Government in his able brief, the case of a waiver presumed from mere non-action but from non-action in the special circumstances disclosed.*"

"We do not think," said the same court in Deseret v. Tarpey, 142 U. S. p. 253, speaking of the provision of the Act of Congress requiring the payment of the costs of survey and the patent fees by the Railroad Company on application for a patent—"We do not think the provision was designed to impair the force of the operative words of transfer in the grant of the United States, or to invalidate *the numerous conveyances by sale and mortgage of the lands made by the Railroad Company with the express or implied assent of the Government.*"

The situation, for all these years, "must have been well known to Congress," and if it was one making for a forfeiture on breach of condition subsequent, it would be "naturally therefore a subject for its legislation." (U. S. vs. Winona R. Co., 165 U. S. p. 478.) But this record has more to the point. It appears from Subdivision XXI of the "Stipulation as to the facts," that an Act of Congress was approved June 19, 1878, entitled "An Act to create an Auditor of Railroad Accounts and other purposes." (Item 1.) The Act of March 3, 1881, appropriated moneys for the salaries of the auditor, therein styled "Commissioner of Railroads", and his assistants, and for travelling and other expenses, and incidental expenses of the office

—in all, $17,100 for the fiscal year. (Item 2.) The Act of April 17, 1900, appropriated $11,420 for the fiscal year, and terminated the office of Commissioner of Railroads as of June 30th, 1901. (Item 3.)

The Act of March 3, 1901, appropriated $9,220, and continued the office of Commissioner of Railroads until June 30th, 1902, "when the same shall terminate, and the duties of the Commissioner shall be transferred to the Secretary of the Interior, together with the records and styles of the office." (Item 4.) The Act of June 28th, 1903, appropriated $6,220, and postponed the termination and transfer of the office of Commissioner until June 30th, 1903. (Item 5) The Act of March 3, 1903, appropriated $6,220, and once more postponed the termination and transfer of the office, this time until June 30th, 1904. (Item 6.)

As appears from Item 7, "pursuant to the requirements of the said Act of June 19th, 1878, the forms of reports to be made by the Railroad Companies contemplated by the said Act, including the defendant Oregon & California Railroad Company, were prepared and adopted and transmitted to the said Railroad Companies, including the defendant Oregon and California Railroad Company, by the

said Bureau, from 1879 to 1903; and the defendant Oregon & California Railroad Company complied with the provisions of the said Act, and the demands of the said Bureau, as to the making of said reports, continuously from 1879 to 1903, both years inclusive, as is hereinafter set forth."

These reports are set out in Item 8 of Subdivision XXI. They begin with the half year ending December 31st, 1879, and continue, without break, from year to year, to and including the year ending June 30th, 1903. Take the first report for instance:—

(1st) For the half year ending December 31st, 1879:

Total cash receipts from all sales to date	$83,579.93
Average price per acre for all sales to date	2.23
Average price per acre for all sales during half year	2.39
Average price per acre for all purchases to date	2.48
Maximum price per acre from sales (not town lots)	15.00
Minimum price per acre from sales (not town lots)	0.25

Maximum price per acre now asked (not town lots)	7.00
Minimum price per acre now asked (not town lots)	0.25
Average price per acre now asked (not town lots)	2.50

It thus appears from this first half yearly report, of December 31st, 1879, that the average price per acre was under $2.50; that the maximum price per acre from sales was in excess of $2.50 per acre, and that the maximum price asked per acre also exceeded $2.50 per acre. The same is true for the half year ending June 30th, 1880; also for December 31st, 1880, for June 30th, 1881, for December 31st, 1881, for June 30th, 1882, for December 31st, 1882, for June 30th, 1883. For the year ending June 30th, 1884, while the average price per acre for all sales to date is under $2.50, the average price for all sales during the year is slightly in excess, being $2.725; while the maximum per acre received and asked exceeds $2.50. The same is to be said for the year ending June 30th, 1885, except that the average per acre for all sales during the year is a trifle lower, $2.5608. For the half year ending December 31st, 1885, we have the same thing except that the sale price during the year averages $2.65; and for the

year ending December 31st, 1885, it averages $2.70, for the half year ending June 30th, 1886, $2.99; for the half year ending December 31st, 1886, $2.99; for the year ending December 31st, 1886, $2.99; for the half year ending June 30th, 1887, $3.19; for the half year ending December 31st, 1887, $3.40; and for the year ending December 31st, 1887, $3.24. The maximum prices, both received and asked, will be understood, as this enumeration goes on, unless otherwise specified, to be in excess of $2.50. For the year ending December 31st, 1888, the average price per acre for all sales to date, now exceeds $2.50, being $2.58, while the average acre price for the sales during the year is $3.74; the corresponding figures for the year ending June 30th, 1889, are $2.642 and $4.96; for the year ending June 30th, 1890, $3.146 and $6.32; for the year ending June 30th, 1891, $3.33 and $4.92; for the year ending June 30th, 1892, $3.61 and $5.61; for the year ending June 30th, 1893, $3.66 and $4.51; for the year ending June 30th, 1894, $3.63 and $2.83; for the year ending June 30th, 1895, $3.40 and $3.49; for the year ending June 30th, 1896, $3.40 and $3.57; for the year ending June 30th, 1897, $3.40 and $3.35; for the year ending June 30th, 1898, $3.41 and $3.95; for the year ending June 30th, 1899, $3.75 and $2.62; for the year ending June 30th, 1900, $3.77 and

$5.02; for the year ending June 30th, 1901, $4.076 and $5.348; for the year ending June 30th, 1902, $5.00 and $7.85; for the year ending June 30th, 1903, $4.73 and $4.22.

It appears from Item 10 of Subdivision XXI, as follows: "The said Bureau of the Interior Department made annual reports to the Secretary of Interior, as required by the said Act of June 19th, 1878, from 1879 to the termination of said office; which reports were embodied in the annual reports of the Secretary of Interior for the same years, transmitted by him to the President of the United States and by the latter to the two Houses of Congress, and the said Secretary's annual reports were there referred to appropriate Committees and printed as Executive Documents."

The attention of the court is now drawn to Item 11 of Subdivision XXI which sets forth these reports of the Bureau of the Interior Department as they pertain to the Oregon Land grant. This report and information was embodied in the annual reports of the Secretary, as indicated in Item 10, it was transmitted by him to the President, it was transmitted by the President to the two Houses of Congress, and the annual reports of the Secretary went to the proper Com-

mittee in House and Senate, and were printed as executive documents. The first report, "For the year 1883, Executive Documents, 2nd Session, 47th Congress, 1882-83, No. 1, Part 5, Vol. 2, page 471," shows land grant sales by the Oregon and California Railroad Company "up to December 31, 1881—date of last report—for an amount aggregating $309,486.15, at an average price of $2.25 per acre. The minimum price now asked is 25 cents, the maximum $10 per acre."

For the year 1886, the report shows 237,-773.78 acres sold, with $384,889.72 received from sales and $385,647.67 outstanding on time sales; for 1887, 242,516.35 acres sold, received $407,876.54, outstanding on time $377,545.36; for 1888, 254,964.08 acres sold, received $458,836.01, outstanding on time, including $91,913.69 interest, $363,638.95; for 1889, 269,442.88 acres sold, received $541,-650.33, outstanding on time $394,226.58, of which $98,992.42 is interest. The statement is then made: "The average price per acre for all sales to date was $2.64, while the average price for sales made during the year was $3.96."

For 1890, 225,270.57 acres sold, received $626,520.03, outstanding on time, $516,287.66.

"Average price per acre for all sales during the year was $6.32."

For 1891, 298,261.45 acres sold, received $707,556.88, outstanding on time, including principal and interest, $603,028.05; for 1892, 340,475.85 acres sold, received $785,536.79, outstanding on time, principal and interest, $832,958.98; for 1893, acreage not specified, "that the total cash receipts from all sales had amounted to $859,477.34, and that there remained outstanding on account of time sales the sum of $861,923.64, principal and interest. The receipts of the Land Department for the year were $73,940.55, and the expenses $75,570.07," as "the report of the company shows."

For 1894, "the Company submits the following report on June 30, 1894, of the operations of its Land Department to date:

	Acres	Acres
Acquired by United States patent		615,555.58
Disposed of for cash	201.93	
Disposed of on time contracts	17,299.27	
		17,501.20
Balance owned by Company		598,054.38

"The Company also reports that the total cash receipts from all sales to date amounted to $909,008.59, and that there remained outstanding on account of time sales the sum of $891,905.60, principal and interest. The receipts during the year were $49,525.25, and the expenses $55,449.08."

For 1895, acreage acquired by patent 1,163,-073.56, disposed of for cash and on time 381,-402.78 acres; total cash receipts from all sales to date, $946,952.81, outstanding on time, principal and interest, $700,064.64; receipts during the year, $37,747.22, expenses $59,-294.90. The statement is then made: "The average price per acre for all sales to date had been $3.40, and the average price now asked is $3.00."

For 1896, "The records of the General Land Office show that to June 30, 1896, there had been patented to the Company 2,180,-366.07 acres. The Company reports that to June 30, 1896, it had received by patent from the United States, 2,397,717.17 acres of land, and there had been disposed of for cash and on time contracts 387,119.43 acres, leaving the balance owned by the Company, 2,010,-657.74 acres." The total cash receipts from all sales to date $986,605.69, outstanding on time, principal and interest, $875,146.35, def-

icit in operations of company's land department during year, $81,770.68. The statement is then made:

"Average price per acre received was $3.57.

"Average price per acre now asked, $3.00."

For 1897, records of General Land Office to June 30, 1897, show acreage patented to the company, 2,287,131.66. Report of company to same date show patents received from government for 2,503,754.59 acres; disposed of for cash and on time (not including cancelled contracts) 383,443.44 acres; total cash receipts from all sales to date, $1,020,329.75, outstanding on time, $775,881.34; receipts for year, $33,724.06, expenses, $60,012.11. The statement is then made: "The average price per acre now asked for land is $3.00."

For 1898, Company reports to June 30, 1898, patents received, 2,561,685.30 acres; sold for cash and on time 504,606.53 acres; total cash receipts from all sales to date, $1,069,513.25, outstanding on time, $792,-990.38; receipts for year, $49,183.50, expenses, $73,183.06. The statement is then made: "The average price per acre now asked for land is $3.00."

For 1899, Company reports to June 30, 1899, patents received, 2,659,300.56 acres;

total cash receipts from all sales to date, $1,234,225.97, outstanding on time, $734,-957.16; receipts for year $164,712.72, expenses, $77,138.22. The statement is then made: "The average price per acre now asked for land is $3.00."

For 1900, Company reports to June 30, 1900, patents received, 2,787,363.55 acres; total cash receipts from all sales to date, $1,542,728.71, outstanding on time, $1,189,-918.71; receipts for year $308,502.74, expenses, $91,932.33. The statement is then made: "The average price per acre now asked for land is $3.00."

For 1902, Company reports to June 30, 1901, patents received, 2,795,567.64 acres; total cash receipts from all sales to date, $1,852,756.51, outstanding on time, $1,808,-935.66; receipts for year $310,027.80, expenses, $72,713.77. The statement is then made: "The average price per acre now asked for land is $3.50."

For 1903, Company reports to June 30, 1903, patents received, 2,928,809.55 acres; sold for cash and on time 1,032,591.47 acres; total cash receipts from all sales to date, $2,735,532.88, outstanding on time, principal and interest, $2,800,637.57; receipts for year,

$437,471.63, expenses, $105,936.96. The statement is then made: "The average price per acre now asked for land is $4.73."

Further, it appears from item 12 of Subdivision XXI as follows:

"The Commissioner of Railroads appended to several of the reports set forth in the next preceding 'Item 11' hereof, a copy of the said Acts of Congress approved July 25th, 1866, April 10th, 1869, and May 4th, 1870; for greater particularity as to the reports in which said Acts of Congress are set forth, all parties may refer to the said official published reports."

The Land Department, then, the President, the two Houses of Congress, all were apprised through the years, and from year to year, even from half year to half year, of the transactions and dealings of the company in the granted lands, of the sales made, whether for cash or on time, of the acreage sold, of the moneys received and outstanding, and of the average price. No condition subsequent was said to have been broken, no forfeiture was charged or attempted, the patents issued continuously and consistently. Is there anything of a fair argument left, that, by the practical interpretation of the parties themselves, government, railroad-company, bond-

holders, purchasers, the general public, a condition subsequent was understood or assumed to have been imposed on the grant by the proviso in the settlers' clause? Whatever may be the scope and effect of the proviso as a contract or covenant, it is not a condition subsequent; and covenant is the precise characterization given to the proviso by the Commissioner of the General Land Office in his report for 1906, and again by the Commissioner of the General Land Office, soon to become Secretary of the Interior, in his communication of 1907 to the representative in Congress from the State of Oregon. The report of the Commissioner for 1906,—"it is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons—the officers concerned are usually able men and masters of the subjects, not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret," Hastings vs. Whitney, 132 U. S. p. 366,—proceeds at pages 21 and 22 as follows:

"The grant to the Oregon and California Railroad Company, under the Act of July 25, 1866, embraced 3,821,901.80 acres. The prescribed conditions of the grant not having been met by the company, the time for performance was extended by the Act of April 10, 1869. Although the company failed to

comply with the terms of the grant within the the time specified, it complied with them substantially before a forfeiture, and title to all the lands consequently vested in the company (see *Schulenberg v. Harriman,* 21 Wall., 44), subject only to the *covenant* expressed in the proviso of the Act of 1869, which declares that the lands granted by the Act aforesaid shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser and for a price not exceeding $2.50 per acre."

On March 19, 1907, Commissioner of General Land Office Ballinger, afterwards Secretary of the Interior, writes to Hon. W. C. Hawley, representative in Congress from the State of Oregon, as follows:

"Department of the Interior.
"General Land Office, Washington, D. C.

"March 19, 1907.

"Honorable W. C. Hawley, House of Representatives——

"Sir: In reply to your letter of the 7th inst. addressed to the Secretary of the Interior, and handed to me for attention, you are advised that the Act of 1866 made a grant of lands to the California and Oregon Railroad Companies conditioned upon the performance

of certain acts by the company within a specified time. The prescribed conditions not having been met by the company, the time of performance was extended by the Act of 1869 and, although the company failed to comply with the terms of the grant before the time specified they were subsequently complied with before a forfeiture, and title to all the land within the grant consequently vested in the company (See *Schulenberg v. Harriman,* 21 Wall., 44), subject only to the *covenant* expressed in the proviso contained in the Act of 1869, which declares that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter-section to one purchaser, and for a price not exceeding $2.50 per acre. As soon as the title vested in the company, the jurisdiction over the lands passed from the executive branch of the Government, and the enforcement of the provision rests with the courts, through appropriate action by either the settlers entitled to purchase or by the government acting through the Department of Justice." The Commissioner goes on to say that in his judgment the power of Congress to prescribe the proviso cannot be questioned, and he puts it on the ground that the proviso "was made in consideration of the extension of time granted to the company."

"The company," he adds, "is therefore without authority to sell the lands to any other person, in any other amount, or for a greater price than prescribed in the proviso; and any conveyance which the company has attempted to make on a sale made in violation of the statute would not be sustained by the courts. Since title passed from the Government, subject only to the *covenants* created by the proviso, it is doubtful if Congress has power to enact any law to compel a compliance with the terms of the provision, and the *covenant* can only be enforced in the courts." It should be held, therefore, we respectfully submit, that the settlers' clause does not impose a condition subsequent.

We are now to look at the question of condition subsequent from another and independent point of view.

The West Side Company, it has been seen, had filed its assent under the Act of July 25, 1866. The legislature of Oregon, finding that the West Side Company lacked the corporate status required by the granting Act, receded from its designation of that company, and, on October 20th, 1868, designated the East Side Company. The time to file the assent under Section 6 of the Granting Act of July 25, 1866—"one year after the passage here-

of—" had passed. Congress, in the amendment of April 10, 1869, refrained from taking sides in the controversy between the two companies. The amendment is worded "so as to allow *any* railroad company heretofore designated by the legislature of the State of Oregon, in accordance with the first section of said Act, to file its assent to such Act in the Department of the Interior within one year from the date of the passage of this Act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act; *Provided,* That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to grant of land."

There is clear recognition here, by Congress, with the two companies in its eye, that some rights, under the granting Act, had been acquired by one or other of the two companies. The West Side Company had filed its assent within the year. Whatever rights the West Side Company acquired under the granting Act did not depend on any further and additional filing of assent, and passed to the East Side Company, or its successor, Ore-

gon and California Railroad Company, under the terms of the deed of October 6, 1880, made part of the bill as Exhibit C. If, on the other hand, the East Side Company acquired any rights under the granting Act, its attitude in respect to the congressional permission to file assent, whether in seeking that permission or in acting upon it, and whether inadvertent, or prudential, did not affect its vested right as by an estoppel. (Bybee v. Oregon & California R. R. Co., 139 U. S. 663; S. C., 26 Fed., 591); and it was provided in the amendment itself of April 10, 1869, "that nothing herein shall impair any rights heretofore acquired by any railroad company under said Act."

Now, the Act of July 25, 1866, as the Supreme Court has frequently held, was a grant in praesenti. Of this very Act, it was said by the Supreme Court of the United States in the Bybee case just cited: "The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been considered by this court as taking effect *in praesenti,* although the particular lands to which the grant is applicable remain to be selected and identified when the road

is located, and the map is filed with the Secretary of the Interior. The act then operates as a grant of all odd-numbered sections within the limits, except so far as they may have been in the meantime 'granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of.' "

But the Act of July 25, 1866, so far as the Oregon company was concerned, contemplated a future grantee—"such company organized under the laws of Oregon as the legislature of said state shall *hereafter* designate." "If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently." (Hall v. Russell, 101 U. S. pp. 509-510.) As the Supreme Court said in the case just cited, where the grantee of the Act was a settler, "the Act of Congress made the transfer only when the settler brought himself within the description of those *designated as grantees.*" The East Side Company was designated as grantee by the legislature of Oregon on October 20, 1868. At that date, therefore, the Act of Congress made the transfer.

It is true, the granting Act, in Section 6, required the filing of assent within one year; and Section 8 provided that, in the event of a

failure in this regard, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States." As to the unpatented lands, therefore, from the point of view of the filing of assent, the grant was made on a condition subsequent but it was none the less a grant in praesenti, qualified by the futurity of designation, and the company, when designated, "took the title upon the terms, conditions and restrictions expressed in the Act of Congress." (Railroad Land Co. v. Courtright, 21 Wall., p. 316; Schulenberg v. Harriman id., p. 62.) A breach of this condition subsequent would not have the effect, *ipso facto,* of divesting the title of the railroad company; unless the government saw fit, as it had not seen fit by April 10, 1869, to assert its right to enforce a forfeiture for such breach, the title remained unimpaired in the railroad company. "It is settled law," said the Supreme Court of the United States in Schulenburg v. Harriman, 21 Wall., p. 63, "that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture

on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed." In the case of a private grant, the right to resume the estate "must be asserted by entry or its equivalent; if the grant be a public one—it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement." (Schulenburg v. Harriman, ubi supra.) And the Supreme Court went on to say in the Schulenburg case: "In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and

became attached to the adjoining alternate sections."

Now, then, the question here is not one of contract or covenant—not simply whether Congress, after having made the grant and passed the title, could or did, on April 10, 1869, in return for permission to file assent, take from the company a contract or covenant to sell the granted lands to actual settlers, in small lots, at statutory prices. The question now making is, whether Congress, after having made the grant and passed the title, certainly not later than October 20, 1868, could, in the absence of proceedings, judicial or legislative, to forfeit that grant, and while the title "remained unimpaired" in the company, annex to the grant a condition subsequent by the amendment of April 10, 1869?

The Act of July 25, 1866, was, of course, the grant of an estate on condition subsequent. Section 8 of the Act in terms provided that in case the grantees "shall fail to comply with the terms and conditions required, namely, *by not filing their assent thereto* as provided in Section 6 of this Act, or by not completing the same as provided in said section, this Act shall be null and void, and all the lands *not conveyed by patent* to said company or companies, as the case

may be, at the date of any such failure, *shall revert* to the United States." This is a distinct recognition of the character of the Act, as being one which passed the title *in praesenti,* and it is said in so many words that the lands not conveyed by patent, and which had passed by title *in praesenti* to the Company "shall revert" to the United States. The significance of the term "revert" cannot be minimized or avoided. The estate was one on condition subsequent, and the filing of assent was one of the conditions subsequent, for breach of which there was a reverter to the grantor. Annexed to that grant, part of it, in the same instrument and conveyance, certain conditions subsequent had been annexed to the estate. They were, in the language of the law, conditions in deed. But the settlers' clause of April 10, 1869, was not one of them. That came afterwards, after the grant had been made, after the title had passed, after the estate upon condition had been created. "An estate on condition," says Tiffany, Modern Law of Real Property, sec. 64, "is one which *by the terms of the instrument by which it is created,* is subject to a contingency not forming a part of the limitation of the estate, it being an estate on 'condition precedent' if it is to begin or 'vest' on the happening of a contingency, and an estate on 'condition subsequent' if it is to terminate there-

on, at the option of the creator of the estate or his successor in interest, before its natural time for termination."

This is the statement of an elementary rule. "Estates upon condition," says Blackstone, (Book II, p. 152) "are of two sorts:

1. Estates upon condition *implied.*

2. Estates upon condition expressed."

He goes on to explain that "estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexed hereto a secret condition that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor, or his heirs, to oust him and to grant it to another person."

Now, as to conditions in deed: Blackstone says, *ubi supra,* "An estate on condition *expressed in the grant itself* is where an estate is granted, either in fee-simple or otherwise, with an expressed qualification annexed, whereby the estate granted shall either commence, be enlarged or be defeated, upon per-

formance or breach of such qualification or condition. These conditions are therefore either precedent or subsequent."

Kent says in his Commentaries, 4 Kent, 122:

"Estates upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created, or enlarged, or destroyed. They are divided by Littleton into estates upon condition implied or in law, and estates upon condition express or in deed.

1. Of conditions in law.—Estates upon condition in law are such as have a condition impliedly annexed to them, without any condition being specified in the deed or will. If the tenant for life or years aliened his land by feoffment, this act was, at common law, as we have already seen, an implied forfeiture of the estate, being a fraudulent attempt to create a greater estate than the tenant was entitled to; and the reversioner might have entered, as for a breach of the condition in law."

He proceeds:

"2. Of conditions in deed.—These conditions are *expressly mentioned in the contract*

between the parties, and the object of them is either to avoid or defeat an estate; as if a man (to use the case put by Littleton) enfeoffs another in fee, reserving to himself and his heirs a yearly rent, with an express condition annexed, that if the rent be unpaid, the feoffor and his heirs may enter, and hold the land free of the feoffment."

Washburn says, in his book on real property, section 935: "An estate upon condition is one which may be created, enlarged, or defeated, by the happening or not happening of some contingent event. *A condition is a qualification or restriction annexed to a conveyance, and so united with it in the deed* as to qualify or restrain it."

The conclusion is inevitable, passing now any questions of contract or covenant, that Congress did not, in the amendment of April 10, 1869, annex a condition subsequent to an estate which had been transferred by the granting Act of July 25, 1866, to a grantee in whom the title vested not later than October 20, 1868. The settlers' clause was not united with the conveyance in the granting act of July 25, 1866; it came later and in the sequel. If the government has any rights or remedies in the premises, it must look elsewhere than to the breach of a condition subsequent for their basis.

In the court below, counsel for the Government made some attempt to use the debates in Congress as a means of interpreting the Settlers' Clause to be a condition subsequent entailing forfeiture. It may be that the same course will be taken by counsel here. There is nothing, we venture to submit, in these debates which settles the meaning of the proviso to be a condition subsequent, with consequent forfeiture. But we do say, in the first place, that these debates are not the proper source from which to discover the meaning of language employed in an Act of Congress. The position of this court in the matter has been clearly and recently stated, and, it is believed, will be adhered to.

In the Freight Association Case, 166 U. S. 318, this court said:

> "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States vs. Union Pacific Railroad Company,* 91 U. S. 72, 79; *Aldridge vs. Williams,* 3 How. 9, 24, Taney, Chief Justice; *Mitchell vs. Great Works Milling & Mfg. Co.,* 2 Story, 648, 653; *Queen vs. Hertford College,* 3 Q. B. D. 693, 707.

> The reason is that *it is impossible to determine with certainty* what construction was put upon an act by the members of a legislative body that passed it *by resorting to the speeches of individual members thereof.* Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed. (Cases cited, *supra.*)"

In the Standard Oil Case, 221 U. S. 50, this court said, approving the Freight Association Case:

> "Although debates *may not be used as a means for interpreting a statute (United States vs. Trans-Missouri Freight Association,* 166 U. S. 318, and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, *the history of the period when it was adopted.*"

In the recent case of Lapina vs. Williams, 232 U. S. 90, this court said:

> "Counsel for petitioner cites the debates in Congress as indicating that the act was not understood to refer to any other than immigrants. *But the unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out, (United States vs. Trans-Missouri Freight Ass'n,* 166 U. S. 290, 318, and cases cited) *and we are not disposed to go beyond the reports of the committees. Holy Trinity Church vs. United States,* 143 U. S. 457, 463; *Binns vs. United States,* 194, U. S. 486, 495; *Johnson vs. Southern Pacific Co.,* 196 U. S. 1, 19."

But if the debates are to be looked into they will not be found to help the cause of a condition subsequent. The Act of March 10, 1869, relative to the East Side grant, was passed, as counsel for the Government expressed it in the court below, "without objection and *without explanation.*" The only debate on the Oregon situation was in relation to the Act of May 4, 1870, and if that debate, notwithstanding what this court has said about debates, is to be taken as a source and means of interpreting the Settlers' Clause, it will be found to negative the idea of a condition subsequent, with its characteristic mark

of forfeiture; *for the proposition to visit a departure from this proviso with forfeiture was voted down.*

Senator Williams spoke of "the policy that has been adopted by the Government to assist in the construction of railroads in new states by grants of land" as being beyond the necessity, at the time he spoke, of any defense. (Cong. Globe, 2nd Session 41st Cong., p. 965.) He was sustained by other senators, but the bill was opposed by Mr. Thurman. (Id. 965-6.)

Mr. Stewart quoted the special provision of the Act of May 4, 1870, for the sale of the granted lands to settlers, as affording complete protection to settlers.

On resumption of the debate (Id. pp. 1423-30) the bill was passed. Mr. Thurman spoke in opposition to railroad land grants. (Id. 1423.) Mr. Stewart defended the policy of land grants to railroads at great length, making detailed comparisons with other grants of public land. (Id. 1423-25.) Mr. Casserly spoke briefly in opposition. Mr. Hamlin was for the bill, and took occasion to say (Id. 1426):

> "I think the senator who rises here in his place for the purpose of placing ob-

structions in the progress of improvement and the development of the interior of our country mistakes the condition and the spirit of the times. The whole system of land grants and aids by the Government for the construction of railroads as a means to develop the country and to favor transportation has been very familiar to myself. I believe I was here at its inauguration, and have remained here most of the time since. I confess very frankly that in the early period I had some doubts about it, but those doubts have long since left me. But if, at that period of time, I had doubted even to the point of objection, it would seem to me that a system so well established, and applied to so many localities, not only furnishes a justification, but makes a demand upon us that we shall apply it in equity to other localities."

And further, Mr. Hamlin went on to say:

"I think it most eminently wise and just that these grants should be made. I have long favored them. I shall certainly continue to favor them so long as a case like the present shall be presented for my consideration and my vote. It is too late in this day to undertake to

interpose these obstructions, and I think the very signal-guns displayed along the lines of your road may admonish us that we had better get out of the way after the bell rings. We cannot afford to go back to that system which was in existence fifty years ago. It is retrograding in improvement; it is retrograding in progress. I shall vote for the bill of the Senator before me, with the greatest pleasure."

Mr. Casserly followed to say that:

"The period has arrived when this government, if it shall determine to grant aid to a railroad, shall do it in some other mode than by vesting its lands in great tracts in railroad corporations. (Id. 1426.)

Mr. Davis objected, not to the principle of the land grant, but to the extent of the land granted. (Id. 1426-8.)

Mr. Casserly's motion to recommit the bill with instructions to strike out so much of the same as granted land except for the right of way, was defeated by a vote of 37 to 3. (Id. 1428.)

The amendment of Mr. Davis, to substitute five alternate sections per mile instead of two, was rejected. (Id. 1428.)

Mr. Thurman objected to the provision in the bill touching the mortgaging of the road and the creation of a sinking fund out of the proceeds of the granted lands, upon the ground that "If the company has that power (to mortgage) it is not necessary for us to enact that it may or shall create a mortgage. If it has not that power under the charter, we cannot confer the power upon it." He went on to say of the peculiar provision in the Act of May 4, 1870, touching the mortgage:

> "I believe the effect of this section will be to utterly destroy the provision in the Fourth Section that the land shall be sold to actual settlers." (Id. 1429.)

Mr. Williams, in reply, said:

> "Here is a grant made to this company of public land, and Congress has the right to attach any condition it pleases to that grant. It provides that the net proceeds of these lands shall be secured to the persons who hold the bonds of this company, so that the company may

> not use this grant for any other purpose whatever except to construct this road."

It will be remembered that in the Act of April 10, 1869, no attempt was made to qualify or circumscribe the right to mortgage, and in that respect the Act of May 4, 1870, is to be distinguished. Mr. Williams went on to say:

> "Now the entire object of this section is to make the grant answer the purpose contemplated by the bill—that is, to aid in the construction of the road by requiring that the net proceeds of the lands granted shall be invested and set apart to secure the bondholders when they advance money for its construction." (Id. 1429.)

There was considerable discussion between Mr. Williams and Mr. Thurman, as to the scope and effect of the provision touching the mortgage—an object lesson in what this court has characterized as the unreliability of debates when used as a means to interpret a statute. Mr. Williams argued that the bill made the proceeds of the granted lands into a sinking fund "which shall be a security for the payment of this mortgage upon the bonds." (Id. 1429.) To this Mr. Thurman replied:

"In answer to the senator, I have this to say: That by this same Act, which provides that 'land shall only be sold to actual settlers in quantities not exceeding 160 acres, or a quarter-section, to any one settler, and at prices not exceeding $2.50 per acre,' it is also provided that a mortgage may be executed by the company for the security of the holders of its bonds. If you do that, both parts of the Act must have effect; for you cannot reject one in preference to rejecting the other. The company may therefore, in perfect consistency with the terms of the Act, give its first mortgage; and if the lands are not sold on that mortgage, but are sold in fee to purchasers, then it must sell to actual settlers. The provision that they shall be sold to actual settlers does not destroy the provision that there may be a first mortgage on these very lands. Such is the intention of the bill; and therefore, under that first mortgage thus expressly authorized by the bill, the whole lands may be taken away from actual settlers."

Mr. Thurman's motion to strike out the whole of the fifth section was rejected. Thereupon Mr. Vickers moved an amendment at the end of the fourth section, and the action

of the Senate on this Vickers amendment is conclusive, if debates are to be resorted to, that it was not the intent of Congress to impose the penalty of a forfeiture in the event that sales should be made otherwise than to actual settlers. The significance of the Vickers amendment and the action of the Senate thereon is emphasized by the fact that Mr. Vickers moved his amendment immediately after the argument which has just been quoted from Senator Thurman, and upon the rejection, which followed, of the Thurman amendment. Mr. Vickers said: "I move an amendment, to insert at the end of the fourth section the following:

> "And that no mortgage that may be given by the said company shall operate to prevent the sale of any lands affected by this Act to actual settlers; and any violation of this condition shall work a forfeiture of all lands which may remain unsold to actual settlers."

In the fourth section, so Mr. Vickers went on to say: "The grant is made expressly on condition that the land shall be sold to actual settlers, and no other persons."

Mr. Vickers, we pause to note, was in error. The fourth section does not recite that the land grant is made expressly on condition

that the land shall be sold to actual settlers and no other persons. There is no such phraseology in the fourth section, which is a simple declaration that the lands granted shall be sold to actual settlers.

Mr. Vickers continued: "The amendment is only to secure the performance of that condition—solely for that purpose." (Id. 1430.)

It was suggested by Mr. Morrill that the phraseology of the Vickers amendment bore the meaning that the forfeiture of the lands would be to actual settlers:

> "Mr. Vickers. No sir; only a forfeiture of the lands unsold.
>
> Mr. Morrill, of Vermont. 'To actual settlers'; all lands unsold are to be forfeited to actual settlers. That is not what he intends.
>
> Mr. Vickers. As I understand the bill, the company have no right to sell the lands to anybody but an actual settler. If the lands are sold to actual settlers there is no forfeiture. If a portion of the land is sold to actual settlers, the portion unsold will be forfeited to the Government if that condition is violated. That is the sole object of the amendment.

> It is to secure the sale of the lands to actual settlers, according to our purpose. If any other phraseology can be suggested by the senator from Vermont, I shall be very happy to adopt it. That is the idea, the object, the sole purpose of the amendment."

Mr. Williams thereupon expressed the hope that the Senate would vote the Vickers amendment down, as it complicated and made doubtful the meaning of the section.

Mr. Casserly then proceeded to say:

> "What security has the Government that this important provision in the bill will be complied with? I respectfully ask the senator from Oregon—who I know will understand that my query proceeds from a desire to carry out what is the distinguishing feature of the bill—to state in what way that clause of the bill is to be enforced which provides for confining the sales by the company of this land to settlers. Suppose they do not sell to settlers?"

Mr. Williams, in reply, was very far from asserting that in the bill, as framed, the Settlers' Clause was a condition subsequent, carrying a forfeiture. This is what he said:

> "I believe that this law has as much effect as any other law in reference to public lands. There is no law in reference to the public lands of the United States that may not be violated, and the remedy is in the hands of the Department."

Mr. Vickers then offered his amendment again, modified, as he said, "to meet the views of the senator from Vermont." As so modified, it read:

> "And no mortgage that may be given by the said company shall operate to prevent the sale of any lands affected by this Act to actual settlers; and any violation of this condition shall work a forfeiture of all the lands which may remain unsold."

Mr. Williams thereupon said:

> "I hope that will not be adopted. The object seems to be, notwithstanding it is proposed to grant this land to this company, to make it as worthless as possible, in the hands of the company, so as to prevent the construction of a railroad. The object of these provisions of the bill is to expedite and facilitate the construction of the road and make these lands

valuable for that purpose; but if these amendments are put in, doubts are thrown upon the effect of the different provisions of the Act, and when the company seeks to negotiate its bonds, various questions of construction will arise. I hope, as this section is wholly unobjectionable and is drawn in the interest of the public and against the company, these amendments will not prevail."

Mr. Vickers remarked:

"I do not see what a mortgage is to operate upon except it be upon the land; and in order to prevent a mortgage of the land itself so as to interfere with the rights of settlers, I have offered this amendment to make the matter plain and explicit."

Mr. Casserly supported the Vickers amendment, and said:

"The object of the senator from Maryland, by his amendment, is to provide that in case the company shall give a mortgage upon this road for any purpose, notwithstanding the mortgage, the right of the settler shall continue, as the theory of this Act is that it must continue, namely, as free to enter and acquire title

to these lands as though the Act had not been passed."

Mr. Vickers followed Mr. Casserly:

> "If this company were to execute a mortgage upon these lands, and that mortgage should be foreclosed and the lands sold by a trustee, what would become of the rights of actual settlers? It is only to avoid what would follow as the result of an event of that kind that I have offered this amendment."

The amendment was rejected. (Id. 1430.)

Mr. Vickers thereupon offered another amendment, "so as to confine the mortgage to the road and its appurtenances, and not allow it to extend to the lands."

Mr. Williams made no objection, and the amendment was agreed to. (Id. 1430.)

Mr. Casserly then declared himself in final opposition to the bill:

> "As I conceive the vesting of title in a railroad company not to be at all essential in the object of aiding the company to build the road, and to be productive of very great evils, as I have stated, and

to be part of a pernicious system, I shall be obliged to vote against the bill."

Mr. Thurman called for the yeas and nays on the passage of the bill, and the same being ordered there were 34 votes for the bill, and only 7 against it. Those seven included senators Casserly, Thurman and Vickers.

We submit that no fair mind can rise from the reading of these debates in the Senate without coming to the conclusion, first, that there was no universal or general sentiment in the Senate against land grants to railroads, and, second, that it was not the intent of the Senate, in passing this bill and after the issue had been made so acutely and explicitly, to turn the Settlers' Clause into a condition subsequent involving forfeiture of all lands not sold to actual settlers—and certainly if that was not the intent of the Senate in respect to the West Side grant it was not the intent of the Senate in respect to the East Side grant.

When the bill came before the House Mr. Smith of Oregon spoke for it and defended the policy of land grants to railroads, and expressed the opinion that "There has never been a land grant in which those interests (of the Government) have been so carefully guarded as in this bill." Referring to the

proviso as to actual settlers, he said: "It is the most carefully guarded bill ever presented in this House." (Cong. Globe, 2nd Sess. 41st Cong., p. 2361.)

Thereupon Mr. Holman, who bitterly antagonized the bill, read to the House a communication from some voluntary and irresponsible meeting in New York City, objecting to grants of public land to railroads and other corporations—a meeting referred to in the course of the debate as "a political club." This communication was given solemn dignity in the court below by counsel for the Government, who spread it at large in their brief. Mr. Holman followed up this communication with a speech against the absorption of public lands by corporations. Mr. Butler expressed the hope that the bill would be referred to the Committee on Public Lands, and examined. (Id. 2362.) Mr. Holman went on to make the statement that there was a well-settled public sentiment in this country against grants of public land to railroad corporations—a statement which the debates, and the result of the debates, will show to have been liberally contradicted. (Id. 2362.)

On resumption of the debate, Mr. Sargent spoke for the bill, defended the policy of

land grants to railroads, and severely criticised the remarks of Mr. Holman. (Id. 3104.)

He spoke of the guarded character of the bill in respect to the sales of the lands to settlers, as Mr. Smith had done, but nowhere does he suggest, nor is it suggested anywhere in the debates in the House, that the Settlers' Clause, even in the Act of 1870, was a condition subsequent entailing forfeiture.

Mr. Fitch spoke at length in defense of the policy of land grants, and alluded to the "frothy declarations" of Republican clubs against further grants, and to the certainty that Democratic clubs would pass even more frothy declarations upon the same subject, and that while partisans thus "experiment in manufacturing factitious public sentiment to meet supposititious party exigencies" they would "smite with paralyzing power the growth of the West and South." He referred to the "artificial clamor against railroad land grants created by a few men who do not know, or who do not care, how much the land grant system has developed the western country." (Id. 3105.)

While he favored the bill, and stated that it was "carefully guarded" in respect to actual settlers, he further said:

> "Where the addition of such a condition will obstruct negotiations for the sale of bonds, or throw obstacles in the way of procuring money to build the road, I would not annex it. It is of questionable wisdom in any case."

Speaking of the policy of granting lands in aid of railroad construction, he said:

> "I believe this to be the true policy. I believe that those who inaugurated and those who continued such a policy acted with wisdom and liberality. It is this policy which has made Illinois opulent and powerful, which has pushed Wisconsin into the front rank of states, which has turned Iowa into a beautiful garden, which has brought the far Pacific to your doors. If this has been a wise policy for these communities, so benefited and advanced, why is it not a wise policy for those who have yet to receive its benefits and feel its generous power?" (Id. 3107.)

Mr. Holman's motion to refer the bill to the Committee on Public Lands was defeated —yeas 74, nays 96. The bill was then finally passed by the House; yeas 97, nays 69.

There is nothing, therefore, in the House debates, or in the result of those debates, to

indicate either a general sentiment at the time against land grants to railroads, or an intent to impose the Settlers' Clause as a strict condition subsequent involving forfeiture.

In the brief for the Government filed in the lower court, the objectionable practice of referring to the debates on the Oregon Railroad situation was extended to another and different subject-matter, namely, the Denver & Pacific Railway. The following passage from Mr. Washburn's speech in the House was made somewhat prominent in the brief of Government counsel:

> "When you contemplate the vast power of these non-resident landholders, the over-shadowing land monopoly created, the evils and oppressions always connected therewith, we must all be filled with amazement at the reckless and shameless legislation of Congress on this subject. * * * I voted for some of the earlier bills, but when I saw the use that was being made of these grants, the brazen greed of speculators who obtained possession of them to use for their own interests, regardless of the public interests; * * * my views in regard to the whole policy of land grants were

> very materially modified." (Cong. Globe, 3rd Sess. 40th Cong., p. 463.)

And it was added in the brief that the same views were expressed by Mr. Julian and Mr. Holman, Mr. Logan, Mr. Donnelly, Mr. Lawrence, and many others.

The impression is possible to be derived from the Government's brief, and it may be suggested again, in the lower court, that the general sentiment of the House was one of intense hostility to land grants in aid of railroad construction. Indeed, it is said in the Government brief in the court below:

> "An examination of the debates will demonstrate that the quotation which we have given from Mr. Washburn's speech expresses the general sentiment upon the subject."

Nothing could be farther from the actual fact, and nothing could better point the recent observation of this court as to the unreliability of using congressional debates as a means of interpreting a statute.

Mr. Washburn made a long speech, and in concluding apologized for taking up so much time, and explained that he would not have done so "had it not been for the fact that it

is the final bill of the session, and that the House is to determine by its vote on the bill what is to be its policy on the subject of other land grants and subsidies to railroads. If we pass this bill," he went on to add, "with all its enormities, we ignore the demands of the country upon us, and give an emphatic sanction to other projects which are lying in wait, involving some two hundred million dollars, to aid in the construction of some ten thousand miles of railroad."

Mr. Covode, on resumption of the debate, took the floor and replied at length to Mr. Washburn. Speaking of the Union Pacific Railroad, he said:

> "I give the greatest credit to the men who invested their money in that great enterprise. They deserve it at our hands, and they should receive our applause instead of being denounced as they have been as thieves and scoundrels. I say this as one who helped to organize the first movement toward building the Platte Valley Railroad." (Id. 486.)

In closing, he remarked:

> "Before I close I wish to ask my friend from Illinois (Mr. Washburn) where his great state would have been today with-

out the land grants and aid to railroads to open and develop it. Where would have been his great city of Chicago had it not been for the land grants given to make their canal? I will also ask my friend (Mr. Price) the chairman of the committee, what would have been the condition of his state (Iowa) without the aid furnished by the Government to checker her territory with railroads? Had I time I would try to show my friend from Illinois that his figures yesterday with regard to the value of the lands granted to railroads were wild in the extreme. The idea of estimating the lands at $5 per acre, while many of us have seen lands of the Pacific Railroad that no man would give one cent per acre for hundreds of square miles; and if others have great value, was it not the construction of the road that gave it to them and doubled the value of the alternate sections for the Government?" (Id. 487.)

Mr. Kelley from Pennsylvania followed Mr. Covode in support of the bill and in reply to Mr. Washburn. Among other things, he said:

"The gentleman from Illinois I know did not mean to be unfair. No man hon-

ors more than I do his sturdy perseverance in guarding the treasury; yet I cannot help saying that in the vehemence of his nature he often takes partial and one-sided views; that having committed himself, not by public declaration but by his own convictions, to a given side of a question, he accepts as true any statement that seems to sustain his view."

Mr. Kelley then quotes a letter written on March 4, 1866, from General Sherman to General Grant, pointing out the necessity of additional subsidy for the completion of the road to Cheyenne Wells. Mr. Kelley points out at length the effect of the policy of land grants to railroads in building up the prosperity of the State of Illinois. He also quotes a letter from General Sheridan to General Grant, of May 2, 1868, to the same purport as General Sherman's letter, and Mr. Kelley concludes by saying:

"As a measure of humanity, as a measure of economy, as a means for developing the mineral regions of the country, I believe that the gentleman from Illinois (Mr. Washburn) would better subserve his great purpose of protecting the treasury and restoring the credit of the

country by advocating than by opposing the bill." (Id. 489.)

Mr. Van Trump (Id. 528) addressed the House very much along the lines of Mr. Washburn's speech in opposition to the bill. He was followed by Mr. Clarke of Kansas, who began by saying:

> "Mr. Speaker, in what I have to say it will be my purpose to discuss the bill now before the house. I shall not attempt to follow the gentleman from Ohio (Mr. Van Trump) through his declammation in which he has indulged against our Pacific Railroad system. With some of the views he has so ably presented I entirely agree, while from much he has said I dissent most emphatically. Much less, sir, shall I attempt to imitate the remarkable speech of the gentleman from Illinois (Mr. Washburne) made at the outset of this debate. Sir, the gentleman from Illinois (Mr. Washburne) has seen many years of service in this House. He has been honored by its Presiding Officer with the chairmanship of one of its most important committees. But, sir, no length of service, no parliamentary position here can possibly justify his unbridled license of statement and misconception of facts so far as this bill is con-

cerned. I am at a loss whether to condole with him most on the array of accusations with which some one has supplied him, or the ridiculous errors into which they have led him." (Id. 532.)

Mr. Clarke said further:

"Supported by facts and sustained by wise considerations of public policy, the gentleman from Illinois (Mr. Washburne) has often rendered on this floor great service to the country in resisting schemes of reckless extravagance and fraud. But, sir, in the discussion of this bill the gentleman has grown furious at a phantom, has presented fictions for facts, and has evidently been made the victim of misplaced confidence by some over-zealous and ignorant opponent of the pending bill." (Id. 532.)

On the question of mortgage, Mr. Clarke remarked:

"The privilege of mortgaging that part of the road that gets nothing but the lands already granted is given to the two companies, respectively by the bill—a privilege I suppose they have already." (Id. 532.)

As to the general policy of the country, Mr. Clarke said:

> "From time immemorial it has been the policy of this nation to make judicious expenditures on behalf of trade and commerce. Millions upon millions have been lavished upon rivers, harbors, and coast works, to insure and protect the mercantile and commercial interests of the people. The spirit that condemns this use of public moneys is alien to the necessities of the country, and hostile to its growth, prosperity and wealth. The enterprise which weds the eastern and western shores of this continent by a grand thoroughfare which is destined, in the event of its success, to avenue the accumulated wealth of ages, and lay its vast treasures at the feet of our people, is one not less deserving our encouragement and aid than those measures which call for the nation's treasure to protect the commerce of the seas." (Id. 532.)

Mr. Clarke goes at great length into the economic and military reasons in favor of the bill. Referring again to the sentiment and policy of the people, he says (Id. 534):

> "Not even the gentleman from Illinois, grown gray in the public service, and

> entitled to grateful recognition from the people—from which I would be the last to detract—can stay the march of empire, or successfully resist the demands which a progressive and enlightened people have the right to make upon him."

Mr. Clarke, it should be observed, expressed himself as favoring, in future grants of land, not to railroad corporations only, but for all works of internal improvement as well, a policy of actual settlement, at stated prices and under public regulation. "I believe," he said, "that in all our future grants of land to railroad corporations, and for all works of internal improvement, it should be opened to actual settlement only at stated prices, and under such regulations as will render it easy for all classes of people to acquire a speedy title." (Id. 535.)

If such a method as this had been incorporated into the Union Pacific land grant, or the Oregon land grant, with a system of adequate regulations for the administration of settlements, a good deal of difficulty and disturbance might have been obviated. Indeed, as we have suggested, it is still open to Congress, under the power to alter, amend or repeal, to provide a system of regulations by which, after the construction mortgage has

been protected, sales of the land not covered by the lien may be conducted.

It is of interest to note that Mr. Julian, in his speech on the Denver-Pacific Railway bill (Cong. Globe, 3rd Sess. 40th Cong., Appendix p. 70), used this language—somewhat striking language, in view of the claim made in the Government's brief below that Mr. Washburne's speech expressed the general sentiment upon the subject. Mr. Julian said:

> "I do not agree with my colleague (Mr. Holman) and the gentleman from Illinois (Mr. Washburne) in their hostility to all such grants. I think they forget the wholesome duty of discrimination. Neither common sense nor a regard for the true interests of the country will warrant their wholesale opposition to such legislation."

Mr. Julian goes on, at the same place, to refer to the facts and figures of Commissioner Wells on the subject of railway extension, and to the argument made by Mr. Windom of Minnesota on the same subject, and he adds:

> "These are very pregnant facts, and they call for a liberal policy on the part of Congress toward railroad enterprises."

He announces himself as in favor of land grants to railroads, "under proper restrictions," and his notion of a proper restriction was "that the lands shall be granted on the express condition that they shall be sold to actual settlers only, in quantities not greater than one quarter-section to one purchaser, and for a price not exceeding $2.50 per acre."

He went on to say: "This will avoid the complete monopoly of the lands, as sanctioned by the old system of land grants." But nowhere does he impugn the right to make a construction mortgage; nor does he say anywhere in his speech that the restriction suggested by him carried with it the penalty of forfeiture, or that it could not have been enforced as a negative covenant by resort to the courts.

Mr. Stevens, in supporting the bill, referred to "the fierce and violent denunciation against the measure, uttered by the gentleman from Illinois (Mr. Washburne) and the gentleman from Ohio (Mr. Van Trump). (Id. 71.) He went on to say:

> "It is very evident that much of the heated and declamatory denunciation indulged in by gentlemen in opposition to this bill has no bearing, even in its terms, upon the corporation which seeks aid at

> our hands. There is another corporation, known as the Union Pacific railroad, on which gentlemen have expended a vast amount of vituperation, and which, if it was capable of being annihilated by words, high-sounding and defiant, would not have survived the early stages of this debate." (Id. 71.)

The economic and military reasons for the bill are gone into at length by Mr. Stevens. In closing he said (Id. 72):

> "I am so confident of the merits of this proposition that I am amazed, after a full examination, to find it opposed, not by facts and arguments, but by accusation and declamation. I am persuaded that the demands of the public and military necessity of this measure have been overslaughed by the general clamor against the policy of subsidies. But this is an independent and well-recommended measure, and as such shall receive my conscientious support under the demands of that public policy which is so well established by the evidence I have read in the hearing of the House."

Mr. Loughbridge and Mr. Logan opposed the bill (Id. 72-74). Mr. Logan, in the course of his remarks, was taken sharply to task

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for intimating that the subsidies had not been used in good faith for building railroads. (Id. 75.)

Mr. Windom's speech in reply to Mr. Washburne was designed to correct some of the extreme statements as to figures made by the member from Illinois. (Cong. Globe, 3rd Sess. 40th Cong., p. 583.)

Mr. Schenck spoke for the bill. Referring to Mr. Washburne he said:

> "I said I was not actuated by prejudice; neither will I be influenced by a general outcry against these improvements. But I am afraid the gentleman from Illinois (Mr. Washburne) who addressed the House a few days ago yielded a little to that feeling. When he gave us one of his customary lectures on extravagance, in which he is in the habit of assuming everybody but himself to be in the wrong, I am afraid he gave way to his imagination a little instead of confining himself strictly to the facts." (Id. 584.)

Mr. Schenck then calls attention to the figures furnished by Mr. Windom, and goes still further into the erroneous statements of Mr. Washburne. He said:

"Now, sir, why should we not pursue the policy which I have indicated? I hold that in governmental matters the best way ordinarily to get along is to do just as a sagacious individual would do in the management of his own affairs. Suppose I have land lying out upon one of the prairies, remote from settlement, and I divide the tract into town lots, or a number of small farms, how do I get those lands taken up? I offer to give to any mechanic who will go and settle there, to anyone who will establish a small store or a church or a school, some of these lands free of charge, the occupation and the improvements thus made enhancing the value of the remainder of the tract. And when I sell my lands I sell them at first at a very low rate, expecting that the settlement of a portion will further enhance the value of the remainder of my possessions. Upon a similar ground I justify these appropriations of public lands and this pecuniary aid given by the Government to assist in opening up and developing the remote regions of the West by making highways of trade and travel through them." (Id. 584.)

Mr. Schenck, after referring to the benefits which had accrued to the State of Illinois from the land grant to the Illinois Central Railroad, went on to say:

> "But I will not multiply instances of this sort. They are familiar to every gentleman. I hold that it is a wise policy to open up our western possessions by liberal grants in order to induce settlement, progress, improvement, from all of which we shall have returns a thousand-fold in the shape of increased resources, the Government deriving directly, in the form of taxation, more than all it appropriates in thus developing the country." (Id. 585.)

And again:

> "My friend from Illinois (Mr. Logan), who last addressed the House, informed us that we are going against the wishes of the people. I do not believe it. I do not believe the people are opposed to these great works of public improvement, but look at them as clearly as any gentleman here can, and as understandingly; and I do not wish to depreciate their intelligence on that point." (Id. 585.)

Mr. Schenck was followed by Mr. Higby, who spoke for the bill, and who deprecated the attempt to raise a clamor in the House against "building these roads across the continent." (Id. 586.)

Mr. O'Neill, from Pennsylvania, followed in support of the bill. He said, among other things:

> "I am sorry to find that in the discussion a great deal has been insinuated about fraudulent transactions and corrupt corporations—of men and corporations taking grants of land and money from the Government and failing to devote them to the purposes for which they were designed. If such be true, let us have facts, and not mere insinuations. I will not dwell on that branch of the subject, brought in here to prejudice the proposed legislation, but come at once to the bill before us."

Then follows his argument in support of the bill. (Id. 586.)

Mr. Washburne moved to lay the bill and the amendments on the table. This included the Julian Amendment. The motion was lost. Thereupon, the House having refused to second the previous question, the bill was or-

dered referred to the Committee on Public Lands. There was no action by the House at this session adopting the bill or adopting the Julian Amendment.

At the Third Session of the 40th Congress (15 Stats. at L. 324) a bill was passed to authorize the transfer of lands granted to the Union Pacific to the Denver Pacific Railway, and to expedite the completion of railroads to Denver. The Union Pacific was authorized to contract with the Denver Pacific for the construction of its road and telegraph between Denver and Cheyenne, and to extend its own railroad and telegraph so as to form a continuous line from Kansas City to Cheyenne. The companies were authorized to mortgage their respective portions of the road, to enable them "to borrow money to construct the same"; and it was provided that neither of the companies should be entitled to subsidy in United States bonds. This Act was approved March 3, 1869.

It is submitted, therefore, that the Denver Pacific debate and the action of Congress in reference to that company do not justify the claim that there was a general sentiment in Congress hostile to the policy of land grants to railroads; nor does it justify the attempt to use the debates of Congress as a

means to interpret the Settlers' Clause in the Oregon Railroad Acts of 1869 and 1870 as a condition subsequent involving forfeiture.

The Coos Bay Wagon Road grant (15 Stats. 340) passed the Senate without any Settlers' Clause. This clause went into the bill by amendment offered in the House by Mr. Julian. (Cong. Globe, 3rd Sess. 40th Cong., p. 1820.) The grant in this case was to the State of Oregon. Mr. Mallory of Oregon, in charge of the bill, accepted the amendment of Mr. Julian. There was no discussion touching this amendment. (Id. p. 1820.) The amendment as concurred in by the Senate, instead of using the term "actual settlers", used the expression "to any one person", and in that form the bill was approved. (15 Stats. 340.)

Senate Bill 679 was an Act to amend an Act entitled "An Act granting lands to the State of Oregon to aid in the construction of a military road from Eugene City to the Eastern Boundary of said State." The purpose of the bill was to extend the time for construction. The amending bill passed the Senate without any settlers' clause; and in the House Mr. Julian moved to amend the bill by adding the settlers' clause. (Id. 1821.) Mr. Mallory, in charge of the bill,

had no objection to the amendment, but urged that to adopt it in the closing hours of the session would endanger its passage. Mr. Julian insisted on his amendment, and moved that the bill be laid on the table. His motion was defeated—yeas 35; nays 98—and the bill was passed without the amendment. (Id. 1821-2.)

It was in connection with his defeated amendment that Mr. Julian made the remark that the amendment "is a provision which ought to be applied to every future grant of land, and to every grant that seeks a revival at our hands. If the gentleman from Oregon will not permit that amendment to be offered and voted upon, I hope the House will refuse to second the previous question, and will allow me to submit a motion to refer the bill to the appropriate committee." He then went on to make a statement touching the action of the Senate in approving the amendment, which we have shown to be contradicted by the debates in the Senate on other bills, and by the circumstance that the pending bill and the Coos Bay bill both came from the Senate without such amendment.

Mr. Julian's inaccurate statement was as follows:

> "The adoption of the amendment will not defeat the passage of the bill, for the Senate, like the House, has repeatedly approved of the very condition prescribed in the amendment, and it will take but a moment for that body to concur in it if it be attached to the bill." (Id. 1821.)

As has just been pointed out, the House refused to sustain Mr. Julian either by passing his amendment or by referring the bill to committee.

The Act of April 10, 1869, (16 Stats. 46) extending the time for the construction of a railroad under a land grant to the States of Missouri and Arkansas, was corrected by the Act of March 8, 1870, (16 Stats. 76) in this respect: That Congress repealed the settlers' clause, which had gone without discussion into the Act of April 10, 1869, at the instance of Mr. Julian. On the same day, April 10, 1869, (16 Stats. 45) a grant to the State of Alabama in aid of railroad construction was revived. As in the case of the grant to Missouri and Arkansas, there was a settlers' clause passed without discussion, and there is nothing, therefore, in the debates of Congress, so far as this legislation is concerned, to give us any light.

The grant to Alabama (16 Stats. 46) is revived and renewed "subject to all the conditions and restrictions contained in the Act referred to (the original Act), and subject to the further limitation that if either of the said railroads is not completed within three years from the passage of this Act, no further sales shall be made for the benefit of such railroad, *and the lands unsold shall revert to the United States.*"

Here is the distinguishing mark of a condition subsequent. The Settlers' Clause, however, is a mere declarative proviso, reading as follows:

> "Provided that the lands granted by the Act hereby revived, except mineral lands, shall be sold to actual settlers only, in quantities not greater than one-quarter section to any one purchaser, and for a price not exceeding $2.50 per acre."

No penalty of reverter is attached, and the significance of the omission, while such penalty is industriously attached to the "conditions and restrictions and limitations" of the original Act, cannot be overlooked. It was in reference to this Act that the statement was made in the Government brief in the court below that the Settlers' Clause had been "construed to be a condition subsequent by

the Alabama Supreme Court in Warrior River Coal & Land Co. vs. Alabama State Land Co., 154 Ala. 135." This statement, while not intentionally misleading, is misleading in fact. So far from holding the Settlers' Clause to be a condition subsequent, the Alabama Supreme Court intimated that such would be an extreme construction to be put upon the clause; and under the well settled rule already so fully discussed, of this court and other courts, an extremity of construction is not to be labored for the purpose of turning a statutory declaration into a condition subsequent and a cause of forfeiture. The exact language of the Alabama Supreme Court in the case cited should be called to the attention of this court. The Alabama court first points out that the legal title "having vested in the State, and the beneficial interest in the railroad company having become individualized as to the land and the companies, respectively, the land here in controversy included, by the performance of all conditions precedent *(sic.)* erected by the national grant, the limitation (meaning the Settlers' Clause) quoted from the Act was *at most* a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting government, and by that only. This record shows no such

action on the part of the United States. Certainly it will not be presumed, however conclusively a breach of the quoted condition was shown. Hence the objection urged as upon a violation of the stated condition subsequent is untenable."

Instead, therefore, of holding the Settlers' Clause to be a condition subsequent, the Alabama court goes on to say that the limitation "was *at most* a condition subsequent."

It was only by an extremity of construction (in the view of the court) that this clause could be regarded as a condition subsequent; and extremities of construction will not be tolerated to force the interpretation of a condition subsequent involving a forfeiture.

In the debate on the Northern Pacific land grant (Cong. Globe, 2nd Sess. 41st Cong., p. 2480) the Settlers' Clause was proposed in the following terms:

> "The additional alternate sections of land hereby granted by this Act shall be sold by the company only to actual settlers, in quantities not exceeding 160 acres, or a quarter-section, to any one settler, at prices not exceeding $2.50 per acre."

Mr. Stewart, addressing the Senate, said:

"I apprehend no one can be in favor of this proposition, whatever he may want to do in the line of providing for settlers. The House committee have abandoned anything like this proposition. It has become manifest to them that it is unjust. It provides that all the lands granted to the company shall be sold for the same price; a townsite shall be sold for the same price as lands that are hardly fit for anything twenty miles off from the line of the road. This equalizes them, and the result will be that speculators will call themselves settlers and locate on the town sites. There is no place where the company will locate its depots where there will not be a settlement. Men will go ahead and find where depots are to be located. You will find your settler there; and then when the company has bought him off it will find him at the next depot. Men can go on the even sections at $2.50, and to say they shall go at every point where there is a depot or station to be located and take it at $2.50, and that the land twenty miles off shall be sold at the same price, is too manifestly absurd to need argument. That idea has been entirely abandoned even by those who desired to regulate it. They have in the other House

reported a bill saying that the land granted shall be sold in the aggregate at a certain price not exceeding $2.50 an acre; but on investigation the proposition has been abandoned by everybody. It is unjust."

He further said (Id. 2482):

"Talk about settlers going there! They cannot go there without a railroad."

Mr. Pomeroy said:

"What is that system? It is granting alternate sections to aid in building a road, not to build the road. No company could get an acre of land if they could build the road without it. It is in aid of an enterprise that is proposed to be prosecuted in advance of settlements. Of course in the old states, and in our newer states when they become old, people can build railroads without this stimulus; but in a new country it is not only impracticable, but it is impossible. You cannot put your finger on a railroad in the United States built in a new state or territory that had no grants of land or bonds from the Government. It is a question either of having no roads at all

or of giving reasonable grants of public lands to aid in their construction." (Id. 2483.)

He further said:

"Mr. President, my judgment has not yielded to this clamor about confining land grants to an arbitrary rule of $2.50 an acre. I believe it is an injurious thing. I do not believe that it will settle the country through which the railroad goes with anything like the facility that the old policy of land grants will settle it. If the chairman of the committee submits to an amendment which deprives railroad companies of the rights that have already vested in them; if he encourages an amendment that looks like taking away what has been granted to them for six years, I say it is an abomination. Such legislation as that is piracy. When a company have not forfeited their grants and are legally in possession of them, for Congress to come forward with a proposition to take them away is monstrous." (Id. 2484.)

Senator Nye of Nevada, in the same debate, speaking of the development of the West public lands by construction of the Central Pacific Railroad, remarked:

"That is another triumph of this great American policy of giving lands to aid in the construction of railroads. Stop it! As well would I think of severing the main artery of my system and expect to live. (Id. 2485.)

And again:

"I have seen the wonderful benefits of this policy in my own state, and I will not withhold it from others. A policy that was good for the Union and the Central is good for the Northern Pacific railroad. I have no selfish purpose to accomplish for the Central Pacific road. It has had its aid, and it must stand or fall upon its merits; but I will never consent to accept for them what I am not willing to grant to others." (Id. 2485.)

In the House it was said by Mr. Wilson of Minnesota:

"But to return to the subject of this $2.50 clause, I say it never was the intention of the committee on the Public Lands to attempt to burden these great enterprises with such a condition. On the contrary, the committee held a meeting to discuss this very question, and determined that it was not proper or prudent

> to do so, and that we should recommend the passage of the bill from the Speaker's table. Thus it has received the sanction both of the Pacific Railroad Committee and the Public Lands Committee of this House." (Id. 3266.)

When the Northern Pacific Act was passed, therefore, it certainly was not the intent, nor was it the "general sentiment" of Congress to impose the Settlers' Clause upon the enterprise of railroad construction as a condition subsequent involving forfeiture.

The question here is as to the policy and intent of Congress with reference to the imposition of a condition subsequent; it is not whether the provision for the sale of granted lands, in the Northern Pacific resolution of May 31, 1870, was the same as the proviso in the Act of April 10, 1869. Did Congress mean by the proviso in the earlier Act to impose a condition subsequent, with consequent forfeiture? So far as the debates at that time disclose, it was not the intent of Congress, for a forfeiture amendment, as we have shown, was expressly voted down in the Senate debate on the Act of May 4, 1870. It certainly was not the intent of Congress on May 31, 1870, when the Northern Pacific Joint Resolution was passed.

As Mr. Blair remarked, in speaking for the majority who carried the bill:

> "Now, sir, a word as to this provision which is insisted upon here, that these lands must be sold at $2.50 an acre to actual settlers only, and in quantities not exceeding 160 acres. I do not see that the settlers will gain anything by such a provision; but I do see that thereby the grant itself will be rendered almost valueless to the company. What will be its effect? It will attract along the entire line of this road a swarm of land 'bummers', if I may so call them, who will spy out all the better portions of the land and make false claims to them. They will put themselves in the way of the company. Some of these lands near the road, and near where the depots will be, will be worth a large sum of money, while other and more remote parts of the land will be worth very little. Is it intended to allow men without any serious intention of settlement, but merely for purposes of speculation, to take up the very best of these lands, and deprive the company of the benefits of the grant? I declare this proposition to be an unmitigated humbug. It always has been a humbug, and has lived and flourished on

humbug from the beginning. I say that the simple effect of it will be that the company will be compelled to employ its bummers also to make its own settlements along its own line. It can do it just as well as not, but it will be very expensive and annoying. The whole proposition is utterly worthless, being based from the beginning upon a misapprehension and a misunderstanding of the question.

I know very well how persistently the gentleman from Indiana (Mr. Julian), the chairman of the Committee on Public Lands, has clung to this measure. He has had constantly before his mind an idea that there is great danger of land monopolies in this country—an apprehension which has never frightened my mind for one moment—and he has sought to avert that danger by this measure. But, sir, it has been found, and will be found, entirely worthless for the purpose intended." (Cong. Globe, 2nd Sess. 41st Cong., pp. 3791-2.)

In the case of the Missouri & Northwestern Railroad the amendment proposed May 3, 1870, to insert the Settlers' Clause, was rejected. (Cong. Globe, 2nd Sess. 41st Cong., p. 3179.)

The land grant for the railroad to Winnipeg Settlement, which passed May 16, 1870, (Id. 3478-9) again presented the question of the Settlers' Clause by way of an amendment to the bill. The amendment was rejected by the Senate, and the bill passed.

On January 18, 1869, (Cong. Globe 3rd Sess. 40th Cong., pp. 424-5) Mr. Holman's resolution against grants of public lands to corporations was laid on the table in the House by a vote of 110 yeas and 55 nays.

We will file with the clerk, accompanying this Reply Brief, for delivery to the court, a copy of an official book entitled "Statement showing Land Grants made by Congress to aid in the Construction of Railroads, Wagon Roads, Canals and Internal Improvements, together with data relative thereto. Compiled from the records of the General Land Office by order of the Secretary of the Interior. Washington Government Printing Office, 1908."

This book gives the Statutes at Large and page where each Act of Congress making, forfeiting, renewing, or otherwise relating to, railroad land-grants, is published; and on page 20 it gives a list, with references to Acts of Congress, and all other material data, rela-

tive to "Forfeited Railroad Grants," in cases where the *entire grant* has been forfeited.

It will be found, by reference to the Acts of Congress cited, that in each instance (except one) of railroad land-grant forfeiture, in whole or in part, the *Act expressly declares forfeiture; and in no instance is a land-grant forfeited except for failure to construct the road* in aid of which the grant was made. The one exception referred to is under the heading "Forfeited Railroad Grants," item 1, page 20 of the accompanying book; where a grant made by Act of June 29, 1854, was repealed by Act of August 4, 1854,—repealed before the Railroad Company completed its organization. (Rice vs. Railroad Co., 1 Black 372.)

Instead of following the course taken in the lower court, in counsel's effort to show that (a) railroad land-grants may be, and are frequently, forfeited by judicial proceedings without any declaration of forfeiture by Congress, and that (b) the April 10, 1869, proviso followed the settled policy of Congress, which has obtained since the end of 1868, not to grant further time, or make new grants, to railroad companies, except "upon conditions restricting the sale of the granted lands" to actual settlers, we will endeavor to demonstrate, by reference to the "State-

ment showing Land Grants made by Congress", etc., filed herewith, that:

(a) In each instance of railroad land-grant forfeiture, there is an Act of Congress expressly declaring forfeiture (except the one case of repeal); and that

(b) Twenty Acts of Congress passed since April 1st, 1869, making or renewing railroad land-grants, do not contain any restriction of land-sales, as to persons, quantity or price.

(a) The following references will be to the page and "chronological number" (first, left-side column) of the accompanying "Statement Land Grants made by Congress"; the statute and page of the forfeiture Act being given in columns under the heading "Additional Legislation Affecting but Increasing Grant", at the right side of the page.

We call attention to the fact that in each instance the forfeiture declared was for *failure to construct* the road in aid of which the grant was made.

Page 4, No. 15. Act of September 29, 1890, 26 Stats. 496, first section:

> "That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto * * *"

Page 4, No. 22-a. Act of March 2, 1889, 25 Stats. 1008, first section:

> "That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto * * *"

Page 6, No. 32. Act of July 14, 1870, 16 Stats. 277:

> "That all the lands which were granted by Congress * * * are hereby declared forfeited to the United States, and these lands shall hereafter be disposed of as are other public lands of the United States."

Page 12, No. 46. Act of March 3, 1863, 19 Stats. 101:

> "That all lands which were granted by Act of Congress * * * are hereby declared forfeited to the United States, and shall hereafter be subject to entry only under the provisions of the homestead laws of the United States."

Page 18, No. 60. Act of July 6, 1886, 24 Stats. 123:

> "That all lands * * * granted to the Atlantic & Pacific Railroad Company

> * * * which are adjacent to and coterminous with the uncompleted portions of the main-line of said road * * * be and the same are hereby declared forfeited and restored to the public domain."

Page 18, No. 62. Act of January 31, 1885, 23 Stats. 296, first section:

> "That so much of the lands granted * * * as are adjacent to and coterminous with the uncompleted portions of said road * * * be and the same are hereby declared to be forfeited to the United States and restored to the public domain."

Page 20, No. 1. The grant was made by Act of June 29, 1854, and repealed by Act of August 4, 1854, 10 Stats. 575; the repealing Act, passed before organization of the Railroad Company (Rice vs. Railroad Co., 1 Black 372) provides:

> "That the bill * * * which passed the House * * * and which was approved by the President * * * be and the same is hereby repealed."

Page 20, No. 2. Act of July 10, 1886, 24 Stats. 140:

"That all rights, titles and privileges as to any of the public lands granted or conferred * * * be, and they are hereby declared forfeited and determined * * * and they are hereby restored to the public domain."

Page 20, No. 3. Same as No. 2 above.

Page 20, No. 4. Same as No. 2 above.

Page 20, No. 5. Same as No. 2 above.

Page 20, No. 6. Same as No. 2 above.

Page 20, No. 7. Same as No. 2 above.

Page 20, No. 8. Act of June 28, 1884, 23 Stats. 61:

"Whereas said * * * Company * * * never became entitled to or received any of said lands; therefore, be it enacted * * * That * * * all of the lands granted by said section one be and they are hereby restored to the public domain for distribution under the public land laws of the United States."

Page 20, No. 9. The "Statement" book says, as to this grant: "State never availed itself of this grant."

Page 20, No. 10. Act of April 15, 1874, 18 Stats. 29:

> "That all lands which were granted * * * are hereby declared forfeited to the United States * * * "

Page 20, No. 11. Act of March 3, 1877, 19 Stats. 404:

> "Sec. 4. That said Railroad Company, its successors or assigns, shall reconvey, by deed or deeds duly executed, all unsold lands patented to it * * * and pay into the Treasury of the United States the proceeds of all such lands sold."

The last column, against this item says (p. 21):

> "This company received patents for 21,341.77 acres of land, all of which was reconveyed to the United States April 26, 1877, under Act March 3, 1877, except 526.94 acres, for which it paid into the United States Treasury $1,498.80, the amount realized from the sale of said 526.94 acres."

Page 20, No. 12. Act of June 15, 1874, 18 Stats. 72:

"That all lands which were granted * * * are hereby declared forfeited to the United States, and these lands shall be hereafter disposed of as other public lands of the United States."

Page 20, No. 13. Act of February 28, 1885, 23 Stats. 337:

"That all lands granted * * * be and they are hereby declared forfeited and the whole of said lands restored to the public domain."

Page 20, No. 14. Act of March 2, 1889, 25 Stats. 1008:

"That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted * * * "

Page 20, No. 15. Act of September 29, 1890, 26 Stats. 496, first section:

"That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto * * *"

(b) This "Statement" book refers to the following twenty Acts of Congress, *passed since April 1, 1869, three making new rail-*

road land-grants, and seventeen reviving or renewing former railroad land-grants, none of which contain any "actual settler" or other land-sale restrictions.

Page 4, No. 22. Grant made by Act of June 3, 1856, (11 Stats. 21) contains no "actual settler" or other land-sale restriction. By Act of April 20, 1871, (17 Stats. 643) the Railroad Company was authorized to change and make a new survey and map of definite location of its line of route—and receive the land-grant originally made. The Act contains no "actual settler" or other land-sale restriction.

Page 4, No. 24-a. Grant made by Act of March 3, 1865, (13 Stats. 520) contains no "actual settler" or other land-sale restriction. By Act of May 23, 1872, (17 Stats. 160) the railroad company was authorized to "change and relocate" its line of route; the land grant made by the original Act not to be "changed in any respect whatever by the change of line hereby authorized." The Act contains no "actual settler" or other land sale restriction.

Page 4, No. 25. Grant made by Act of June 3, 1856, (11 Stats. 21). By Act of March 3, 1871, (16 Stats. 586) the railroad

company was authorized "to change the location of the incompleted portion of its railroad"—which change of route shall not "work any change in the land grant made to aid in the construction of said road." There is no "actual settler" or other land sale restriction in either Act.

Page 6, No. 29. Grant made by Act of June 3, 1856, (11 Stats. 20). The Act of March 3, 1871, (16 Stats. 582) provides "That the time specified (in the original grant) "for reversion to the United States of the lands granted by said Act * * * be, and the same is hereby, further extended for the period of five years from and after the passage of this Act." There is no "actual settler" or other land-sale restriction in either Act.

Page 6, No. 30. Grant made by Act of June 3, 1856, (11 Stats. 20). The Act of March 3, 1869, (15 Stats. 307) authorizes the Railroad Company to select lands to the full extent of its road as originally located. There is no "actual settler" or other land-sale restriction in either Act.

Page 6, No. 36-a. Grant made by Act of March 3, 1865 (13 Stats. 526).

First—The Act of March 3, 1871, (16 Stats. 588) authorized change of location of

branch line; "with the same proportional grant of lands to be taken in the same manner along said altered lines, as is provided for the present line by existing laws."

Second—The Act of March 3, 1873, (17 Stats. 631) provided "That the time for the completion of the railroad * * * be extended for the period of nine months."

Third—The Act of June 22, 1874, (18 Stats. 203) provided "That the provisions of 'the above-mentioned Act of March 3, 1873,' be and the same are hereby revived until" March 3, 1876.

There is no "actual settler" or other land-sale restriction in any of these Acts.

Page 8, No. 39-a. Grant made by Act of March 3, 1865, (13 Stats. 526). The Act of January 13, 1873, (17 Stats. 409) provides "That the time for the completion of the railroad * * * be extended for six months from the time limited in the said Act." There is no "actual settler" or other land-sale restriction in either Act.

Page 12, No. 46. Grant made by Act of March 3, 1863, (12 Stats. 772). The Act of April 19, 1871, (17 Stats. 5) provides that the Railroad Company "may relocate any

portion of its road south of the Town of Thayer * * * but not thereby to change, enlarge or diminish said land grant." There is no "actual settler" or other land-sale restriction in either Act.

Page 12, No. 49. Grant made by Act of May 5, 1864, (13 Stats. 66).

First—The Act of April 9, 1874, (18 Stats. 28) extends the time "for the completion of the road * * * and for the reversion of the lands granted * * * until" December 31, 1876.

Second—The Act of March 3, 1875, (18 Stats. 511) authorizes the Railroad Company to change its line of route; provided "That this Act shall not be construed as increasing said grant."

There is no "actual settler" or other land-sale restriction in any of these Acts.

Page 12, No. 53. Grant made by Act of July 2, 1864, (13 Stats. 356).

First—The Act of April 10, 1869, (16 Stats. 54) authorizes the Burlington Company "to assign and convey to a railroad company to be organized * * * all the rights, powers and privileges granted" by the Act of July 2, 1864.

Second—The Act of May 6, 1870, (16 Stats. 118) authorizes the railroad company to change its line of route; "and said change shall not impair the rights to, nor change the location of, the said land grant."

There is no "actual settler" or other land-sale restriction in any of these acts.

Page 14, No. 54. Grant made by Act of July 2, 1864, (13 Stats. 365).

First—The Act of April 10, 1869, (16 Stats. 57) authorizes the railroad company to extend its branch line from Portland to Puget Sound.

Second—The Act of May 31, 1870, (16 Stats. 378) authorizes the Northern Pacific to change the line of its main road, and grants additional lands; all such lands remaining undisposed of five years after construction to be subject to pre-emption settlement and sale "at a price to be paid to said company."

There is no "actual settler" or other land-sale restriction in any of these Acts.

Page 18, No. 61. Grant made by Act of July 27, 1866, (14 Stats. 292). By Act of June 28, 1870, (16 Stats. 382) the Southern

Pacific was authorized to construct its road along a designated line not described in its charter. There is no "actual settler" or other land-sale restriction in either Act.

Page 18, No. 63. Grant made by Act of March 3, 1871, (16 Stats. 573) of odd sections within 20 miles and 30 miles of the contemplated line of route (Yuma, via Los Angeles, to Mojave). This grant is identical, in material features, with the East Side grant of July 25, 1866; and contains no "actual settler" or other land-sale restriction.

Page 20, No. 13. Grant made by Act of March 3, 1871 (16 Stats. 573) of odd sections within 20 miles and 30 miles of the contemplated road (from Marshall, Texas, to San Diego, California).

The Act of May 2, 1872, (17 Stats. 59) extended time for construction; and there is no "actual settler" or other land-sale restriction in either Act.

From which it appears that, by Acts of Congress passed since April 10, 1869, *three new land grants were made, and seventeen extensions of time to construct,* and the like equivalent of revivals of former grants were made, *all without any "actual settler" or other land-sales restrictions.*

III.

Congress was without lawful authority on April 10, 1869, (16 Stat. 47) to annex a new condition, by amendment or otherwise, to the land grant made by the Act of July 25, 1866, (14 Stat. 239) as amended by the Act of June 25, 1868, (15 Stat. 80) for the following reasons:

(1) The California & Oregon Railroad Company filed its assent within one year and completed the "first section of twenty miles of said railroad" within two years after the passage of the Act of July 25, 1866.

(2) The Oregon Central Railroad (East Side) Company was not in default on April 10, 1869.

The Act of July 25th, 1866.

The printed "Stipulation as to the Facts," filed on January 31st, 1913, is hereinafter cited as the "Stip." (Vol. IV, pp. 1552-1732 Transcript of Record)

It is therein agreed that the Act of Congress approved July 25th, 1866, *"became operative"* on the day of its approval (Stip. Subd. II Item 1); and that said Act is correctly copied on pages 5 to 10 of the Bill (Stip. Subd. II Item 2).

The said Act is entitled "An Act granting lands to aid in the construction of a *railroad* and telegraph line from the Central Pacific railroad in California to Portland, in Oregon." (Bill Vol. I, p. 6 Transcript of Record; *Infra* pp.803-813, Appendix)

The *first section* of the Act authorized the California & Oregon Railroad Company "and such Company organized under the laws of Oregon as the Legislature of said State shall hereafter designate", to construct *"a railroad* from Portland in Oregon to the Central Pacific railroad in California; the California Company to construct "that part of the *said railroad"* in California and the Oregon Company to construct "that part of the *said railroad"* in Oregon; *provided* that either Company "shall have the right to construct beyond its State line, "until the said parts shall meet and connect and the whole line of *"said railroad* shall be completed." (Bill Vol. I, p. 6 Transcript; *Infra* pp 803-5 Appendix)

Section 2 provides "That there be, and hereby is, granted to the said Companies, their successors and assigns, for the purpose of aiding in the construction of *said railroad"* certain lands; the lands granted to be "applied to the building of

said road within the States, respectively, wherein they are situated."

Section 3 makes a right of way and station-grounds grant.

Section 4 provides, "that whenever the said Companies, or either of them, shall have twenty or more consecutive miles of *any portion of said railroad"* completed, three Commissioners shall be appointed to examine the same and report to the President, "and thereupon patents shall issue to said Companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of *said railroad."*

Section 5 requires that "the *said railroad",* after construction, be kept in repair and use, for the benefit of the United States, and so forth.

Section 6 requires the "said Companies" to file their assent to the Act, in the Interior Department, within one year after the passage thereof; "to complete the first twenty miles of *said railroad"* within two years, at least twenty miles each year thereafter, and the whole thereof on or before July 1st, 1875; and that

"the *said railroad* shall be of the same gauge as the Central Pacific railroad of California, and be connected therewith."

Section 7 requires that "the said railroad" be operated and used as "one connected and continuous line."

Section 8 provides, "that in case the said Companies" fail to file their assent or to construct the railroad as provided in Section 6 of this Act, "this Act shall be null and void, and all the lands not conveyed by patent to said Company or Companies, as the case may be, at the date of any such failure, shall revert to the United States.

Section 9 provides that the said Companies shall be governed by the general railroad laws of their respective States; and that the word "Company" or "Companies" shall be construed to embrace the words "associates, successors and assigns".

Section 10 reserves mineral lands, other than iron and coal lands, from the land-grant.

Section 11 provides that the said Companies shall be governed by statutory

regulations respecting right of way over private lands, wherever "the *said road*" shall pass over such lands.

Section 12 provides "That Congress may at any time, having the due regard for the rights of said California and Oregon Railroad Companies, add to, alter, amend, or repeal," the Act. (Bill Vol. I, p. 13; *Infra* pp. 813 Appendix)

The Act of June 25th, 1868.

It is agreed that the said Act of July 25th, 1866, was amended by an Act of Congress approved June 25th, 1868, entitled "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad in California, to Portland, in Oregon. (Stip. Subd. II, Item 3); and that the said amendatory Act is correctly copied on page 10 of the Bill (Stip. Subd. II, Item 4).

The amendatory Act provides that Section 6 of the said Act of July 25th, 1866,

"be so amended as to provide that instead of the times now fixed in said Section, the first section of twenty miles of *said railroad* and telegraph shall be completed within eighteen months from the passage of this Act, and at least

twenty miles in each two years thereafter, and the whole on or before" July 1st, 1880. (Bill Vol. I, pp. 13-14 Transcript. *Infra p.* 813-14 Appendix)

The California & Oregon Railroad Company filed its assent within one year, and completed "the first section of twenty miles of said railroad" within two years, after passage of the Act of July 25th, 1866.

The Act of July 25th, 1866, authorized "the construction of *a railroad* from the Central Pacific railroad in California to Portland, in Oregon."

The "Central Pacific railroad in California", referred to in the Act of 1866, is that part in California constructed by the Central Pacific Railroad Company, of the continuous, trans-continental, railroad from the Missouri River via Ogden, Sacramento, Stockton and San Jose to San Francisco—which railroad was constructed under Act of Congress approved July 1st, 1862 (12 Stat. 489), known as the Union Pacific-Central Pacific Act; the Union Pacific having constructed that part of the railroad from the Missouri River West to Ogden, and the Central Pacific that part extending from San Francisco East to Ogden.

In the case of United States vs. Union Pacific, 91 U. S. 79, considering the situation

out of which the Union Pacific-Central Pacific Act arose and the purpose of Congress in passing it, Mr. Justice Davis, in delivering the opinion, said:

> "Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap

> and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise."

Section 12 of the Union Pacific-Central Pacific Act, before the Supreme Court in the above-mentioned case, provides that "The track upon the entire line of railroad and branches shall be of uniform width, * * so that, when completed, cars can be run from the Missouri River to the Pacific Coast," the entire line of railroad to be used "as one connected, continuous line." Section 6 of the Act of 1866, referring to the railroad it authorizes the construction of, requires that "the said railroad shall be of the same gauge as the Central Pacific railroad of California, and be *connected* therewith"; and Section 7 of the Act of 1866 requires that the

said railroad be operated and used "as one connected and continuous line".

From which it is apparent that the railroad contemplated and provided for, by the Act of July 25th 1866, was intended as a branch, or extension, of the trans-continental Union Pacific-Central Pacific railroad, to be used and operated in connection with it as one continuous line, connecting the East with the West at San Francisco and Portland; and it follows that the same purpose of binding "together the widely separated parts of our common country, and furnishing a cheap and expeditious mode for the transportation of troops and supplies", which the Supreme Court found, in the above-quoted opinion, to have actuated Congress in passage of the Union Pacific-Central Pacific Act, also actuated Congress in passage of the July 25th 1866 Act.

The first Section of the July 25th 1866 Act, like Section 10 of the Union Pacific-Central Pacific Act, authorized either Company named to construct the entire railroad.

Section 6 of the Act of 1866 requires "That the said Companies file *their assent*" within one year, construct the first 20-mile section "of *said railroad*" within two years, and at

least 20 miles each year thereafter; and Section 8 provides that forfeiture of the land-grant shall follow failure to file assent, or complete construction, as required by Section 6. There can be no question, however, but that, notwithstanding Section 6, literally construed, by use of the words *"their assent"* called for a joint assent, had the California Company filed its separate assent in time and constructed the entire railroad before declaration of forfeiture for failure to construct in time, it would thereby have earned the entire land-grant; especially had the Oregon Legislature failed to designate a Company to construct the Oregon portion of *"said railroad."*

The California & Oregon Railroad Company's assent of date October 8 1866 to the Act of July 25th 1866 (the first Section of which Act, it will be remembered, authorized that Company to construct the entire railroad was filed with and accepted by the Department of Interior in October 1866 (Vol. 13 p. 6783 Transcript—Defendants' Exhibit 284); and that Company completed construction of the "Said railroad" from connection with the Central Pacific railroad, at Roseville Junction, to Lincoln October 24th 1867, to Wheatland October 28th 1867, and to Yuba September 19th 1868 (Vol. V, pp.

2087-8)—all prior to passage of the Act of April 10th 1869; the distances being, from Roseville Junction to Lincoln 10.4 miles, Lincoln to Wheatland 11.1 miles, Wheatland to Yuba 10.1 miles (Vol. V, pp. 2087-8)—in all 21.5 miles within two years after passage of the Act of July 25th 1866, and 31.6 miles prior to passage of the Act of April 10th 1869 and prior to designation of the East Side Company by the Oregon Legislature.

In other words: The first Section of the Act of 1866, in effect, authorized the California & Oregon Railroad Company, a corporation then in existence, to construct any part or all of "the *said railroad*", provided the Oregon Legislature failed to designate a Company, or such Company failed to file its assent in time. As to the California Company, then in existence, Section 2 of the Act made a presenti grant of the odd-sections within the limits therein specified, along the line of "*said railroad*" (from Roseville Junction to Portland); and Section 4 of the Act provided for the issuance of patents for the granted lands as fast as the "said railroad" was constructed and accepted. Section 6 imposed conditions subsequent, that assent be filed within one year, and the first 20-mile section of "said railroad" (i. e., from Roseville Junction to Portland) be constructed

within two years; and Section 8 provided forfeiture for failure to comply with the conditions imposed by Section 6. The California & Oregon Railroad filed its assent to the said Act, and constructed the first 20-mile section of the "said railroad", within the required time—thus perfecting full performance, and rendering the grants made by the Act of 1866 indefeasible for failure to perform conditions required to be performed prior to July 25th 1868; and it is sufficient to say that the Act of June 25th 1868 extended the time for further performance (construction of the second 20-mile section of "*said railroad*") until December 25th 1871—long after passage of the Act of April 10th 1869.

It is true that on October 10th 1866 the Oregon Legislature adopted and the Governor approved a Joint Resolution designating the West Side Company to construct that part in Oregon of the "said railroad" (Stip., Subd. III, Item 4, Vol. IV, p. 1555); and that on July 6th 1867 (within the time allowed therefor) the West Side Company filed its assent to the said Act of 1866. If such designation and assent were lawfuly made and filed, it follows that the assent of both Companies was filed in time, and the first 20-mile section of "*said railroad*" was constructed in time—hence, there being no default, Congress

was powerless to annex a *new condition* by Act of April 10th 1869; nor was the West Side Company, considered individually and independently of performances by the California Company, in default on April 10th 1869—as it had filed assent in time, and the Act of June 25th 1868 allowed until December 25th 1869 to construct the first 20-mile section of the "said railroad."

The Act of 1866 bid for one railroad connecting the Central Pacific railroad in California with Portland, in Oregon; and construction of that portion of "*said railroad*" within the limits of California, only, would not have served the purposes of the enactment. A railroad commencing at the Central Pacific railroad and terminating at the northern boundary line of California, would have been of no use to the Government—it would not have tended in the slightest degree to connect Portland, in Oregon, with the transcontinental Union Pacific-Central Pacific railroad; and the construction of such a railroad would have been an idle, wasteful expenditure of money by the constructing Company.

Section 12 of the Act of 1866 reserved the right of Congress, "having *due regard for the rights* of said California and Oregon Railroad

Companies, to add to, alter, amend or repeal this Act"; but the California & Oregon Railroad Company, having filed its assent and constructed the first 20-mile section of the *"said railroad"* in time, perfected a vested right that the said Act be not repealed, nor altered or amended in any way that would embarrass or defeat construction of the Oregon portion, or any other portion, of the contemplated railroad connecting the Central Pacific railroad with Portland.

Section 2 of the Act recites that the land-grant is made "for the purpose of aiding in the construction of *said railroad"*; which aid was necessarily extended, in fact and as it may be fairly assumed, to procure construction of the "said railroad"—fairly assumed that such aid was necessary because, otherwise, Congress would not have granted it. As before said, the only conditions imposed by the Act of 1866, upon this aid by land-grant, were the filing of assent within one year, and construction of the *"said railroad"* in 20-mile sections within the periods specified; and the constructing Companies were left free to mortgage or otherwise dispose of the lands, in aid of construction, without any restriction as to persons, consideration price, or land quantities. After performance of all conditions imposed by the Act of 1866 re-

quired to be performed prior to April 10 1869, the California Company on April 10th 1869 possessed a *vested right* which cut off the power of Congress to "alter, add to or amend" the Act of 1866 in any way that would tend to embarrass, delay or defeat construction of either the Oregon or California portion of *"said railroad"*.

Section 3 of the Union Pacific-Central Pacific Act (12 Stat. 489) provides "That there be, and is hereby granted," the lands "for the purpose of *aiding in the construction* of *said railroad"*; and the corresponding words of the Act of July 25th 1866 (Sec. 2) are identical.

In Platt vs. Union Pacific, 99 U. S. 48-67, speaking of the purpose of Congress in making the Union Pacific-Central Pacific land-grant, and the rights of the grantees under that Act, the Supreme Court said:

> "Suffice it to say, the *purpose of Congress,* above all others, was to obtain the construction of the railroad by the corporations it created to undertake the work. Only for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise. * * The lands were granted to be used

in furtherance of such construction. But Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon construction of the road. *Purchasers could not have been reasonably expected, certainly few for immediate settlement.* * * Many persons might be willing to advance money on faith of the prospective value of the lands, *if the railroad was built,* who would not be willing to buy when it was doubtful whether the Company would ever be able to raise the money necessary to build the road and thus render the *lands salable.* (p. 60).

No limitation was set to the quantity of land which the Company might sell to single associations, or single persons. It was at liberty to sell, if it could, to any land association or private purchaser, the entire body of the lands, or any lesser quantity, regardless of any general legislative policy." (p. 65).

The Act of April 10th, 1869, it is claimed attempted to cut off the unrestricted right granted by the Act of 1866 to dispose of the lands in Oregon to aid construction of the

Oregon portion of the railroad, by the following proviso:

> "And Provided, Further, That the lands granted by the Act aforesaid (the Act of July 25th, 1866) shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty cents per acre."

Here, as said by the Court in the Platt case *(supra)*, speaking of the Union Pacific Act:

> "Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon construction of the road. Purchasers could not have been reasonably expected, certainly few, for immediate settlement. The obvious mode, therefore, of using the lands for construction of the road (not for paying debts incurred in the construction, but immediate need as the construction was progressing) was to hypothecate them as security for a loan. * * * Congress must have been blind indeed if it did not foresee this, and in-

> tend to authorize the use of the lands to raise money *by mortgage* for the object it had so much at heart." (99 U. S. 60).

Had the sales limitation provisions, to "actual settlers" imposed by the Act of April 10th, 1869, been observed, as now contended, the Oregon portion of the *"said railroad"* would not yet have been constructed; for there were (speaking generally) no settlers there then, and but few there now, to settle upon or purchase the land—nor does the bill contain any allegation to the contrary.

It is true that construction of the Oregon portion of the *"said railroad"* was aided, largely, by moneys procured under Trust Mortgages covering the Oregon portion of the land-grant (Stip., Vol. IV, p. 1560 Item 1, p. 1563 Item 5, page 1575 Item 21); but the Bill alleges that those Trust Mortgages were "in violation and breach of the aforesaid terms, conditions and provisions" of the Act of April 10th, 1869, in that they purported to convey and authorize the Trustees thereunder to sell and convey the lands "to persons other than actual settlers, and in quantities greater than one-quarter section to one purchaser, and for a price exceeding $2.50 per acre" (Bill, Vol. I, pp. 36-7-49 Transcript)

The general incorporation laws of Oregon, as they existed in 1866, 1867, 1868 and 1869, constituted Oregon's continuous consent to the construction of railroads in Oregon by Railroad Companies incorporated for that purpose (Act of October 14, 1862, sections 1 to 51, now Lord's Oregon Laws, Sections 6679, 6680, 6681-3-6-7-8-6691-2-3-4-6-7-8-9-6838-9-40-41-42-43-44-45-46-6653); and unless and until the Oregon Legislature, in the exercise of the special authority delegated to it by the first Section of the Act of July 25th 1866, lawfully designated a particular Railroad Company to construct the Oregon portion of the "said railroad", the California and Oregon Railroad Company (or its successor the Central Pacific), had the consent of the Oregon Legislature to construct the same—if not as California corporations, then by the mere filing of Articles of Incorporation in Oregon. It is immaterial to present considerations which, if either, the West Side Company or East Side Company designation, constituted the proper exercise of the authority, as such, delegated by the Act of 1866; if, for no other reason, because either of such designations cut off the opportunity of the California Company to procure the express consent of the Oregon Legislature for it to construct the Oregon portion of the *"said railroad"*—except, of

course, by becoming the successor of such designated Company, by transfer of its stock, or conveyance of its rights and property.

As hereinbefore shown, the California & Oregon Railroad Company's assent to the Act of 1866 was filed in October 1866; it completed construction of the first 21.5 miles of the *"said railroad"* from its connection with the Central Pacific railroad at Roseville Junction on October 28th 1867, and the next 10.1 miles of "said railroad" on September 19th 1868; and the first 77.6 miles of "said railroad", from connection with the Central Pacific to Chico, as constructed by that Company, was finally accepted by the United States authorities in August 1870 (Defendants' Exhibit 285, Vol. XIII, p. 6784)

About December 1867, the principal stockholders of the Central Pacific Railroad Company of California (grantee under the Union Pacific-Central Pacific Acts of 1862 and 1864) became the principal stockholders of the California & Oregon Railroad Company (Stip. Subd. VII, Item 11, Vol. IV, p. 1571 Transcript); and in August 1870 the said California & Oregon Railroad Company became amalgamated and consolidated into the Central Pacific Railroad Company (Stip.

Subd. VII, Items 2, 3, Vol. IV, p. 1566 Transcript). The Articles of Amalgamation and Consolidation, after reciting that the California & Oregon Railroad Company was incorporated and organized to construct, maintain and operate the continuous line of railroad from Roseville Junction to Portland, in Oregon, provided for by the Act of July 25th 1866 (Stip. Subd. VII, Item 3, Vol. IV, p. 1566 pp. 1652-62 Transcript), declares that "The object and purpose of said new corporation (Central Pacific Railroad Company) shall be to purchase, construct, own, maintain, and operate all and each of the railroad lines hereinbefore described" (Vol. IV, p. 1656 Transcript).

At the time of said amalgamation and consolidation, the Central Pacific Railroad Company owned the railroad constructed under the Union Pacific-Central Pacific Acts, from Ogden by way of Elko, Reno, Colfax, Sacramento, Stockton, Niles and San Jose to San Francisco, and the co-terminous land-grant made by the said Acts; and the California & Oregon Railroad Company, at that time, owned the California portion of the land-grant made by the Act of July 25th 1866 (Stip. Subd. VII, Item 4, Vol. IV, pp. 1567-8 Transcript), and theretofore completed construction of its railroad from connection

with the Central Pacific railroad at Roseville Junction to Chico (Vol. V, pp. 2087-8, p. 217). Prior to the year 1883 the Central Pacific completed its railroad from Chico northerly to Delta, and during the years 1885, 1886 and 1887 the Pacific Improvement Company under the several contracts hereinafter mentioned (with the Central Pacific as to the California portion and with the Oregon & California Railroad Company as to the Oregon portion) completed the *"said railroad"* by continuous construction work commencing at Delta and extending Northerly to Ashland; the entire construction work (Delta Northerly through to Ashland) having been done by Wm. Hood, then and now Chief Engineer of the Central Pacific, and was paid for as the work progressed, by the Pacific Improvement Company (Vol. IV, pp. 2051-2)

On February 7th 1885 the Central Pacific leased its railroad from Ogden to San Francisco, and from Roseville Junction to Delta, unto the Southern Pacific Company (Stip. Subd. VII, Item 7, Vol. IV, p. 1569 Transcript).

Construction of the Oregon portion of the railroad was subjected to frequent delays, by reason of financial embarrassment and, at

times, threatened bankruptcy, of the Oregon & California Railroad Company. In 1870, after considerable financial embarrassment theretofore, the Oregon & California Railroad Company procured $8,000,000 construction funds, by mortgaging its land (Stip. Subd. V Item 1 Vol. IV p. 1560 Transcript), which funds became exhausted about January 1873 by the cost of construction, and in consequence further construction was suspended until about June 1881 (Stip. Subd. V, Item 3, Vol. IV, p. 1561); by Trust Deed covering the land-grant, given in June 1881, $5,000,000 further construction funds were procured, and construction was resumed in June 1881 (Stip. Subd. VI, Item 5, Vol. IV, pp. 1563-4 Transcript), but about January 1884 the said $5,000,000 fund became exhausted by construction costs, and construction was again suspended; and about January 1885 all property and affairs of the Oregon & California Railroad Company were placed in the hands of a Receiver (Stip. Subd. VI, Item 6 and 7, Vol. IV, p. 1564 Transcript)

On July 31st 1885, the Oregon & California Railroad Company and Central Pacific Railroad Company entered into an Agreement (Stip. Subd. VII, Item 12, Vol. IV, pp. 1571-2, pp. 1689-1696 Transcript) by which the Oregon Company agreed to sell and trans-

fer, free of debt, its railroads and land-grants (less lands sold to that date, "which does not exceed in aggregate 300,000 acres") (Stip., Vol. IV, p. 1690 Transcript), unto the "Appointee" of the Central Pacific, in consideration of (*a*) 80,000 shares of Central Pacific stock at par value of $8,000,000, (*b*) $10,500,000 in Bonds to be delivered to the Oregon Company secured by Trust Mortgage on the lands and railroads sold including the railroad completed to the South boundary line of Oregon, and (*c*) completion of the said railroad from Ashland to the South boundary line of Oregon.

On October 11th 1886 the Central Pacific Railroad Company and the Pacific Improvement Company entered into an Agreement (Stip., Subd. VII, Item 12, Vol. IV, pp. 1571-2, and Vol. II, pp. 949-56 Transcript) which, briefly stated, makes the following recitations, covenants and agreements:

> *Recites* that the Central Pacific is successor in interest of the California & Oregon, and has completed construction from connection with the Central Pacific railroad at Roseville Junction to Delta, of the railroad provided for by the Act of July 25th 1866; that the Oregon & California Railroad Company is in "an

embarrassed condition" and unable to complete the Oregon portion of the said railroad; that until the whole of said railroad connecting Portland with the Central Pacific railroad is completed no part of the said railroad can be profitably operated, nor can the Government use the same for transportation of troops and soforth; that completion by the Central Pacific of the uncompleted portion in California of the said railroad "without assurance of the completion of that portion of the road from Portland to said (California) boundary line would be a waste of money;"

"Now, THEREFORE, For the purpose of completing the said railroad as a through line from Portland to and connecting with the Central Pacific railroad at Roseville Junction, thus connecting San Francisco, Ogden and the Union Pacific railroad East from Ogden, with Portland, the following *covenants and agreements* are made:

First: The Pacific Improvement shall construct and fully equip the said railroad from Delta to the Oregon-California boundary line as soon as the Oregon & California railroad is completed to that line:

Second: The said railroad construction to be subject to the approval of the President or Chief Engineer of the Central Pacific; the Chief Engineer's salary to be paid by the Central Pacific:

Third: The Pacific Improvement Co. to pay costs and expenses of purchasing and acquiring right of way;

Fourth: The Pacific Improvement Co. will "within a reasonable time", purchase the whole, or a majority, of the shares of Capital Stock of the Oregon & California Railroad Co., *and* complete the Oregon portion of the said railroad to connection with the Central Pacific railroad;

Fifth: The Central Pacific "will upon execution of this Agreement issue and deliver to the Pacific Improvement Co. 80,000 shares of its Capital Stock; and for construction of the California portion of the said railroad will pay the Pacific Improvement Co. $4,500,000—part thereof when ½ of the railroad from Delta to Oregon is completed, and the other ½ thereof when the entire railroad between said points is completed.

Pursuant to the provisions of the Contract of March 28th 1887 (Ex. E to Bill, Vol. I, pp. 166-184 Transcript), on or about May 12th 1887 all of the Capital Stock of the Oregon & California Railroad Company was assigned and delivered to the Pacific Improvement Company (Stip. Sub. VII, Items 13, 14, Vol. IV, pp. 1572-3 Transcript), in consideration and exchange for the 80,000 shares of Central Pacific Stock referred to in the before-mentioned Agreements of July 31st 1885 and October 11th 1886; and the Pacific Improvement Company held the said Capital Stock of the Oregon & California Railroad Company from May 12th 1887 until April 9th 1901—on which last-mentioned date it assigned and transferred the same to the Southern Pacific Company (Stip. Subd. VII, Item 15, Vol. IV, p. 1573 Transcript). The Pacific Improvement Company also agreed, in the said Contract of March 28th 1887 (as Stockholder of the Oregon & California Railroad Company), to execute and deliver unto the Union Trust Company (a party to the Contract) a Trust Mortgage covering the lands, railroads and all property of the Oregon & California Railroad Company, to secure the payment of Mortgage Bonds to be issued by the Union Trust Company and guaranteed by the Southern Pacific Company, to be used for the redemption of the then

outstanding Mortgage Bonds and indebtedness of the Oregon & California Railroad Company, and the remainder to be used for completion of the railroad from Ashland to connection with the Central Pacific railroad (Bill, Vol. I, pp. 48-49 Transcript). The Agreements of this Contract were carried out by the execution and delivery of the Trust Mortgage from the Oregon & California Railroad Company to the Union Trust Company, dated July 1st 1887 (Stip. Subd. VII, Item 16, Vol. IV, p. 1573 Transcript); and the Bonds issued thereunder were used in part to discharge the Oregon Company's debts as agreed in the Contract of March 28th 1887, and the balance was used to complete the construction of said railroad (Stip. Subd. VII, Items 20, 21, Vol. IV, pp. 1574-5 Transcript).

By Agreement dated June 6th 1887, between the Oregon & California Railroad Company and the Pacific Improvement Company, the Pacific Improvement Company agreed to construct and equip the Oregon portion of the said railroad, from Ashland to connection with the Central Pacific railroad, near the State line, for the consideration price therein set forth (Stip. Subd. VII, Item 24, Vol. IV, 1576, 1697-1702 Transcript); and during the year 1887 the Pacific Improvement Company

constructed that portion of the said railroad extending from Delta, in California, to Ashland, in Oregon (Stip. Sub. VII, Item 24, Vol. IV, p. 1576 Transcript). On July 1st 1887 the Oregon & California Railroad Company leased its Oregon railroad to the Southern Pacific Company, and on January 1st 1888 the Central Pacific leased unto the same Company its railroad from Delta North to connection with the Oregon & California railroad; and the Southern Pacific has ever since operated the said continuous railroad from Portland to the Roseville Junction, and from there Westerly to San Francisco and Easterly to connection with the Union Pacific railroad at Ogden (Stip. Subd. VII, Items 8, 9, 10; Vol IV, pp. 1569-1571 Transcript).

In conclusion: The following is a brief summary of the foregoing statement of facts, coupled with the conclusions which flow therefrom:

(*a*) The Act of July 25th 1866 provided for the construction of *"a railroad"* from the Central Pacific railroad to Portland, to be of the same gauge as and to be connected with the Central Pacific railroad, and to be operated as one continuous line of railroad (Sec's 1, 6 and 7); and the said Act authorized

and empowered the California & Oregon Railroad Company, therein described as the Company "organized under an Act of the State of California to protect certain parties in and to a railroad survey to connect Portland in Oregon with Marysville (on the line of said railroad as constructed, and about 33 miles North of Roseville Junction) in California", to construct the California part of *"said railroad"* and "to continue in constructing the same" beyond the California boundary line, "with the consent of the State" of Oregon, to Portland or until it met and connected with a railroad (if any) constructed by an Oregon Company designated by the Oregon Legislature (1st Sec.).

(*b*) The said Act, "for the purpose of aiding in the construction of *said railroad*", made a land-grant of twenty odd sections "per mile (ten on each side) of *said railroad*" (Sec. 2); and the only *conditions* imposed, upon the franchise to construct and maintain the railroad or receive the land-grant, are, "That the said Companies shall file their assent to this Act in the Department of Interior within one year after the passage hereof, and shall complete the first section of

20 miles of said railroad within two years, and at least twenty miles in each year thereafter" (Sec's 6 and 8).

(*c*) In October 1866 the California & Oregon Railroad Company's assent to the said Act was filed with and accepted by the Interior Department (Def'ts' Ex-284, Vol. XIII, p. 6783 Transcript); and on July 6th 1867, the Oregon Central Railroad Company (West Side) filed in the same office its assent to the said Act, together with a certified copy of the Joint Resolution of the Oregon Legislature, adopted and approved on October 10th 1866, designating "the Oregon Central Railroad Company, a Company organized under the general incorporation laws" of Oregon, "as the Company which shall be entitled to receive the land granted and all the benefits in Oregon of the Act of Congress approved July 25, 1866" (Stip. Subd. II, Items 4, 5, Vol. IV, p. 1555 Transcript). From which it appears that both Companies filed "their assent to this (July 25th 1866) Act within one year after the passage thereof" (Sec. 6); hence there was no default, on April 10th 1869, *for failure to file assent.*

(*d*) Congress, conscious that the said assents had been filed in time, on June

25th 1868 passed an Act amending Section 6 of the Act of July 25th 1866 so as to allow until December 25th 1869 to construct the first 20-mile section of "*said railroad*"—without requirement for filing of further assent. This date (December 25th 1869) it will be observed, is *subsequent* to the Act of April 10th 1869; from which it follows that, had neither Company constructed any railroad prior to April 10th 1869, still there would have been no default on April 10th 1869, *on account of failure to construct.*

(*e*) However, the California & Oregon Railroad Company actually constructed the first 20-mile section of the "*said railroad*" within the time allowed therefor by the Act of July 25, 1866, but failed to report the construction, or to ask acceptance thereof, until after passage of the Act of June 25th 1868 granting further time; at the time of which acceptance the California Company had 77.6 miles of the "*said railroad,*" connecting with the Central Pacific at Roseville Junction and extending North to Chico, satisfactorily constructed and equipped. In other words, the California Company constructed sufficient railroad

prior to April 10th 1869, to save breach of condition for failure to construct, down to December 24th 1875; but, as before said, the time to construct the first 20-mile section did not expire until December 24th 1869—more than eight months *after* passage of the Act of April 10th 1869.

(*f*) The Act of July 25th 1866 constituted the owners offer to dispose of the lands described upon terms and conditions expressly stated in the Act, namely: filing of assent and construction of the railroad, within the times fixed therefor. The California Company specifically and fully performed those conditions (in so far as they were required to be performed prior to December 24th 1875), at its own great cost and expenditure of money; hence the California Company had a vested right, on April 10th 1869, that the integrity of the Act of 1866 be preserved—and that the said Act be not so altered or amended as to in anywise lessen, or diminish, the present or prospective value of the benefits promised by that Act.

(*g*) The purpose of Congress, in passing the Act of 1866 was to procure the

construction of a continuous railroad of the same gauge as, and connecting Portland with, the Central Pacific railroad—thus establishing a continuous transcontinental railroad, over which cars carrying Government troops and provisions, could be transported from the East at the West end and to Portland at the North end. A railroad commencing at Portland which did not extend to nor connect with the Central Pacific railroad, or which commenced at the Central Pacific railroad and did not extend to Portland would not, for obvious reasons, fulfill the purposes of Congress in passing the Act; and the construction of such a road would be a wasteful expenditure of money. The California Company, therefore, having fully performed and expended a substantial sum of money in constructing and equipping the Southern part of "*said railroad*", was legally and equitably entitled that the Act of 1866 remain intact, unshorn of benefits offered by it—to the end that the full measure of subsidy offered by the Act to aid construction, both in Oregon and California, remain free and open to realization; a right, in other words, that sale of the lands granted in aid of construction be not restricted or limited to a

particular class of persons, nor as to sale price per acre, nor as to quantity salable to one person.

(*h*) While the general incorporation laws of Oregon, at the time the Act of July 25th 1866 was passed and continuously since (Lord's Oregon Laws, Sec's 6679 to 6702), constituted the continuing general consent of the Oregon Legislature to the construction of railroads in Oregon by any incorporated Railroad Company, special designation by the Oregon Legislature, first of the West Side Company and thereafter of the East Side Company, cut off the general consent that any Company other than the specially designated Companies construct the particular road covered by such designations; hence the only way, after the said special designations were made, that the California & Oregon or its successor the Central Pacific could continue the construction of the "*said railroad*" into Oregon, was by continuing such construction in the name and as the work of the designated Company—which necessitated the purchase by the Central Pacific (acting through the Pacific Improvement Company) of the Oregon Company's Capital Stock.

(*i*) The Oregon & California ceased construction, for lack of funds, from about January 1873 until about June 1881 (Stip. Subd. V, Item 3, Vol. IV, p. 1561 Transcript), thereafter from January 1884 until about April 1887 (Stip. Subd. VI, Item 6, Vol. IV, p. 1564 Transcript), and in January 1885 all property of the Oregon & California Railroad Company was placed in the hands of a Receiver (Stip. Subd. VI, Item 7, Vol. IV, p. 1564).

On July 31st 1885 the Oregon & California Railroad Company and Central Pacific Railroad Company entered into an Agreement (Stip. Subd. VII, Item 12, Vol. IV, p. 1571, pp. 1689-1696 Transcript) by which the Oregon Company agreed to sell and transfer all its property, free of debt, to the Central Pacific "Appointee" to be thereafter designated, in consideration of 80,000 shares of Central Pacific Stock and $10,500,000 in new Bonds to be secured by Mortgage on all Oregon & California property; the new Bonds (presumably) to be used in redeeming and paying the then outstanding Mortgage Bonds and indebtedness of the Oregon Company—presumably to be so

used because of the agreement to sell and transfer the property free of debt.

On October 11th 1886 the Central Pacific Railroad Company and Pacific Improvement Company entered into an Agreement (Stip. Subd. VII, Item 12, Vol. IV, pp. 1571-2, Vol. II, pp. 949-56 Transcript) in which, after reciting the financial inability of the Oregon & California Railroad Company to complete construction of the Oregon part of the "*said railroad*" and that without completion of the entire railroad from the Central Pacific railroad at Roseville Junction to Portland all expenditures made and to be made in constructing the California part of the "said railroad" were wasteful and useless, the said Companies mutually agreed that the Pacific Improvement Company would purchase the Capital Stock of the Oregon & California Railroad Company and cause the "said railroad" to be completed so as to connect Portland with the Central Pacific railroad, in consideration of 80,000 shares of Central Pacific Stock (to be exchanged for the Oregon & California Stock), and $4,500,000 to be paid for construction of the uncompleted part of the Central Pacific railroad; the effect

of which Agreement was, among other things, to constitute the Pacific Improvement Company the "Appointee" of the Central Pacific, provided for in the said Agreement of July 31st, 1885.

On March 28th 1887, the Oregon & California Railroad Company Stockholders and Bondholders' Committees of that Company, The Pacific Improvement Company, Southern Pacific Company and Union Trust Company, entered into an Agreement (Stip. Subd. VII, Item 13; Vol. IV, pp. 1572-3; Vol. I, pp. 168-85 Transcript) by which the said Stockholders' Committee agreed to sell all or substantially all Capital Stock of the Oregon & California Railroad Company unto the Pacific Improvement Company, in consideration of and exchange for 80,000 shares of Central Pacific Capital Stock; and the Bondholders Committee agreed to exchange the $10,500,000 then outstanding Oregon & California Mortgage Bonds for new Bonds to be issued under a Trust Mortgage to be given by the Oregon & California Railroad Company unto the Union Trust Company with payment guaranteed by the Southern Pacific Company—the old Bonds to be delivered to the Southern Pacific Com-

pany (Bill, Vol. I, pp. 43-166-184 Transcript).

Pursuant to the last-mentioned Agreement all of the Capital Stock of the Oregon & California Railroad Company was, on or about May 12th 1887 assigned and delivered to the Pacific Improvement Company; and at the same time the said old Mortgage Bonds were transferred and delivered to the Southern Pacific Company (Stip. Subd. VII, Item 14, Vol. IV, pp. 1572-3 Transcript).

About August 1st 1899 the Southern Pacific Company became the owner of the Capital Stock of the Central Pacific Railroad Company (Stip. Subd. VII, Item 11, Vol. IV, p. 1571 Transcript); and on April 9th 1901 the Pacific Improvement Company assigned and transferred the Oregon & California Capital Stock to the Southern Pacific Company.

Presumably, however, the Pacific Improvement held the Oregon & California Capital Stock in trust for the Central Pacific, down to the time the Southern Pacific became owner of the Central Pacific—especially as the Oregon & California Capital Stock was surrendered to

the Central Pacific and the certificates of Central Pacific Stock therefor were issued directly by the Central Pacific unto the persons entitled thereto by such exchange (Bill, Vol. I, p.).

Furthermore, Congress by the Act of June 15, 1866 (14 Stat. 66) enacted a statute that is in harmony with the settled policy of the country, as evidenced by the land grants to Union Pacific Railway Co. in 1862 and in 1864, and like regulation granting lands to Central Pacific Railroad Company in 1862. This statute may well be called the National Charter of American Railroads. It provided that every railroad company in the United States whose road is operated by steam, its successors or assigns should be and was thereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. As said by Mr. Judson in his work on Interstate Commerce, Sec. 40, p. 51, "The purpose of

this act, as declared by the Supreme Court was to remove trammels upon transportation which had previously existed, and to prevent the creation of such trammels in the future, and also to be a declaration by congress in favor of the great policy of continuous lines."

Railroad Company vs. Richmond, 19 Wallace 584

Union Pacific Railway Company vs. Chicago, etc., Railway Company, 163 U. S. 565 and 589

Bowman vs. C. & N. W. Railroad Company, 125 U. S. 465.

In Union Pacific Railway Company vs. Chicago, etc., Railway Company, 163 U. S. 565 and 589, Chief Justice Fuller speaking for the Court, after quoting the Act of June 15th 1866, now Sec. 5248 of Revised Statutes, says: "It is impossible for us to ignore the great policy in favor of continuous lines thus declared by Congress, and that it is effectuation of that policy that such business arrangements as will make such connections effective are made."

If it was competent for Congress to pass the Act of April 10th 1869, thereby

placing upon the lands granted by the Act of July 25th 1866 within the State of Oregon the restrictions contained in the actual settler clause, the enforcement thereof would in effect destroy the right of the California & Oregon Railroad Company to construct this continuous line to Portland and earn the grant under the original Act and free from the restrictions of the actual settler clause.

If Congress cannot, in view of the policy thus evidenced by the Act of July 25th 1866 impose this limitation upon any part of these lands, it must necessarily follow that whether the lands were earned by either company or both is immaterial. The condition is in violation of the contract right created by the Act of July 25th 1866.

A complete summary of the evidence to be considered under this point will be found at pages 320-33 of the brief of facts filed herewith, and special attention is also called to letter of July 16, 1868, from A. M. Loryea to O. H. Browning, Secretary of the Interior, of date July 16, 1868, Vol. XIV, p. 7439, showing acceptance of Act of July 25th, 1866, by East Side Company, and also Vol. X, pp. 5023-5028, showing

acceptance of Act of July 25th, 1866, by East Side Company, on November 25, 1868, after its designation by Oregon Legislature October 20, 1868, and before the passage of the Act of April 10, 1869.

It is thus seen that prior to the passage of the Act of April 10th 1869 the East Side Company was the owner of a vested estate in the grant made by the Act of July 25th 1866; and there remained only the question as between the West Side Company and the East Side Company as to which was the legally designated beneficiary of the grant; that is, whether the West Side Company had been legally designated under the Joint Resolution of October 10th 1868, and, if not so legally designated, as to whether the East Side Company had been legally designated under the Joint Resolution of October 20th 1868. It will be remembered that the East Side Company commenced actual construction on April 16th 1868 and continued such construction in sections, so that by September 1868 various portions of the line were under construction as far south as Salem, the capital of the State, and the tracks had been laid through Oregon City (Defendants' Exhibit 367, Volume XVIII, page 9028; Defendants' Exhibit 371, Volume XVIII, page 9030; testimony of Joseph Gaston, Volume V, page

2442; testimony of George H. Himes, Volume V, page 2443; testimony of J. C. Moreland, Volume V, page 2461). That on April 29th 1868 the East Side Company adopted a resolution accepting the grant of July 25th 1866 and empowered A. M. Loryea to present a duly certified copy thereof to the proper authorities to be filed as certified by S. A. Clarke, Secretary of the East Side Company, under date of April 30th 1868 (Volume XIV, page 7454); and, in connection therewith, adopted a resolution appointing A. M. Loryea agent and representative of that Company April 15th 1868 (Volume X, pages 4934-8); and that A. M. Loryea on July 16th 1869 (Volume XIV, page 7454) wrote a letter to Secretary Browning, which the latter acknowledged in his letter of July 17th 1868 (Volume XIV, page 7440).

It will also be remembered, that on November 25th 1868 the East Side Company (Volume X, page 5023-5026) adopted a formal resolution assenting to the Act of July 25th 1866 and appointing J. H. Mitchell to act as attorney for the East Side Company, to go to Washington, D. C., and represent the Company in all of its legal matters. At that time the East Side Company had been legally designated by the Joint Resolution of October 20th 1868. It was legally incorporated

on April 22nd 1867. Congress had by the Act of June 25th 1868 disposed of the filing of assent and had continued the time for the construction and completion of the first 20 miles of the road and construction and completion of the entire road. The Act of June 25th 1868 operated as a waiver of the necessity for the filing of assent by the newly designated Company, known in this record as the East Side Company. Congress at that time knew that the East Side Company was engaged in actual construction work and that on July 23rd 1868 the first 150 miles of its line were under contract and construction and that the work thereon was proceeding from Portland as far south as French Prairie, in which the town of Woodburn is now located. Congress also knew that the West Side Company was claiming to be legally designated and was pushing its construction work for the purpose of earning the grant, and Congress also knew that the West Side Company had filed its assent within the time and that the East Side Company had not been at that time legally designated by the Legislature, but was claiming to be entitled to the benefit of the grant, and that its articles of incorporation of date April 22nd 1867, authorized under the Code of 1862, was a continuing consent upon the part of the State of Oregon and a designation of the State of Oregon, un-

der its joint statute relating to the incorporation of railroad companies, and that the articles of incorporation of the East Side Company aptly appropriated or indicated its intention to construct the road required to be constructed under the Act of July 25th 1866. In this situation, it must also be borne in mind that the California and Oregon Railroad Company was designated in the Act of July 25th 1866 as a corporation already in existence that would take the grant in California, and under certain conditions would be the grantee as to that portion of the grant in Oregon. There was therefore a grantee or beneficiary to take the grant of July 25th 1866 in esse from the date of the Act of Congress; and the objection that the East Side Company was not in esse and as such designated is without force, in view of the legally designated beneficiary, the California and Oregon Railway Company, named in the Act of July 25th 1866, with the contingent right to become the beneficiary and grantee of the lands granted, which were situated in Oregon. That right was defeated by the designation of the East Side Company by the Legislature of Oregon under the Resolution of October 20th 1868, and the authority that had vested contingently in the California and Oregon Railroad Company passed over to the East Side Company, and that Company, as

we have seen, accepted the grant by actual construction and therefore filed its assent. The filing of its assent after the Act of June 25th 1868 was a wholly unnecessary thing to do, so far as any rights were thereby secured; and the failure to file any assent after the passage of the Act of June 25th 1868 had no possible effect in that situation. The Act of April 10th 1869 was passed over the objections of the West Side Company and, as the report of the Judiciary Committee of the Senate in reporting the bill shows, the object of that legislation was to permit the East Side Company (not by name or in fact) to file its assent—not for the purpose of vesting title in that Company, but for the purpose of bringing the East Side Company into clear relation to the grant and its claims thereto, so that the contest between the East Side Company and the West Side Company could be judicially determined. As the Act of April 10th 1869 passed the Senate, the actual settler clause was not found therein, but it was added in the House. In that situation, the most that could be claimed for the proviso is that, if there was a consideration for the promise or contract, the East Side Company by filing its assent thereafter agreed with United States that it would sell these lands to actual settlers. In other words, it made a promise that it would file its assent,

accepting the provisions of April 10th 1869, by which it covenanted with the United States and with no one else, and by which the East Side Company was personally bound to see that these lands were sold to actual settlers. This was a personal promise which did not run with the land, did not effect its title and which, if broken by the East Side Company prior to issuance of patent, could have been remedied by the Land Department refusing to issue patent, because the Company had failed to keep its promise. The President could have refused to accept constructed portions of road or to approve to be patented the lands opposite to, and coterminous with, such constructed portions of road, for the same reason. But when the East Side Company sold this grant to the Oregon and California Railroad Company on March 29th 1870 and the covenant was thereby broken, from that date the Oregon and California Railroad Company was under no obligation as matter of law to observe this proviso. The covenant did not run with the land, the Oregon and California Railroad Company was not a party to the contract and the facts that further construction of the road by said Company was accepted by the President, that lands opposite to and coterminous with the completed sections were approved to be patented, and that patents there-

for regularly issued to the Oregon and California Railroad Company, are persuasive and conclusive evidence that the United States in the execution of this grant and the amendment of April 10th 1869 so construed the operative effect of this actual settler clause. It therefore is conclusive, as it seems to us, that the rights acquired by the East Side Company, prior to April 10th 1869, passed to the Oregon and California Railroad Company, unaffected by the proviso of April 10th 1869, in whatever aspect the case may be considered.

IV.

"The actual settlers" clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, (16 Stat. 94) construed so as to give potent effect to the primary policy of Congress, and to carry out the purposes of the granting acts, in the light of long continued contemporaneous and permitted construction of these acts, as evidenced by the record, and subsequent legislation of Congress relating to land grants, and the public lands, did not create a condition subsequent. It was not the intention of Congress to burden the title to these lands with a condition as to their sales which, if broken at any time as to a single sale, would subject the title to the entire grant to forfeiture

to the United States. Congress, even though intending and expecting that the lands could and should be sold to actual settlers, relied upon the good faith and self interest of the Company to carry out its policy and direction in that behalf. If Congress had intended that the grant should be subject to forfeiture for any failure to carry out its policy, it would have used clear and apt words to effectuate the same. There is no presumption in favor of the United States that an estate granted in fee simple shall be destroyed by any act of the grantee which shall re-invest the United States with title. Estates granted by the United States will not be enlarged by construction, but when granted, there is no presumption that such estates will revert for any cause. The destruction of the estate will not be favored, whether the grant is public or private.

Section 4 of the Act of May 4, 1870, reads:

> "Section 4. And be it further enacted that the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, sidetracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one

> hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre." (16 Stat. 94)

The proviso of the Act of April 10, 1869, (16 Stat. 47) is as follows:

> "And provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

It will be remembered that the original granting act amended April 10, 1869, was passed July 25, 1866, and that the Oregon Central Railroad Company of Portland (West Side) was designated by the legislative assembly October 10, 1866 as the company entitled to this grant, but that the legislative assembly on October 20, 1868 set aside this action and designated the Oregon Central Railroad Company of Salem as the beneficiary of the act.

It also appears from the testimony that both companies commenced construction of their respective roads in April, 1868, and that construction work of the Oregon Central (West Side) proceeded with more or

less interruption, and it was engaged in constructing its road up to and on May 4, 1870, and that construction of the railroad of the Oregon Central (East Side) was prosecuted with considerable diligence during 1868 and the first twenty miles of completed road was finished December 25, 1869. The evidence fairly shows that more than one half of the construction work of the Oregon Central (East Side) had been done prior to April 10, 1869.

Bearing in mind that the primary object of both grants was to secure rapid construction of each road, and that under the act of July 25, 1866 (14 Stat. 239) the first section of twenty miles of the railroad contemplated by that act, extending from Roseville Junction to Portland, was to be completed within two years from July 25, 1866, and at least twenty miles in each year thereafter, and the whole on or before July 1, 1875.

Congress having in mind the insuperable conditions retarding construction, both in Oregon and California, passed the act of June 25, 1868 (15 Stat. 80), amending the act of July 25, 1866, so as to provide that the first section of twenty miles should be concluded within eighteen months from June 25, 1868, and at least 20 miles in each two

years thereafter, and the whole on or before July 1, 1880.

It appears from the testimony (Exhibit No. 14 to Stipulation, pages 171, 172, 173, 174, Item 2, subdivision 19, pages 39, 40 of "Stipulation as to the Facts") that the first section of the east side railroad in Oregon was completed December 24, 1869, accepted January 29, 1870; the second, third and fourth sections of 20 miles each were completed in the year 1870 and all accepted February 28, 1871; the fifth and sixth sections of 20 miles each were completed August 11, 1871 and January 13, 1872 respectively, and accepted March 11, 1872; seventh, eighth and ninth sections, a distance of 77.3668 miles were completed in 1872, accepted July 11, 1878; tenth section of 45 miles, first 28 miles thereof completed and in operation November 1882, and all accepted August 29, 1883; the eleventh section of 100 miles to a point about 1¼ miles south of Ashland completed, from the north end to Glendale, 20 miles, May 14, 1883; from Glendale to Grants Pass, 55 miles, December 4, 1883; to Phoenix, 91 miles, February 25, 1884; to Ashland, 99 miles, May 5, 1884; all accepted January 29, 1887; twelfth section, extending from a point 1½ miles south of Ashland to the Oregon and California state line, a distance of 24.135

miles, completed prior to June 28, 1888, and accepted November 8, 1889.

It is thus seen that the road was constructed from Roseburg south to the California state line after the time specified in the Act of June 25, 1868 and accepted by the President, the last section thereof, over nine years after such date.

The first section of 20 miles of the West Side railroad was completed prior to and accepted February 16, 1872; and the second section extending from the 20 mile post to the Yamhill River, a distance of 27½ miles, was completed prior to May 3, 1876 and accepted June 23, 1876. This was only a portion of the line contemplated by the Act of May 4, 1870, but this portion of 47½ miles was completed within the time specified in the Act of May 4, 1870.

By section 8 of the Act of July 25, 1866, it was provided that "in case the said companies shall fail to comply with the terms "and conditions required, namely, by not "filing their assent thereto as provided in "section 6 of this act, or by not completing "the same as provided in said section, this "act shall be null and void, and all the lands "not conveyed by patent to said company or

"companies, as the case may be, at the date "of any such failure, shall revert to the "United States. These were both conditions subsequent to the grant. Assent was filed by the California & Oregon Railroad Company, and failure to file assent upon the part of the Oregon and California Railroad Company or the Oregon Central Railroad Company within time was legally waived, if indeed such assent was not evidenced by acts of the Company in commencing construction and subsequently filing such assent.

The second condition subsequent has never been asserted and is, of course, waived, because the road was completed nine years after the time limited in the act of June 25, 1866, but notwithstanding it was so completed after breach of this condition subsequent, the road was accepted and patents directed to be issued.

Furthermore, the act of September 29, 1890 (26 Stat. 46), known as the "general forfeiture" act, is clearly a waiver of the right to forfeit this grant for breach of this condition subsequent.

It will be observed also that there are no words of forfeiture in the actual settlers clause in either the act of May 4, 1870 or

April 10, 1869, and that no words of re-entry are used.

In view of the primary purpose of Congress and its anxiety to secure early and prompt construction of these railroads, in view of the action of the President of the United States in accepting these completed sections of road, notwithstanding the Oregon Central (West Side) failed to construct a portion of railroad contemplated by that act, towit, that leading from Forest Grove to Astoria, and notwithstanding the Oregon Central (East Side) failed to construct within time, and in view of the passage of the act of January 31, 1885 (23 Stat. 296) declaring a forfeiture of certain lands granted by the act of May 4, 1870 for failure to construct a railroad from Forest Grove to Astoria, and no claim made then or at any time up to April 30, 1908, as to a breach of the actual settlers clause, and in view of the passage of the "general forfeiture" act of September 29, 1890, forfeiting lands granted to railroad companies opposite to and co-terminous with the uncompleted portions of the railroads contemplated by the grants, and no action taken in respect to the forfeiture of the grant of July 25, 1866 until April 30, 1908 for breach of the actual settlers clause, it is respectfully submitted that in the light of these facts,

indicating a settled purpose of Congress, it must be presumed that the parties, the United States on one side and the companies on the other, construed the actual settlers clause as evidencing a secondary policy. The contemporaneous and permitted construction of these acts, as evidenced by the record, and subsequent legislation relating to land grants and the public lands, clearly indicate that it was not the intention of Congress to create a condition subsequent by the words used in the actual settlers clause. It may have been expected, and doubtless was expected, that the lands could and should be sold to actual settlers, that the construction of the roads would induce settlement and that in this way, the direction evidenced by these words we have quoted, would be observed.

It may be conceded that in construing a grant made by the United States, where such grant does not rest upon pecuniary or valuable consideration, but is a gratuity or gift,—that the grant should be construed in favor of the United States and that nothing will be presumed to have been granted that does not clearly appear to have been intended to be granted.

It may be conceded further that grants made of public lands by the United States

to aid in the construction of railroads, should be construed so far as the estate created is concerned, strictly, and that all doubts as to the extent of the estate should be resolved in favor of the United States, unless the intention is clearly expressed, but estates granted by the United States will not be enlarged by construction. When the estate has been granted there is no presumption that such estate will revert for any cause. It is well settled that the destruction of an estate will not be favored, whether the grant is public or private.

These acts of Congress constitute contracts or conveyances by which a present estate was granted to the companies. The estate became absolute and vested in fee simple as to lands within place limits, and acquired precision upon the filing of the map of definite location. There is no presumption that the estate in the circumstances was conditional, or that it was granted upon a condition which might destroy or annihilate the fee.

In *Schulenberg v. Harriman,* 21 Wall. 44, 60, Mr. Justice Field says:

> "The language used imports a present grant and admits of no other meaning. * * * * The title passed to the sections, to be afterwards located; when the

route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land.

* * * * * * *

"A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires.

* * * * * * *

"The provision in the act of Congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. In Sheppard's Touchstone it is said: 'If the words in the close or conclusion of a condition be thus: that the land shall return to the enfeoffer, &c., or that he shall take it again and turn it to his own profit, or that the land shall revert, or that the feoffer shall recipere the land, these are, either of them, good words in a condition to give a re-entry—as good as the word 're-enter'—and by these words the estate will be made conditional.' "

It will thus be seen that in Schulenberg v. Harriman, there was an express provision by which, upon failure to complete the road, the land should revert, and it was there held that this created a condition subsequent and gave the right of re-entry, provided the grantor, in that case the United States, should see proper to assert this right. It was, as we shall presently show, not a reversion, but a possibility of reverter.

It should be borne in mind, also, that these grants to railroad companies of public lands to aid in the construction of roads, were not gratuities, or donations, or gifts, but were founded upon contracts in which pecuniary considerations were expressed and required to be paid. There was the expected enhancement of the value of the unsold public lands within the limits of these grants, and located outside of the limits of the grant but tributary to the territory served by those national highways. It was also required in the act of July 25, 1866 that the companies should transport, free of charge, troops and munitions of war and property of the United States, which, as the testimony shows, has aggregated a very large sum of money.

In such cases the rule of strict construction, even as to the estate granted, is not observed.

In *United States v. Denver & Rio Grande R. R. Co.* 150 U. S. 1, 14, Mr. Justice Jackson, speaking for the court, says:

> "It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In Winona & St. Peter Railroad v. Barney, 113 U. S. 618, 625, Mr. Justice Field, speaking for the court, thus states the rule upon this subject: 'The acts making the grants * * * * are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.'
>
> "Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of

the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. Bradley v. New York & New Haven Railroad, 21 Connecticut 294; Pierce on Railroads, 491."

The case of *Bradley v. New York & New Haven Railroad Co.* 21 Conn. 294, cited by Mr. Justice Johnson, strongly sustains these views.

Bearing in mind this rule thus announced by the Supreme Court of the United States, which must be applied to the question now under consideration, that is, whether the so-

called actual settlers clause quoted, creates a condition subsequent, the attention of the Court is called to the rules of law which control and which determine whether particular words used, either in a public or private grant, create a condition subsequent.

In *Stuart v. Easton,* 170 U. S. 383, 397, Mr. Justice White, speaking for the court, says:

> "If the grant be viewed as one merely to trustees to hold 'for the uses and purposes mentioned in the act of the assembly,' it is clear that the fee was not upon a condition subsequent nor one upon limitation. There are no apt, technical words (such as *so that; provided; if it shall happen;* etc., 4 Kent Com. note b. p. 132; 2 Washburn on Real Property, p. 3) contained in the grant, nor is the declaration of the use coupled with any clause of reentry or a provision that the estate conveyed should cease or be void on any contingency. (Ib) So, also, we fail to find in the patent the usual and apt words to create a limitation (such as *while; so long as; until, during* &c., 4 Kent, Ib.), or words of similar import. And, for reasons already stated, if we disregard the absence of technical terms or provi-

sions importing a condition or limitation, and examine the deed with a view of eliciting the clear intention of the parties, we are driven to the conclusion that it was the intention of the grantors to convey their entire estate in the land."

In *New York Indians v. United States,* 170 U. S. 1, 24, Mr. Justice Brown, speaking for the court, says:

"In the view we have taken of the granting clauses of this treaty, the provisions of the third article created a condition subsequent, upon a breach of which the Government might declare a forfeiture, but had no power by simple executive action to reenter, take possession of the lands and sell them. A distinction is drawn by the authorities between the case of a private grantor, who may reenter in the case of the breach of a condition subsequent, and the Government, which can only repossess itself of lands by legislative or judicial action. The distinction was first clearly drawn by this court in the case of United States v. Repentigny, 5 Wall. 211, 267, in which the court said: 'We agree that before a forfeiture or reunion with the public domain could take place, a judicial inquiry

should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly under the authority of the Government, without these preliminary proceedings.' Practically the same language was used with reference to a grant of lands in aid of a railroad in Schulenberg v. Harriman, 21 Wall. 44, 63; in Farnsworth v. Minnesota & Pacific Railroad, 92 U. S. 49; and in Van Wyck v. Knevals, 106 U. S. 360. In St. Louis, Iron Mountain &c., Railway Co., v. Magee, 115 U. S. 469, it was said that 'legislation to be sufficient' (for that purpose) 'must manifest an intention by Congress to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity.' See, also, Pacific Railway Co. v. United States, 124 U. S. 124. As there is no pretence that

any such action as is contemplated by these cases was ever taken, it necessarily follows that, if an estate in fee simple vested in the Indians, the proceedings subsequently taken would not revest the title in the Government.

"But even if it were conceded that the rights of the Indians were subject to forfeiture by executive action, it is by no means certain that the contingency ever happened which authorized such forfeiture; or, if a forfeiture did result, it was not waived by the subsequent action of Congress. A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him, and in favor of the grantee.

"A condition will not be extended beyond its express terms to entitle him to a forfeiture. Jones on Real Prop. Secs. 678, 679."

In *Rice* v. *Railroad Co.*, 1 Black 358, 378, the court says:

> "Whenever the words of a statute are ambiguous, or the meaning doubtful, the established rule of construction is, that the intention must be deduced from the whole statute, and every part of it. (1 Kent's Com. 462.) Intention in such cases must govern when it can be discovered; but in the search for it the whole statute must be regarded, and, if practicable, so expounded as to give effect to every part."

In *Wright* v. *Morgan,* 191 U. S. 55, 58, Mr. Justice Holmes, speaking for the court, says:

> "If the legal title was in the city it was an absolute title. In view of the extreme unwillingness of courts to admit the existence of a common law condition, even when the word condition is used, it needs no argument to show that there was no condition or limitation here. Stuart v. Easton, 170 U. S. 383."

In *Davis v. Gray,* 16 Wall. 203, 232, Mr. Justice Swayne says:

> "When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representa-

> tives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

The cases illustrating what words will create a condition subsequent, also illustrate and enforce the rule that conditions subsequent when created must be strictly construed, and therefore a court of equity will lay hold of circumstances showing impossibility of performance and thereby excusing the breach, or will look with favor upon a state of facts tending to show waiver.

In *Philadelphia, Wilmington & Baltimore R. R. Co. v. Howard,* 12 How. 307, 340, Mr. Justice Curtis says:

> "The law leans strongly against forfeiture and it is incumbent on the party who seeks to enforce one to show plainly his right to it."

This rule of strict construction is sustained and fortified where the United States, as here, has permitted the company, from the beginning, to sell its lands without regard to the restrictions or limitations of the actual settler clause, and at most, has permitted the company to follow the construction placed upon the act of April 10, 1869 by the opinion

of Mr. Wilson submitted to Attorney General Williams in 1872, that is, to sell to such persons as were actual settlers upon the land on April 10, 1869, and up to the definite location of the line of railroad which was the practice of the company, as testified to by Mr. Loring. Page 371, Vol. V p. 2190 et seq.

The United States practically acquiesced in this construction, and this should be considered by the court in determining whether the words of the so-called actual settlers clause should be construed to create a condition subsequent, and whether, if they do create a condition subsequent, the United States has treated the condition as impossible of performance, or as having been waived.

In *Hewitt v. Schultz,* 180 U. S. 139, 156, Mr. Justice Harlan, speaking for the court, says:

> "It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite lo-

cation of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress; for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

"But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas and Smith, and upon which

> the Land Department has acted since 1888. 'It is the settled doctrine of this court,' as was said in United States v. Alabama Great Southern Railroad, 142 U. S. 615, 621, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced.' "

The fact that the United States allowed this road to be completed nine years after the time in which it was required to be completed, and that notwithstanding there had been continuous breaches of this so-called condition subsequent, is a strong circumstance indicating acquiescence upon the part of the United States in the construction of the act of April 10, 1869, practically applied by the company in the administration of the grant from the beginning.

In speaking of the condition subsequent created by the act as to construction of road, and construing this grant, Mr. Justice Brown,

in the case of *Bybee v. Oregon & California R. R. Co.* 139 U. S. 663, 667, speaking for the court, says:

> "A condition that would put it beyond the power of the company to build the last mile of its road by the aid of the granted lands is manifestly so harsh and unjust, that the breach of such condition ought not to be treated as a forfeiture, unless the language of the act be so clear and unambiguous as to admit of no other reasonable construction."

There was an express provision in Section 8 of the act of July 25, 1866, that "all the lands not conveyed by "patent to said company or companies, as the case may be, at "the date of any such failure, shall revert to the United States." Construing this clear and undoubted condition subsequent, containing express words providing for a reverter to the United States for breach of the condition, the court in the Bybee case expressly ruled that as to lands theretofore patented the act continued in full force and effect. Judge Deady, construing this clause in the court below, said:

> "But for this qualification the grant might have been wholly resumed or for-

feited for any failure to comply with the condition, even in the construction of the last mile. And this construction of the section is in harmony with the general purpose of the act and the policy of congress in making the grant."

Bybee v. Ore. & Cal. R. R. Co., 26 Fed. 586, 589.

Mr. Justice Brown quotes with approval this language of Judge Deady and follows same with the statement we have quoted from his opinion.

This rule of strict construction applied to the words of the so-called actual settler clause, would, as it seems to us, indicate that a condition subsequent was not thereby created. But, if it should be held that, in the absence of words of forfeiture and re-entry, and notwithstanding the change of policy of the United States as to the settlement of lands of this class as evidenced by the Timber and Stone Act of June 3, 1878 and the act creating forest reserves, and other like acts, and the act repealing the pre-emption laws passed March 3, 1891, these words do create a condition subsequent, the authorities justify the contention we make, that the condition should be strictly construed; and if it appears

that there was doubt as to its proper construction in the beginning of the administration of the grant and that this matter was presented to the Secretary of the Interior, charged with the administration of this act on behalf of the United States, and that no action was taken in contravention of the construction contended for by the company, and that the matter was allowed to rest in abeyance for nearly 40 years, the court would be justified in holding that under these circumstances the language should not be construed to be a condition subsequent, or if bound by technical rules to hold that the words do create a condition subsequent, that then, under the circumstances, the condition should be held to have been discharged because of impossibility of performance or because impracticable on account of the condition of the lands granted and practically impossible of performance; or, if possible of performance, that its breach has been so long acquiesced in as that it has been waived.

It will be helpful to consider the adjudged cases as illustrating the principles that conditions subsequent are construed strictly.

In *Morrill v. Wabash, St. L. & P. Ry.*, 96 Mo. 174, 179, the court says:

"Again, conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates. 4 Kent Com. (10 Ed.) 150. When relied on to work a forfeiture, they must be created in express terms or by clear implication. 1 Wash. on Real Prop. (3 Ed.) 469."

In *Roanoke Investment Co. v. K. C. & S. E. Ry. Co.*, 108 Mo. 50, 63, the court says:

"Conditions subsequent are not favored in law and are construed strictly, because they tend to destroy estates. Coke, Littleton, 205 b. 219 b. 'If it be doubtful whether a clause in a deed be a covenant or a condition the courts will incline against the latter construction; for a covenant is far preferable.' 4 Kent's Com. 132. The usual words in a condition subsequent are 'so that', 'provided', the latter according to Lord Coke being the most appropriate."

In *Farnham v. Thompson*, 34 Minn. 330, 337, the court says:

"Such conditions are not favored in law, because they tend to defeat estates vested, and are in the nature of forfeitures. Therefore it is in such cases a rule

recognized by all the authorities that an estate on condition cannot be created by deed, except when the terms of the grant will admit of no other reasonable interpretation. The intention that the doing, or failing to do, on the part of the grantee, of the acts specified shall defeat the estate must be clearly and unambiguously expressed. No particular form of words is required to create the condition. Certain words have acquired a technical signification as creating such a condition,—such as 'provided,' 'so as,' or 'on condition',—when followed by words imposing an obligation on the grantee. But though these are apt words, and the most proper to be used for the purpose, they do not necessarily create a condition, for there may be other words in the deed qualifying them, showing that they were not used in their technical sense, and that a condition was not intended. Nor are those technical words necessary to create the condition, for the intent may be clearly and unequivocally expressed without them. As, if it be provided that, upon the failure of the grantee in the matter expressed, the grant shall be void, or the estate granted shall be forfeited, or the grantor may re-enter as of his former estate, a condition is

created. But we have met with no case where the merely imposing an obligation on the grantee,—no technical terms to create a condition nor to clearly express an intent that on his failure the land shall revert to the grantor being used,—has been held to create a condition."

See also, *Cross v. Carson,* 44 American Decisions, 742, and extended note, 743, 759, and extra annotations, same case, pages 1242, 1243, 1244, 1245, same volume.

In *Chapin and Wife v. School District No. 2,* 35 N. H. 445, 450, the court says:

"The usual words of a condition subsequent are, 'so that,' 'provided,' 'if it shall happen,' or 'upon condition.' The latter, according to Lord Coke, is the most appropriate. No form of expression however, is essential to create a condition, and if it is manifest from the terms of the grant that it was made upon condition, the estate will become defeated if the condition is not kept. 2 Black. Com. 154.

"Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates. Co.

Litt. 205, b; 219, b. If it be doubtful whether a clause in a deed is a condition or a covenant, the courts will incline against the condition, for a covenant is far preferable. 4 Kent's Com. 132. Kent says that the distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case. That the intention of the party to the instrument is of controlling efficacy."

In *Emerson v. Simpson,* 43 N. H. 475, 477, the court says:

"Conditions subsequent are not favored in law, says Ch. Kent (4 Com. 129), and are construed strictly, because they tend to destroy estates; and a vigorous exaction of them is a species of *summum jus,* and in many cases hardly reconcilable with conscience. If then a condition be personal, as that the lessee shall not sell without leave, the executors of the lessee not being named, may sell without incurring a breach. Dyer 65; Moor 11.

> "It is a general rule (says the Touchstone 133), that such conditions annexed to estates as go in defeasance, and tend to the destruction of estates, being odious in the law, are taken (that is construed or expounded) strictly, and shall not be extended beyond their words, unless it be in some special cases;"

In *Page v. Palmer,* 48 N. H. 385, 387, the court says:

> "It is well settled that in case of such a grant on terms or conditions as in this case, where the conditions are subsequent to the grant, the conditions are not favored in law, and are to be strictly construed; and that in order to bind the heirs or assigns to the performance of such conditions they must be expressly mentioned in the condition."

Wier and others v. Simmons and others, 55 Wis. 637, 643, the court says:

> "The rule is well settled that conditions subsequent which work a forfeiture of the estate are not favored in the law, and no language will be construed into such a condition contrary to the intent of the parties when such intent can be

derived from a consideration of the whole instrument, or from the circumstances attending the execution thereof; nor will the language used be construed into such a condition subsequent, when any other reasonable construction can be given to it."

In *Curtis v. Board of Education,* 43 Kan. 138, 144, the court says:

"The authorities are uniform that estates upon condition subsequent, which after having been fully vested may be defeated by breach of the condition, are never favored in law, and that no deed will be construed to create such an estate, unless the language to that effect is so clear that no room is left for any other construction. (2 Devlin on Deeds sec. 970, et seq., and cases there cited.) And as illustrations generally of the disfavor with which conditions subsequent are considered by the courts, and as having some application to this case, see the following cases: Packard v. Ames, 16 Gray, 327; Rawson v. School District, 7 Allen, 125; Chapin v. Harris, 8 Id. 594; Sohier v. Trinity Church, 109 Mass. 1; Lareree v. Carlton, 53 Me. 211; Emerson v. Simpson, 43 N. H. 475; Wier v. Sim-

mons, 55 Wis. 627; Mills v. Evansville Seminary 58 Id. 135; Stanley v. Colt, 5 Wall. 119.

In *Gadberry v. Sheppard,* 27 Miss. 203, 207, the Court says:

> "In order to make an estate upon condition subsequent, the grant must contain the condition in express terms or by clear implication, because such conditions are not favored in law, and are construed strictly, as tending to destroy estates. Co. Litt. 219, b.; 4 Kent's Com. 130; 2 Cruise's Dig. 8, sec. 38."

In *Brown v. Caldwell,* 23 West Virginia, 187, 189, the court says:

> "In *Rawson v. Uxbridge,* 7 Allen 125, it was held, that 'a grant of land, which has been used as a burying place to a town, 'for a burying-place forever,' in consideration of love and affection, 'and divers other valuable considerations,' is not a grant upon a condition subsequent.' In the opinion of the court, delivered in that case by chief-justice Bigelow, the court says: 'It is said in Shep. Touch. 126, that 'to every good condition is required an external form;' that is, it must be expressed in apt and sufficient words,

which according to the rules of law make a condition; otherwise it must fail of effect. This is especially the rule applicable to the construction of grants. A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore,* imports a condition of the interest of the grantor to make a conditional estate is otherwise clearly and unequivocally indicated. Conditions subsequent are not favored in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument'—(citing Co. Litt. 205b; 4 Kent. Com. (6th Ed.) 129, 132; Shep. Touch. 133; Merrifield v. Cobliegh, 4 Cush. 178, 184; 7 Allen 127, 128.)

"The usual and proper technical words by which a conditional estate is granted by deed are 'provided,' 'so as,' or 'on condition.' Coke says: 'Words of condition are *sub conditione, ita quod, proviso'*—Parlington's Case, 10 Co. 42a; Co. Litt. 203a, 203b. So a condition in a deed may be created by the use of the words

'si' or *'quod si contingat'* and the like, if a clause of forfeiture or re-entry be added. Co. Litt. 204a, 204b; Duke of Norfolk's Case, Dyer, 138b.

"In public land grants and in devises a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention on payment of a certain sum. But this rule is not applicable to grants of gifts except such as are purely voluntary, and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created."

This rule announced in the case just cited, and relying upon the case of Rawson v. Uxbridge, 7 Allen 172, applied to the case of a grant of public lands, as here, made upon a sufficient and adequate consideration moving to the United States from the grantee, justifies the contention that inasmuch as these lands were granted to aid in the construction of the road and were to be acquired for a consideration, to wit, the construction of a road and the free transportation of the property and troops of the United States for all time, and other pecuniary considerations,

such as enhancing the value of the even sections of the land contiguous to the granted lands, the United States did not intend by the words of the actual settler clause to create a conditional estate in the grantee, or to create a condition subsequent, for breach of which the entire consideration of the grant might fail.

In *Rawson v. Inhabitants of School District No. 5 in Uxbridge,* 7 Allen 125, 128, Chief Justice Bigelow, speaking for the court, says:

> "Conditions subsequent are not favored in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument. Co. Litt. 205 b, 219 b. 4 Kent Com. (6th ed.) 129, 132. Shep. Touchstone, 133. Merrifield v. Cobleigh, 4 Cush. 178, 184."
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> "In grants from the crown and in devises, a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention,

or on payment of a certain sum. But this rule is applicable only to those grants or gifts which are purely voluntary and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created."

* * * * * * *

"But if grants so expressed can be construed to create a condition by which to defeat an estate on breach and entry, it is clear that such an interpretation of them is confined to cases where the whole consideration of the grant is the accomplishment of a specific purpose, and the enjoyment of the estate granted is clearly made dependent on the performance of an act or the payment of money for the use or benefit of the grantor or his assigns. We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not enure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indi-

cating an intent that the grant is to be void if the declared purpose is not fulfilled."

In *Kirkpatrick v. M. & C. C. of Baltimore,* 81 Maryland 179, 192, the court says:

"Technical words are not absolutely essential to create a condition, nor on the other hand does their use necessarily raise one; such words may be controlled by the context of the instrument in which they are used, so that sometimes they work a limitation and condition, and sometimes a covenant or a trust only. Paschal v. Passmore, 15 Pa. St. 295; Bacon v. Huntington, 14 Conn. 92; Lessee of Worman v. Teagarden, 2 Ohio St. 380; Waters v. Bredin, 70 Pa. St. 235; Laberee v. Carlton, 53 Me. 211.

"Conditions subsequent are not favored in law 'because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures.' 4 Kent, 130; Stanley v. Colt, 5 Wallace, 119. Therefore it is, that a condition will not be raised by implication, from a mere declaration in the deed that the grant is made for a special and particular purpose without being coupled with words

appropriate to make such a condition. Packard v. Ames, 16 Gray, 327; Bigelow v. Barr, 4 Ohio, 358.

"And as a further consequence of this rule, it has always been held that 'in doubtful cases the disposition of the Courts is to construe language as creating a trust or covenant rather than a condition. See Earle v. Dawes, 3 Md. Ch. Rep. 230; Brantly's note and authorities there cited; Scovill v. McMahon, 62 Conn. 378, 26 At. R. 481; Greene v. O'Connor, 18 R. I. 49, 25, At. R. 692; Rawson v. Inhabitants, &c., 7 Allen 128, 129.

"In the elaborate and able opinion delivered in the last cited case by Bigelow, C. J., the Court said: 'If it be doubtful whether a clause in a deed be a covenant or condition, Courts of Law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument.' * * * 'We believe there is no authoritative sanction for the doctrine that a deed is to be construed a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used when such purpose will not enure

> specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.' "

In *Gallaher v. Herbert,* 117 Ill. 160, 169, the court says:

> "There is nothing in the form of the language here employed to indicate that it was intended the conveyance was upon a condition subsequent. The words, 'upon condition', do not occur, and there are no other words of equivalent meaning. There is no clause providing that the grantor shall re-enter in any event, and these are the usual indications of an intent to create a condition subsequent. Sheppard's Touchstone, (6th ed.) 118."

In *Elyton Land Co. v. South & North Alabama R. R. Co.* 100 Ala. 396, 406, the court says:

> "Conditions subsequent are not favored in the law, and are construed strictly, for the reason, that they tend to destroy the estate granted, and in many instances, when rigorously exacted, work hardships scarcely reconcilable with good

conscience. And, when there remains a doubt, if the clause in a deed be a covenant, limitation, or condition, the court will incline against the latter, preferring the former. Nor are conditions sustained, when repugnant to the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. 4 Kent 130, 131, 132, Co. Litt. 205, b, 219, b. Lord Cromwells case, 2 Coke 720; Chapin v. Harris, 90 Mass. 594."

In *Voris v. Renshaw,* 49 Ill. 425, 430, Mr. Justice Walker, speaking for the court, says:

"Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and a rigorous exaction of them is a species of *summum jus,* and in many cases hardly reconcilable with conscience. 4 Kent Com. 129. And as illustrating the rule, we find that it has been held, that where the condition is personal to the grantee, as that he shall not sell without leave, the executors of the lessee not being named in the condition, may sell without incurring a breach. Dyer, 65; Moore, 11.

"In Shep. Touchstone, Vol. I, p. 133, it is said: 'It is a general rule, that such conditions annexed to estates as go in defeasance and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases.'"

In *Hunt v. Beeson,* 18 Ind. 380, 382, the Court says:

"'Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and the vigorous exaction of them is a species of *summum jus,* and in many cases hardly reconcilable with conscience.' 4 Kent 130. In Merrifield v. Cobleigh, 4 Cush. 178, 184, it was said by the Court, in speaking of a condition subsequent, 'such a condition, when relied upon to work a forfeiture, is to be construed with great strictness; the demandant shall have his exact legal right and no more.'"

In *Jefferson, Madison & Indianapolis R. R. Co. v. Barbour,* 89 Ind. 375, 378, the court says:

"Conditions subsequent are not favored in law. They are strictly con-

strued. Hunt v. Beeson, 18 Ind. 380. The authorities are unanimous in holding that conditions subsequent require unusual strictness of construction. 'A court of equity,' says Chancellor Kent, 'will never lend its aid to divest an estate for the breach of a condition subsequent. The cases, on the contrary, are full of discussions, how far chancery can relieve against subsequent conditions.' 4 Kent. Com. 130."

In *Summer v. Darnell,* 128 Ind. 38, 43, the court says:

"The rule of strict construction applicable to conditions subsequent, usually expressed in the words, 'Conditions subsequent are not favored in law, and are construed strictly,' is elementary, and does not require the citation of authorities.

"A condition subsequent that will defeat an estate created by a deed must be fairly expressed in the deed itself. The words used must create the condition. The court will not supply it, if the parties fail to express it."

* * * * * * * * *

"A condition may be created by any words which show clear, unmistakable, intention on the part of a grantor to create an estate on condition, regard being had to the whole of the deed in which they occur. The word 'condition' need not be used, but words importing a condition must be used, or plainly inferred from the instrument and the existing facts."

In *Post et al. v. Weil et al.*, 115 N. Y. 361, 371, the court says:

"I think we are in conscience bound to give that construction and thereby place ourselves in accord with that inclination of the law, which regards with disfavor conditions involving forfeiture of estates. In this connection, it may be noted that there is no clause in the deed giving the right to re-enter for conditions broken. While the presence of such a clause is not essential to the creation of a condition subsequent, by which an estate may be defeated at the exercise of an election by the grantor, or his heirs, to re-enter, yet its absence, to that extent, frees still more the case from the difficulty of giving a more benignant construction to the proviso clause. The presence of a re-

> entry clause might make certain that which, in its absence, is left open to construction. The absence of such a clause may have its significance, in connection with the circumstances of the case and the intent to be fairly presumed therefrom."

In *Graves et al., v. Deterling et al.,* 120 N. Y. 447, 457, the court says:

> "There is no provision for a forfeiture or re-entry, nor anything from which it can fairly be inferred that the continuance of the estate is to depend upon the supposed condition, yet this is regarded as essential in order to create a condition. (Lyon v. Hersey, 103 N. Y. 264, 270; Craig v. Wells, 11 id. 315, 320.)

It seems to be a settled rule in the State of New York that "where there is no provision for re-entry or forfeiture and nothing to support an inference that the estate was intended to depend upon performance of the condition, the words used will be held to import a covenant and not a condition." Cunningham v. Parker, 146 N. Y. 29, 33.

There are well considered authorities for the contention that when the United States

has parted with its title, for a consideration, to its lands, that any condition under which these lands are held must necessarily be void as in restraint of alienation or as contrary to the assumed sovereignty of the state in which the lands are situated.

Camp v. Smith, 2 Minn. 131, 144.

However this may be, and conceding for the purpose of the argument that the United States may create a condition subsequent in apt words in any grant conveying its lands to a grantee, even for a valuable consideration, for breach of which the United States may at its election re-enter by legislative declaration of forfeiture, or by judicial proceedings adjudging the breach and consequent forfeiture, still it may well be contended that when the estate has vested, the words constituting the claimed condition must be construed according to the settled rule applicable to conditions subsequent or words claimed to create such an estate in the jurisdiction in which the lands are situated. In other words, that the construction of language claimed to create a condition subsequent as announced and adhered to by the Supreme Court of the state in which the lands are situated becomes a rule of property and is applicable to lan-

guage in grants made by the United States which create a condition subsequent.

In *Seymour v. Sanders, 3 Dillon,* 437, 440, Judge Dillon says:

> "Thus the plenary power of Congress over the disposition of the public lands within the state is expressly recognized to exist by the organic law of the state; and we hold that congress may dispose of them at such time, in such manner, and for such purposes as in its judgment it may deem best.
>
> "The title to all public lands must pass and vest according to the laws of the United States (Wilcox v. Jackson, 13 Pet. 498, 517). And, undoubtedly, it is true as a general proposition, that after the title has passed from the United States, and is fully vested in purchasers from it, the land becomes subject to state legislation, and the power of the general government with respect to it ceases, except so far as it is otherwise lawfully provided in the act by which congress disposes of the land."

See also *United States v. Gratiot,* 14 Pet. 526.

The contention we make, however, does not go to the estate conveyed or the terms upon which the estate has been conveyed by the United States. It goes to the question, whether or not, in construing the alleged condition subsequent annexed to such estate, the rule adopted by the state in which the lands are situated shall control.

In *Wilcox v. McConnel,* 13 Pet. 496, 516, Mr. Justice Barbour, speaking with the unanimous opinion of the court, says:

> "We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

This would require an application of the rules of the common law as declared by the highest court of the state in which the lands

granted are situated, and this is as it ought to be, because the state has the right to tax those lands as to which the alleged condition is attached, and there remains in the United States only a possibility of reverter, and it would not be in harmony with the public policy or the sovereignty of the state to permit the United States to lie by, having a right of action in the nature of a possibility of reverter, resting upon breaches of the alleged condition of which the state has no knowledge and to which it is not a party.

Whether this construction by a state court is considered a rule of property binding upon the federal court or not, is for the moment immaterial. This court, unless controlled by some decision of the Supreme Court of the United States, or of the Circuit Court of Appeals for the Ninth Circuit, will be inclined to follow the rule adhered to by the Supreme Court of the State.

In *Raley v. Umatilla County*, 15 Oregon, 172, 179, Mr. Justice Strahan, speaking for the court, then composed of Justices Lord, Thayer and Strahan, says:

> "To create a condition in a grant, apt and appropriate words ought to be used, such as 'on condition,' 'provided always,'

'if it shall so happen,' or 'so that the grantee pay, etc., within a specified time,' and the like. Therefore, 'the grant of a lot of land to set a meeting-house thereon does not imply a condition. And an estate upon condition cannot be created by deed, except where the terms of the grant will admit of no other reasonable interpretation. Therefore, reciting in a deed that it is in consideration of a certain sum, and that the grantee is to do certain things, is not an estate upon condition, not being in terms upon condition, nor containing a clause of re-entry or forfeiture. And yet these words may create a condition if a right of re-entry is reserved in favor of the grantor in case of failure to carry out the intention thus expressed.' (2 Washburn on Real Property, pp. 4, 5.)"

In *Coffin v. City of Portland,* 16 Ore. 77, 80, Mr. Justice Thayer, speaking for the court, says:

"A condition subsequent in a deed, that will, under any circumstances, defeat the title conveyed, must provide that the conveyance is upon the condition, and that the failure to perform it shall operate as a forfeiture of the estate

granted. When such a condition is broken by the grantee, the grantor is entitled to re-enter, but a court of equity will not entertain jurisdiction to declare the forfeiture. The grantor must go into a court of law if he desires to enforce the condition. Equity will not decree a forfeiture."

In the *City of Portland v. Terwilliger,* 16 Ore. 465, 469, Mr. Justice Strahan, speaking for the court, says:

"In *Raley v. Umatilla County,* 15 Ore. 172, we had occasion to consider the doctrine of estates upon condition, and particularly upon condition subsequent, and reached the conclusion that courts will not favor the forfeiture of estates, and that the rule of the common law that estates upon condition may be defeated by non-performance of the condition subsequent is to be construed strictly; and that if there is any other reasonable construction which can be given to a deed so as to avoid a forfeiture, it ought to receive such construction. In *Wier v. Simpson,* 55 Wis. 637, the language of the deed was: 'Upon the express condition', etc; but the court held that such language did not create an estate upon condition, and

said: 'The rule is well settled that conditions subsequent which work a forfeiture are not favored in the law, and no language will be construed into such condition contrary to the intent of the parties, when such intent can be derived from a consideration of the whole instrument, or from the circumstances attending the execution thereof; nor will the language used be construed into such condition subsequent when any other reasonable construction can be given to it. The rule was thus forcibly stated by the late chief justice in the case of Laws v Hyde, 39 Wis. 345, 356, and the rule there announced is approved in these cases: Lyman v. Babcock, 40 Wis, 503; Morse v. Ins. Co., 30 Wis. 534; Jackson v. Silvernail, 15 Johns. 278; Hadley v. Hadley, 4 Gray, 140; Osgood v. Abbott, 58 Me. 74; Merrifield v. Cobleigh, 4 Cush. 178.' So it was said in Woodworth v. Payne, 74 N. Y., 196; 'Conditions in grants are not favored in law, and hence they must be clearly expressed. (Craig v. Wells, 11 N. Y. 315.) They are also to be construed with great strictness, because they tend to destroy estates, and vigorous exaction of them is a species of *summum jus,* and in many cases hardly reconcilable with conscience.' And other

authorities are to the same effect. (First Methodist Episcopal Church of Columbia v. Old Columbia Public Ground Company, 103 Pa. St. 608; Harner v. Chicago, Milwaukee & St. P. R. R. Co. 38 Wis. 165; Hoyt v. Kimball, 49 N. H. 322; Paschall v. Passmore, 15 Pa. St. 295; McKnight v. Krentz, 51 Pa. St. 232; Mills v. Evansville Seminary Co., 58 Wis. 135; Cross v. Carson, 8 Blackf. 138; 44 Am. Dec. 744, and note.)"

Applying the rule thus announced by the Supreme Court of Oregon to the language used in the so-called actual settlers clause, construed in connection with the practical administration of these grants from the beginning to the commencement of this suit, a period of more than 36 years,—is it not clear, in view of the changed policy of the United States as to the disposition of its public lands of the character of the lands involved in suit, that these words do not create a condition subsequent, and that the United States must be held to have acquiesced in the construction adopted by the company in the beginning.

No one could have supposed that for a breach of this actual settlers clause in the early days of the administration of this grant, when these lands were not sought for settlement or for any purpose, and when, indeed,

settlement could not be made, the entire grant or any part of the same would be subject to forfeiture to the United States. No investor would have purchased a single bond issued to secure construction funds; no bonds secured by mortgage on these lands could have been negotiated. The grant, instead of having been of value to the company, would have been a burden. Even now the lands, as shown by the record, are not sought by actual bona fide settlers upon which such settlers shall make homes, but the proof shows that the lands are sought chiefly and solely for their timber value, and in the main by speculators or persons who have been induced by timber brokers and agents to attempt to purchase, under the actual settlers clause for $400 per quarter section, lands worth, upon an average, from $3000 to $10,000 per quarter.

The action of Congress in passing the so-called "innocent purchasers" act of August 20, 1912, by which nearly four hundred thousand acres of land sold by the company to timber men and companies in quantities in excess of one thousand acres and at prices in excess of $2.50 per acre, is a distinct recognition of the non-settlement character of these lands, and is an express waiver as to them of the essential and controlling facts upon which the United States is now seeking to take from

the company the remainder of its unsold lands of substantially the same kind and class as those title to which is proposed to be quieted in these so-called innocent purchasers.

The act further provides that the lands when forfeited shall be reserved from sale or settlement under the public land laws until the further action of Congress, thus indicating beyond any sort of doubt, that these lands are not deemed suitable for entry or settlement under the homestead act, the only law under which lands can be obtained by the settler.

In such situation, which has been controlling for nearly forty years, is it not clear that these words so claimed to constitute a condition subsequent should be construed in harmony with the action of all the parties as creating merely a preference right of purchase in the actual settlers that were upon these lands prior to the definite location of the road, or, at most, prior to the issuance of patents.

In light of the testimony now before the Court, we earnestly insist that the language used in the actual settlers clause should not be construed to create a condition subsequent, and that if it is so construed, it should be

held to have been waived by the United States, or to be impossible of performance within the true spirit and meaning of the contract between the parties, in the light of subsequent legislation by Congress, and in the light of the action of both parties from the beginning.

V.

The United States cannot in equity as a suitor enforce the "Actual Settler" clause, assuming that its words create a condition subsequent, because

(1) The United States has waived its right by long continued acquiescence and affirmative action, with full knowledge of continued breaches by the Company from the earliest administration of the grants, to the passage and enforcement of the Act of August 20, 1912, (so-called innocent purchaser's Act).

(2) Because the United States is estopped, in view of all of the facts and circumstances, to attempt to enforce the same.

The Act of July 25, 1866, (14 Stat. 239) and the amendments thereto, including the Act of April 10, 1869, (16 Stat. 47), and the Act of May 4, 1870 (16 Stat. 94), were not only laws but were contracts. In so far as these statutes constitute contracts between

the United States and the grantee companies and their successors, the same rules of construction apply as apply to other contracts. In any litigation involving the rights of the parties under these contracts, the United States as a suitor proceeds in its proprietary capacity and is bound by the same legal and equitable rules and principles of law applicable to individuals.

In *United States v. Beebee,* 17 Fed. 36-37-40-41, the Court says:

> "A court of equity cannot contemplate with any degree of favor the proposition that this land shall, at this late day, be declared a part of the public domain, or granted to claimants who have so long slept upon their rights. It must, however, be conceded that, as a general rule, the United States is not bound by any statute of limitations not imposed by Congress, or chargeable with laches."
> * * *

Judge McCrary, after citing numerous authorities to the point, says:

> "In view of these authorities, and upon reason, I hold it to be a general principle of equity that lapse of time may

constitute a sufficient defense, even in the absence of any statute of limitations, and without necessary reference to any question of laches. Such being the law, it is clear that lapse of time may be a sufficient defense to a suit instituted in the name of the government.

"It is well settled that when the United States becomes a party to a suit in the courts, and voluntarily submits its rights to judicial determination, it is bound by the same principles that govern individuals. When the United States States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants." (Citing authorities).

In *United States v. White,* 17 Fed. 561-565, Sawyer, J. says:

"Although statutes of limitation do not run against the government, yet the staleness of the claim may be taken into consideration in determining the question whether a court of equity should interfere and grant relief where the United States, as well as a natural person, is a complainant. When the United States

> goes into a court of equity as a suitor, it is subject to the defenses peculiar to that court. *U. S. v. Tichenor,* 8 Sawy. 156; *U. S. v. Flint,* 4 Sawy. 58-9; *Badger v. Badger,* 2 Wall. 94; *Stearns v. Page,* 7 How. 829."

In *United States v. Bostwick,* 94 U. S. 53-66, the Court speaking by Chief Justice Waite, says:

> "The United States when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.

In the case of *The Siren,* 7 Wallace 152-159, the Court says:

> That the government by its appearance in court "waives its exemption and submits to the application of the same principles by which justice is administered between private suitors."

See also *Brent v. Bank of Washington,* 10 Peters 569-615.

In *United States v. McElroy,* 25 Fed. 804, Judge Brewer quotes with approval case of *U. S. v. Beebee,* 17 Fed. 37.

In *United States v. Ingate,* 48 Fed. 251, the Court says:

> "It is well settled that, 'when the United States voluntarily appear in a court of justice, they, at the same time, voluntarily submit to the law, and place themselves upon an equality with other litigants.' *U. S. v. Beebee,* 17 Fed. Rep. 40; *U. S. v. Barker,* 12 Wheat. 559; *Mitchel v. U. S.,* 9 Peters 743; *Brent v. U. S.,* 10 Peters 615. 'The principles which govern inquiries as to the conduct of individuals in respect to their contracts are equally applicable where the United States are a party.' *U. S. v. Smith,* 94 U. S. 217. In *Brent v. Bank,* 10 Pet. 615, the court declares that there is no reason why the United States should be exempted from a fundamental rule of equity subject to which their courts administer their remedy. In 18 Fed. Rep. 278, in the case of *U. S. v. Coal, etc., Co.,* the court says:
>
> 'It is true, as a general proposition, that when the government becomes a party to a suit in its own courts, it stands upon the same footing with individuals, and must submit to the law as it is adminstered between man and man. But

this general rule has its limitations, in that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States.' "

In *United States v. Devereux,* 90 Fed. 182-6, the Circuit Court of Appeals for the Fourth Circuit, says:

"The United States do not and cannot hold property as a monarch may for private or personal purposes. Van Brocklin v. Tennessee, 117 U. S., at page 158, 6 Sup. Ct. 670. In the present case the United States holds what title it has to the property in question as it holds all other property for public and private purposes (U. S. v. Insley, 130 U. S. 265, 9 Sup. Ct. 485); and cannot be prejudiced by the negligence of the officers and agents to whose care their interests were confided; nor are they bound by any statute of limitations (U. S. v. Railway Co., 118 U. S. 120, 6 Sup. Ct. 1006).

"With this exception, however, and in perfect consistency with it, when a sovereign comes into one of its own courts of its own accord, and seeks relief, all the rules established for the administration of justice between individuals are

applied, and bind all parties. Port Royal & A. Ry. Co. v. South Carolina, 60 Fed. 552; Prioleau v. U. S. L. R. 2 Eq. 659.

"And in U. S. v. Flint, Fed. Cas. No. 15,121 (Field, Circuit Judge), we find: 'If, on consideration of the circumstances of a given case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity, although the United States be the suitor.'

In *United States v. North American Commercial Co.*, 74 Fed. 145-151, Wallace, Circuit Judge, says:

"When the government enters into a contract with an individual or corporation it divests itself of its sovereign character so far as concerns the particular transaction, and takes that of an ordinary citizen; and it has no immunity which permits it to recede from the fulfillment of its obligation. As was said in Cooke v. U. S., 91 U. S. 398:

'If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.' "

In *United States v. Northern Pacific Railway Co.*, 95 Fed. 864-880, Sanborn, Circuit

Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, says:

> "This is a suit in equity, brought by the government itself to set aside the solemn judgment and conveyance of the quasi judicial tribunal to which it intrusted the power, and on which it imposed the duty to hear and determine the very question whether or not the corporation was entitled to do these acts, and thereby to earn these lands, notwithstanding the fact that the time fixed for their performance had passed. That tribunal determined all these questions from time to time, as they were presented, in favor of the railroad company. When the map of definite location of this part of the line was filed in 1882, the land department accepted and approved it, and adjusted the land grant to the line there shown. When the resolution fixing the terminus at Ashland was filed, it accepted and approved that selection, and adjusted the land grant accordingly. As the railroad was constructed from Thomson to Ashland, commissioners appointed by the president, under the charter, examined it, and reported that it was completed in accordance with the requirements of the act, and the land depart-

ment thereupon issued patents to the lands appertaining to this portion of the railroad. The company constructed its road from Thomson to Ashland over hill and dale, through forest, swamp, and morass, in reliance upon these decisions, and in the belief which they induced that it would thereby earn these lands; and it has been operating this railroad for more than a decade. While this construction was proceeding, congress took no action, under section 9 of the charter, on account of any breach of the conditions thereof by the company; the government brought no suit to avoid the decisions of these tribunals to which it had instrusted the power to hear and determine these questions, and gave no warning that it would ever question them; but now, more than 10 years after the road was built, after the government has secured the railroad, the advanced price of the even-numbered sections which it retained within the limits of the grant, and the settlement, occupation, and sale of its otherwise worthless lands which the railroad has induced, it asks this court of equity to strip this company of the lands which it promised to convey, and did convey, in consideration of the construction of the railroad, because that railroad was not

built within the time fixed in the act. In other words, it asks this court to relieve it of the burdens while it retains the benefits of a contract which it not only permitted, but actively induced, the corporation to perform out of time, and which it has itself executed. There is no equity in this prayer. The same fundamental rules of right and justice govern nations, municipalities, corporations, and individuals. The equities of the United States appeal to the conscience of the chancellor with no greater or less force than do those of a private individual under like circumstances. 'A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction.' Boone v. Childes, 10 Pet. 177, 210; Illinois Trust & Savings Bank v. City of Arkansas City, 40 U. S. App 257, 294; 22 C. C. A. 171, 193, and 76 Fed. 271, 293; U. S. v. Winona & St. P. R. Co., 32 U. S. App. 272, 291, 15 C. C. A. 96, 108, and 67 Fed. 948, 960. The act of the railroad company in building its road and receiving the land pertaining thereto was commendable. If one is unable to perform his promise at the time agreed upon, it is not wrong, either in morals or in law, but eminently just and right,

that he should perform it thereafter, especially when the promisee accepts and requests it. Courts of equity sometimes enforce the specific performance of a contract, but they never undo its execution when it has been performed on the one hand, and its performance has been accepted on the other, with a full knowledge on the part of both parties of the facts which conditioned its completion.

"In the second place, when the corporation presented its map of definite location to the land department in 1882, and its selection of its eastern terminus in 1884, the only objection to their acceptance was that they were out of time. But the United States had the right to waive this objection, and to approve the location and selection notwithstanding this fact, and when it did so, and the road was constructed in reliance upon it, that waiver was irrevocable. The government intrusted the power and imposed the duty to consider and determine whether or not this waiver should be made to the officers of the land department, and they waived the delay, and approved the location and selection. These adjudications of this department stand unchallenged. No appeal was taken from them. They

> have not been set aside for fraud, error, or mistake. They therefore have all the force of judicial decisions, and conclude the question. Hartman v. Warren, 40 U. S. App. 245, 250, 22 C. C. A. 30, 33, and 76 Fed. 157, 159, 160; Bogan v. Mortgage Co., 27 U. S. App. 346, 350, 11 C. C. A. 128, 130, and 63 Fed. 192, 195; Railway Co. v. Sage, 36 U. S. App. 340, 355, 17 C. C. A. 558, 567, and 71 Fed. 40, 49."

This is also cogent and forceful reasoning as applied to the facts under particular consideration here upon the subject of waiver and estoppel.

In *United States v. Clark,* 138 Federal 294, 299, Judge Ross, speaking for the Circuit Court of Appeals, Ninth Circuit, says:

> "As a matter of course, when the government comes as a suitor into a court of equity, its claims appeal to the chancellor with no greater force than do those of an individual under like circumstances, etc."

In *United States v. Budd,* 43 Federal 630-34, Judge Hanford says:

> "When the government of the United States seeks relief from a court of equity,

it is as much bounden as any individual suitor by the rules of equity. It can obtain such relief only when entitled to it upon principles of equity and good conscience. U. S. v. White, 17 Fed. Rep. 561, U. S. v. Tin Co., 23 Fed. Rep. 279, and the same case 125 U. S. 273, 8 Sup. Ct. Rep. 850."

In *Mountain Copper Co., v. United States,* 142 Federal 625, 629, Judge Ross, speaking for the Circuit Court of Appeals, Ninth Circuit, says:

"It is the well-established law that, when the government comes into a court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less. United States v. Clark (C. C. A.) 138 Fed. 294; United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 67 C. C. A. 1; United States v. Flint, 4 Sawy. 42, Fed. Cas. No. 15,121; Foster's Federal Practice, Sec. 63; United States v. Barker, 12 Wheat. 559, 6 L. Ed. 728; Mitchel v. United States, 9 Pet. 743, 9 L. Ed. 283; Brent v. Bank of Washington, 10 Pet. 615, 9 L. Ed. 547; United States v. Smith, 94 U. S. 217, 24 L. Ed. 115; Am. & Eng. Enc. of Law (2d Ed.) vol. 4, p. 271."

In *United States v. Flint,* 4 Sawyer 42, 58, affirmed in 98 U. S. 58, Mr. Justice Field says:

> "The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. Unless otherwise provided by statute, the same rules as to the admissibility of evidence are then applied to them; the same strictness as to motions and appeals is enforced; they must move for a new trial or take an appeal within the same time and in like manner, and they are equally bound to act upon evidence within their reach. And, when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief."

In *Lynch v. United States,* 13 Okla. 142-144, the Supreme Court of Oklahoma says:

> "The United States stands in no different relation as a suitor than any individual. When the government comes into court to submit a question to judicial determination, she is not acting in her

capacity as a sovereign, but as a litigant, claiming the same rights, and bound by the same rules as any of her citizens under similar circumstances. This was expressly held in The United States v. The Bank of Metropolis, 15 Peters 377; Brent v. Bank of Washington, 35 U. S. 596; United States v. Hughes, 11 How. 552; United States v. Throckmorton, 98 U. S. 61; United States v. Miner, 114 U. S. 223."

In *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 285, the Court, speaking by Mr. Justice Miller, says:

"But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court

> can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefitted to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances."

In *United States v. Grand Rapids & I. R. R. Co.*, 165 Fed. 297, 304, Lurton, Circuit Judge, speaking for the Circuit Court of Appeals, Sixth Circuit, says:

> "That these facts do not constitute such a claim as might be affirmatively asserted against the government may be conceded. That they may be the basis of an equitable defense against a claim for the price of lands so erroneously patented, when that claim is asserted in

a court of equity, we have no doubt. This would be true if such a claim was presented by a private litigant, and it is no less true when the government comes into a court of equity for the relief it now asks. Equity will not lend its active assistance contrary to conscience and the plain justice of a case. United States v. Winona & St. Peter Railroad Co., 165 U. S. 463, 482, 17 Sup. Ct. 368, 41 L. Ed. 789; United States v. Detroit Lumber Co., 200 U. S. 322, 338 et seq., 26 Sup. Ct. 282, 50 L. Ed. 499."

In *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 339, Mr. Justice Brewer, speaking for the Court says:

"It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the Government and its vendees we must bear in mind the general principles of equity and determine rights upon those

principles except as they are limited by special statutory provisions."

In *United States v. Throckmorton,* 98 U. S. 61, 64, Mr. Justice Miller, speaking for the Court, says:

> "It is true that the United States is not bound by the Statute of Limitations, as an individual would be. And we have not recited any of the foregoing matters found in the bill as sufficient of itself to prevent relief in a case otherwise properly cognizable in equity. But we think these are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest."

This affirmed the case of United States v. Flint, United States v. Throckmorton, and United States v. Carpenter.

That the Act of July 25, 1866 (14 Stat. 239), as amended by the Act of April 10, 1869 (16 Stat. 47), and the Act of May 4, 1870 (16 Stat. 94) are contracts binding upon the United States as well as upon the companies, and should be construed as such, the attention

of the Court is called to the Sinking-Fund Cases, 99 U. S. 700, 719, construing the Act of May 7, 1878, (20 Stat. 56), entitled,

> "An Act to alter and amend the act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two, and also to alter and amend the act of Congress approved July second, eighteen hundred and sixty-four, in amendment of said first-named act."

where the Court, speaking by Mr. Chief Justice Waite, says:

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, with-

> out making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

That the United States is entitled without express legislative authority, to the civil remedies ordinarily administered in its courts, and that the United States may bring suits to enforce its contracts and protect its property was distinctly ruled in the case of *United States v. Holmes,* 105 Fed. 41-43, where Judge Wellborn says:

> "There seems to me no room for reasonable controversy but that the government of the United States, for the protection of its property, is entitled, without express legislative authority, to the civil remedies ordinarily administered in

its courts. On this point the Supreme Court of the United States has said:

'It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the constitution upon their sovereign powers cannot affect their civil rights. Although, as a sovereign, the United States may not be sued, yet as a corporation, or body politic, they may bring suits to enforce their contracts and protect their property in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in Dugan v. U. S., 3 Wheat. 181, 4 L. Ed. 364, 'It would be strange to deny them a right which is secured to every citizen of the United States.' In U. S. v. Bank of Metropolis, 15 Pet. 392, 10 L. Ed. 774, it was declared that when the United States, by their authorized agents, become a party to negotiable paper, they have all the rights and incur all the responsibilities of other

> persons who are parties to such instruments. In U. S. v. Gear, 3 How. 120, 11 L. Ed. 523, the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned.' Cotton v. U. S. 11 How. 229, 13 L. Ed. 675."
>
> See also United States v. American Surety Co., of New York, 110 Fed. 913.

In Davis v. Gray, 16 Wallace 203-232, Mr. Justice Swayne, speaking for the Court, says:

> "When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

This was a case where a large grant of land had been made by the State of Texas to a railroad company, defeasible if certain steps were not taken within a prescribed time. The court held that this grant constituted a contract, and that the United States was bound thereby in the same maner as a private party. It will be observed also that the

grant there construed contained a condition subsequent, which became impossible of performance.

This case also illustrates the doctrine that "breaches of such conditions may be waived by the grantor expressly or *in pais.*"

In *Port Royal &c Ry. Co. v. South Carolina,* 60 Fed. 552-553, the Court says:

> "A sovereign state cannot be forced into court against her consent; but a cross bill presupposes that the plaintiff is already in court rightfully, and when the state comes into court of her own accord, and invokes its aid, 'she is, of course, bound by all the rules established for the administration of justice between individuals.' State v. Pacific Guano Co., 22 S. C. 74."

In *United States v. Budd,* 144 U. S. 154, 160, Mr. Justice Brewer, speaking for the court, says:

> "The first question is, perhaps, stated too broadly, for the inquiry is necessarily limited to the land in controversy. If its title was fairly acquired, it matters not what wrongs have been done by either defendant in acquiring other lands;

so the question properly to be considered is, was this land wrongfully and fraudulently obtained from the government? We have had many cases of this nature before us, and the rules to guide in its determination have been fully settled. Kansas City, Lawrence &c Railroad v. Attorney General, 118 U. S. 682; Maxwell Land Grant Case, 121 U. S. 325, 381; Colorado Coal Co. v. United States, 123 U. S. 307; United States v. Des Moines Navigation &c. Co., 142 U. S. 510.

"In the second of these cases Mr. Justice Miller thus clearly states the rule:

'We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where

> the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal. * * *'"

In *People v. Stephens,* 71 N. Y. 527, 549, Mr. Justice Allen, speaking for the court and concurring in the opinion of Mr. Justice Rapallo, says:

> "The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor. The

> State is not, in tutelage, as one incapable of acting *sui juris,* but has capacity to act in all matters by its representatives and agents, and is bound by the acts and admissions of its duly appointed and recognized officers and representatives, acting within the general scope of their constitutional powers, whether ministerial or executive."

In *Carr v. The State,* 127 Ind. 204, 206, Mr. Justice Elliott, speaking for the court, said, in regard to the defendant:

> "In entering into the contract it laid aside its attributes as a sovereign and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a State whenever it enters into an ordinary business contract. Hartman v. Greenhow, 102 U. S. 672; Poindexter v. Greenhow, 114 U. S. 270; Keith v. Clark, 97 U. S. 454; Murray v. Charleston, 96 U. S. 432; Gray v. State, ex rel., 72 Ind. 567; State ex rel., v. Cardozo, 8 S. C. 71; People v. Canal Com'rs, 5 Denio, 401; Georgia, etc. Co.,

v. Nelms, 71 Ga. 301; Lowry v. Francis, 2 Yerg. 534; Grogan v. San Francisco, 18 Cal. 590."

In *State v. Kilburn,* 81 Conn. 9, 12, the Court says:

> "This action being an equitable one, the State, by bringing it, opened the door to any defense or cross-complaint germane to the matter in controversy, that the city might see fit to interpose. A sovereign who asks for equity must do equity. Rowan v. Sharps Rifle Mfg. Co., 29 Conn. 282, 330."

In *People ex rel Ambler v. Auditor General,* 38 Mich. 746, 750, the Court says:

> "The doctrine is well settled that where a State sues it is limited in its recovery by any defenses which might be set up against individual plaintiffs. Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225; Michigan State Bank v. Hammond, Id., 527."

The case of *Michigan State Bank v. Hastings,* 1 Douglas 224, 252, involved a condition subsequent and the effect of a breach of such condition, and whether under all the circumstances a court of equity was warranted

in granting the relief prayed for. The case proceeds upon the theory that the rights of the State are to be determined by the same rules of law and the same principles of equity which obtain between individuals.

In the case of *Daggett v. Bonewitz* et al, 107 Ind. 276, 279, the Court says:

> "Where the Nation enters into a contract it is as much bound as an individual citizen. Lessieur v. Price, 12 How. 59; Murray v. Charleston, 96 U. S. 432; Gray v. State, ex rel., 72 Ind. 567."

In *Murray v. Charleston,* 96 U. S. 432, 445, the Court, speaking of the contracts of the State, says:

> "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons."

And so in the case under consideration, when the United States made these grants it was not acting excepting in a very general and large sense in its capacity as sovereign, but was acting in its proprietary capacity as the owner of the lands granted. It was

seeking to secure the construction of a transcontinental railroad from the Mississippi Valley, commencing at Omaha, to Sacramento, California, and thence by way of an extension of the Central Pacific Line from Roseville Junction to Portland. It was seeking in its proprietary capacity to increase the value of its unsold lands, and to secure pecuniary benefits by reason of the construction of the road and the performance of the contract upon the part of the grantee companies. Viewing its contract, therefore, in respect to the earning of these lands by the grantee companies, the performance of that contract by the grantee companies, the consideration paid and to be paid for the conveyance of the title —all these things considered—the United States, a contracting party, having the right of any other proprietor in case of condition subsequent to assert a forfeiture for breach of such condition, may waive such breach by acquiescence or conduct inconsistent with good faith, honesty and fair dealing on its part or by express action. This is not a case where the state or the government is acting or has acted in its capacity as sovereign, or in its governmental capacity in the strict and literal sense of that term. It is the case of an owner of land dealing with the grantee, not as a gift or gratuity bestowed upon the grantee, but upon the basis of a bargain,

each party to the contract to receive full compensation for the purchase of the property and the transfer of the title. This purchase price is not evidenced in a recital of a total sum of money to be paid by the one party and to be received by the other, but is evidenced by a pecuniary consideration to be paid continuously by one party and certain covenants mutually binding upon each. When performed, each party to the contract was to receive pecuniary benefits.

This view is expressed in clear and succinct language in the case of *Camp v. Smith*, 2 Minn. 131, 143, where the Court says:

> "The state can never concede to congress the right to prescribe to the actual purchaser of public lands within their limits, the mode, manner or time in which he shall enjoy the land purchased. The federal government may regulate the terms on which it will give land to the citizen, fix the price for which it shall be sold, and give preference to certain purchasers, but when the terms of the gift are complied with, or the purchase money paid, the gift or purchase is complete; congress has then exhausted the power over the public lands reserved by the constitution of the United States, and

the sovereignty of the state immediately attaches. As well may Congress entail the public lands, or regulate the law of their descent and alienation in terms, as to prohibit the purchaser from selling until he has received the patent, and then delay the issuing of the patent at pleasure. We do not think that congress so intended to legislate, and even if the act of September 4, 1841, had in plain terms prohibited the transfer of the lands instead of the mere right of pre-emption, until after the patent has issued, we are not yet prepared to regard such a prohibition as binding.

"The United States has not a proprietary interest in the public lands within the several states; the sovereignty is in the states. The rights attaching to the interest do not differ from those of any other landholder in the state, except as provided by the constitution of the United States and the terms of the compact between the general and state governments at the time the state is admitted into the Union. The constitution merely asserts the right to dispose of, as proprietor, and to make needful rules and regulations necessary to the exercise of that right. But the right to dispose

> of does not include the right to limit the enjoyment after sale, nor to prescribe how or when the purchaser shall dispose of his land; and the right to make needful rules and regulations is such only as may be exercised by every proprietor."

Nor is this principle in conflict with the compact between the United States and the State of Oregon evidenced by the act of February 14, 1859, admitting the state into the Union, nor the act passed by the legislative assembly of the State of Oregon, approved June 3, 1859, which provides:

> "That the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in said soil to the bona fide purchaser thereof."

It may well be claimed under this principle that when these lands had been earned by construction of road, that the title which has vested in fee simple was beyond control of the United States, and that the "actual settlers" clause contained in the act of April 10, 1869, and in section 4 of the act of May 4, 1870, was not a regulation intended to secure the title to bona fide purchasers, but was a

condition in restraint of alienation not within the power of the United States to impose, and that it was not a regulation "necessary for securing the title in said soil to the bona fide purchasers thereof." It was an attempt—it may be true—to grant a title and then take it back upon breach of the alleged condition that the grantee should sell these lands to actual settlers at a particular price and in particular quantities. But however that may be, it is clear that the contract evidenced by these grants was a contract made by the United States in its capacity as a proprietor of the public lands, and not in its capacity as sovereign, or in its governmental capacity.

We have discussed these general principles to the effect that the United States is bound by its contracts, and that such contracts must be construed in the same way and in the same manner as contracts by private parties, and that when the United States seeks to enforce these contracts in a court of equity it comes into that court not as a sovereign, but as a suitor, and that, with certain well recognized exceptions, its rights must be measured by the same rules and according to the same standard as measured to other suitors, in order that we may clearly demonstrate the application of the defenses now to be considered.

The doctrine of waiver and equitable estoppel is applicable to the United States, and upon the facts in this case the United States must be held to have waived its right by long continued acquiescence and affirmative action, with full knowledge of continued breaches by the company from the earliest administration of the grants to the passage of the act of August 20, 1912 (so-called Innocent Purchaser's Act), and the United States is estopped under the facts disclosed by the testimony to attempt to enforce the alleged condition subsequent.

There is, perhaps, a technical difference or distinction between waiver and estoppel. This is recognized in the case of *State ex rel., Douglas v. School District No. 108,* 85 Minn. 230, 233, where the Court says:

> "The rule is that in quo warranto proceedings instituted by a state the doctrine of waiver, operating by way of estoppel in pais, may be appealed to and applied as a defense, although, in strictness, the term 'waiver' is used to designate the act, or the consequences of the act, of one party only, while the term 'estoppel in pais' is applicable where the conduct of one party has induced another

> to take such a position that he will be injured if the first be permitted to repudiate his act. In cases where the right of a corporation to assert its corporate existence has been questioned because of some defect or irregularity in the proceedings for organization, it has frequently been held that the doctrine of estoppel is applicable, where there have been acts on the part of the state which in terms amount to a waiver. The conduct of a state may be such as to constitute a declaration that a forfeiture of corporate rights will not be insisted upon, and that the right to declare such forfeiture is waived."

This principle contravenes the contention of the United States that the Oregon Central Railroad Company of Salem (East Side), incorporated April 22, 1867, was not a legal corporation when the legislative assembly on October 20, 1868, designated that Company as a beneficiary of the grant of July 25, 1866.

Estoppel is defined by Mr. Bigelow in 16 Cyc. 679, as follows:

> "In the broad sense of the term, estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become set-

> tled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, *in pais.*"

This same author defines estoppel by conduct as follows:

> "If a person by his conduct induces another to believe in the existence of a particular state of facts, and the other acts thereon to his prejudice, the former is estopped, as against the latter, to deny that that state of facts does in truth exist. * * *
>
> "By the earlier usage matter *in pais* commonly meant matter of fact as distinguished from matter of record. In the law of estoppel, however, it meant, and still means, matter of fact as distinguished from matter of record or conventional writing. 'Estoppel *in pais*' therefore includes all forms of estoppel not arising from a record, from a deed, or from a written contract."

In *Sly v. Hunt,* 159 Mass. 151, the court defines estoppel to be

> "An admission or determination under circumstances under such solemnity that

> the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies.

The reason why an estoppel is so called is, as stated in Coke Littleton, 352a:

> "Because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth."

It is not a rule of evidence, but is a substantive principle of law, founded upon equitable considerations, and is, as we shall presently show, applicable alike to individuals and to the government.

The distinction between waiver and estoppel is well expressed in 40 *Cyc.* 255, as follows:

> "While waiver belongs to the family of estoppel, and the doctrine of estoppel lies at the foundation of the law of waiver, they are nevertheless distinguishable terms. It is difficult to make a distinction between waiver and estoppel which will give to each a clear legal significance and scope, separate from and independent of the other, as they are frequently used in the cases as convertible

terms, especially as applied to the law of insurance contracts and in the avoidance of forfeitures. There are, however, several essential differences between the two doctrines. Waiver is the voluntary surrender of a right, estoppel is the inhibition to assert it from the mischief that has followed. Waiver involves both knowledge and intention; an estoppel may arise where there is no intent to mislead; waiver depends upon what one himself intends to do, estoppel depends rather upon what he caused his adversary to do; waiver involves the acts and conduct of only one of the parties, estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position, an estoppel always involves this element. Estoppel results from an act which may operate to the injury of the other party, waiver may affect the opposite party beneficially. Estoppel may carry the implication of fraud, waiver does not. Estoppel may arise as between consistent remedies; for waiver by election to operate as a bar, the remedies must be inconsistent. A waiver may be created by acts, conduct, or declarations insufficient to create a technical estoppel. The most general

distinction lies in the fact that the term 'waiver', besides implying an intention on the part of a party to relinquish a right which is not necessarily present in estoppel, refers only to the act or consequence of the act of the party against whom the waiver is sought to be enforced, regardless of the attitude assumed by the other party, whereas estoppel arises where, by the fault of one party, another has been induced, ignorantly or innocently, to change his position for the worse in such manner that it would operate as a virtual fraud upon him to allow the party by whom he has been misled to assert the right in controversy. The distinction is more easily preserved in dealing only with express waiver, but where the waiver relied upon is constructive, or merely implied from the conduct of a party, irrespective of what his actual intention may have been, it is at least questionable if there are not present some of the elements of estoppel."

It is also said:

"A waiver takes place where a man dispenses with the performance of something which he has a right to exact, and is a technical doctrine introduced and

applied by the courts for the purpose of defeating forfeitures."

40 Cyc. 254—notes 62-63.

The relation of acquiescence to estoppel is well expressed in Norfolk Railroad Co. vs. Perdue, 40 W. Va. 442, in the following extract:

> "If a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This is the proper sense of the term 'acquiescence', and in that sense it may be defined 'quiescence', under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct."

In Cass County vs. Plotner, 149 Ind. 116, 121, it was said:

> "Acquiescence is not always treated as an estoppel, but as a quasi estoppel, as it

was called in City of Logansport vs. Uhl, 90 Ind. 531. It is a release or abandonment of one's rights, if, having rights, he stands by and sees another dealing with his property in a manner inconsistent with such rights, and makes no objection while the act is in progress. * * * Acquiescence is like permission to do the thing done; and equity will treat as unconscionable the denial of that to which one has assented or acquiesced."

In Williams vs. Woodruff, 85 Pac. 90, the Supreme Court of Colorado said:

"If one with sufficient notice or means of knowledge of his rights and of all the material circumstances of the case lies by for a considerable time, and knowingly and deliberately permits another to deal with property, or to incur expense, under the belief that the transaction has been recognized, or freely and advisedly abstains for a considerable lapse of time from impeaching him, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity."

And further:

"The strongest equity may be abandoned by acquiescence."

In Given vs. Times Company, 114 Fed. 92, 95, the court said:

> "One who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial."

And again:

> "No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects."

Bearing in mind these distinctions and applying these principles to the consideration of the cases presently to be cited, and to the testimony in the record in support of our contention, it will be found that the courts speak in no uncertain terms the doctrine that the state or the government may be estopped in the same manner and to the same extent as private parties, that even the Government, when it comes down into the forum of litigation as a suitor, will not be permitted, to the

prejudice of its opponent, to repudiate its long standing acquiescence which has crystallized into an assent, and that the state or the government may waive its rights or may waive causes of forfeiture inuring to its benefit.

In *State ex rel., Douglas v. School District No. 108,* 85 Minn. 230, the court speaking upon his subject quotes with approval the language of Judge Gresham in *State v. Milk,* 11 Fed. 389, where, in a few words, the doctrine is well stated:

> "Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel."

The case of *State v. Milk,* 11 Fed. supra, in which this language was used, was one where the State of Indiana sued to recover possession of 2868 acres of land. This language has been frequently quoted as an apt and concise statement of the rule.

In *Bain v. Parker,* 77 Ark. 168, the court, construing the rules of law applicable to a condition subsequent, says:

> "Conditions subsequent that defeat the estate conveyed by the deed are not fa-

vored in law. The words of the deed must clearly show a condition subsequent, or the court will take it that none was intended; and when the terms of the grant will admit of any other reasonable interpretation, they will not be held to create an estate on condition. Now, if we treat the deed as containing the words referred to, there are still no words of condition in the deed, and no words indicating that the estate should be forfeited if the road was not completed at the date named. These words then import nothing more than a covenant, which upon the acceptance of the deed by the grantee, became binding upon him, and for the breach of which the grantor may recover damages suffered thereby, but the deed remains valid. Stone v. Houghton, 139 Mass. 175; Episcopal City Mission v. Appleton, 117 Mass. 326; Studdard v. Wells, 120 Mo. 25; Bray v. Hussey, 83 Me. 329; Stanley v. Colt, 5 Wall. (U. S.) 119; 1 Jones on Conveyancing, Sec. 632, and cases there cited.

"Again, if this provision be treated as a condition subsequent, the facts here show that it was waived. *A condition may be waived by acts as well as by express release. Any acts on the part of*

the grantor which are inconsistent with a claim of forfeiture are evidence of a waiver of the condition. Thus, where lands were granted to a railroad company upon condition that the road should be completed by a certain time, and after the company's failure to do this the grantor suffered the company to go on and incur further expense in constructing the road without making objection, it was held that the condition was waived. Ludlow v. N. Y. & H. R. R. Co., 12 Barb. 440; Duryee v. Mayor of New York, 96 N. Y. 477; Sharon Iron Co. v. Erie, 41 Pa. St. 341; 1 Jones on Conveyancing, Sec. 699."

In *McClellan v. St. L. & H. R. R. Co.,* 103 Fed. 395, the principle is well stated that a breach of the condition subsequent may be waived by acquiescence, and the court says:

"His acquiescence is pronounced recognition of defendant's right of way in solemn pleadings; his various written notices to the company; his delay of years even after forfeiture; his procurement of the building of a fence that would unmistakably segregate this right of way from the remainder of his farm and place it in the exclusive possession of de-

fendant, are all such clear recognitions of defendant's title, that the bare statement of the case carries its own convictions."

Apply this language to the conduct of the United States, to its affirmative action in the issuance of patents after knowledge of the breach of this alleged condition subsequent, its acceptance of title from the Company, its knowledge of the various mortgages executed to secure construction funds or to refund indebtedness contracted to secure construction funds, its knowledge of the delayed construction of this road, the expenditure of millions of dollars by the Company in completing the road after the breaches of this alleged condition subsequent were matters of public record, not only in the Records of Deeds in Oregon, but in the records of the Department of the Interior, communicated to Congress, and in the formal pleadings in litigation affecting the granted lands, directly and actively participated in by the Department of Justice, the action of the various committees of Congress in refusing to forfeit the grant for failure to construct or for failure to perform or keep this alleged condition subsequent—all these things, to which the attention of the Court will be specifically called by the testimony, brings the case clearly within the principle announced by the authorities.

In *State v. Illinois Central R. R. Co.*, 246 Ill. 188, 234, a distinction is sought to be made between contracts entered into by the government in its private capacity, as distinguished from contracts entered into in its governmental capacity. Speaking upon this subject, the court says:

> "Counsel for appellee insist that the State is estopped at this late date from inquiring into the correctness of these semi-annual statements; that this charter being a contract between the parties, the doctrine of estoppel will apply to the State here as it ordinarily would to a private party. The rule invoked by appellee on this point applies only to those contracts where the State goes into business as a partner with individuals or in competition with her citizens. (Brown v. Trustees of Schools, 224 Ill. 184; 2 Herman on Estoppel, sec. 1128; 25 Cyc. 1007; 19 Am. & Eng. Ency. of Law,—2d ed.—p. 190). This charter is not within the class of contracts just referred to. If the State, in enforcing this contract, acted in its private capacity as distinguished from its governmental capacity, then the doctrine of estoppel might be invoked. (Barnard v. County

of Sangamon, 190 Ill. 116; City of Chicago v. Sexton, 115 id. 230; Chicago, Rock Island and Pacific Railroad Co. v. City of Joliet, 79 id. 25.) But the State in enforcing the provisions of this charter contract, is not acting in its private capacity. The contract has nothing to do with trade relations between private individuals and the government, but is one exempting property from ordinary taxation for an equivalent. The revenue to be paid under this charter is simply a substituted tax,—a special form of taxation (State v. Railway Co. 128 Wis. 449,) for the benefit of all the people of the State. In attempting to collect this revenue the State is acting in its governmental capacity, the same as when it is attempting to collect taxes under the general revenue laws. This being so, public policy requires that the State shall not lose through the laches or neglect of its officers. (People v. Brown, 67 Ill. 435; Catlett v. People, 151 id. 16; Whittemore v. People, 227 id. 453.) While cases may arise of such a character that right and justice will require that estoppel may be asserted even against the State when acting in its governmental capacity, (County of Piatt v. Goodell, 97 Ill. 84; Logan County v. City of Lincoln,

81 id. 156; State v. Jackson, L. & S. R. Co., 16 C. A. A. 345, and note;) no such showing is made here in the bill as will bring this case within that class.

So in the case at bar, the United States made contracts with these railroad companies to do what perhaps the United States could itself have done, that is, to build a railroad that should be a public highway to aid in the protection and defense of the country in time of war; to enable the troops and munitions of war to be carried without charge; to enhance the value of its public lands, and generally to do that, through the instrumentality of a private corporation, which in its capacity it could do as a government.

In passing these acts of Congress, the United States did not enact a law applicable to all citizens or act in its governmental capacity. While these acts of Congress were laws and contracts as well, it was because in the nature of things the contracts could not be otherwise executed than in the form of a statute applicable to a particular corporation, and the contract is essentially one made by the United States in its proprietary capacity in so far as the title to these lands is concerned. But it may be urged that inasmuch as contracts can only be made by or pursuant

to an act of Congress, that the non-action of Congress cannot be considered as in anywise modifying or discharging the contract when made. This principle, even if sound, can have no application to a case where, in equity, a waiver of an alleged breach of a condition subsequent is sought to be shown, or the doctrine of estoppel is sought to be applied to the government.

In *Abbott v. N. Y. etc., R. R. Co.*, 145 Mass. 450, 459, Mr. Justice Holmes says:

> "It thus appears that for twenty years the Commonwealth has constantly dealt with this corporation and its predecessor as having a good title to the road, and as having possessed the powers which they assumed to exercise. The Commonwealth has advanced a large sum of money on that assumption. For nearly twenty years before these actions were brought the plaintiffs have acquiesced in the same view, while the road over their lands has been in public operation. Meantime the mortgage was made, and the bonds were sold in the market. We think that courts should be slow to pronounce the Legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within

its will, when for so long a time everything has been conducted upon that footing. But we are satisfied, for the reasons which we have given, that the opinion of the Legislature was correct, and that the Boston, Hartford, and Erie Railroad Company must be taken to have had the power and right to make its location of July 30, 1866."

In *McCauley v. Brooks,* 16 Cal. 11, 27, Mr. Justice Field, speaking for the Court, says:

"The Legislature at the time interposed no objections of the kind. It may well have thought that, as the additional stipulations imposed no additional burdens, the release of the claims secured by the contract was an advantage which it preferred to retain; and may have been satisfied with the security of the bond against any public inconvenience from a possible transfer of the lease. At any rate, the contract was acquiesced in and affirmed; the lessee took possession, maintained the convicts and erected valuable improvements upon the premises, and the State, until the twenty-sixth of December, 1857, paid the monthly instalments stipulated. After such acquiescence and part performance, objections to

the form or provisions of contract cannot be raised.

"We do not admit that an affirmation of a contract entered into by the agents of the State, upon a subject within the constitutional control of the Legislature, can only be made by direct legislative action, in terms designating such contract. On the contrary, such affirmation may be justly inferred from legislation indirectly referring to the contract, or proceeding upon its assumed validity. Thus, in the Act of April 7th, 1856, appropriating moneys to defray the expenses of the prison up to March 28th, passed after a copy of the contract with Estill had been transmitted to the Senate, the Legislature recognized the existence, and in effect the validity of the contract, in the provision that no person should receive any pay for supplies furnished under any contract with the directors of the prison, until he surrendered such contract and released the State from all liability for such supplies 'furnished *after the leasing* of said prison by the Board of Commissioners under an act passed at this session of the Legislature.' That provision was manifestly adopted upon the supposition that

the responsibility for supplies furnished subsequently to the time the prison was received by the lessee, had devolved upon him, and that the contract for the leasing, imposing such responsibility, was valid and binding. (See Journals of the Senate of 1856, page 658; Laws of 1856, chap. 72.)"

In *Grogan v. San Francisco,* 18 Cal. 590, 609, Mr. Justice Field says:

> "A private proprietor, having full power over his own property, may ratify an authorized sale of the same made by a person assuming to be his agent, without reference to its mode, whether made publicly or privately; he may in some instances be estopped from denying the act of the assumed agent, after appropriating its benefits with knowledge of the facts. So the State may ratify the acts of her agents upon a subject within the constitutional control of the Legislature, when they exceed their powers. She may do this by legislation directly affirming the acts, or by legislation proceeding upon their assumed validity."

In *State v. Executor of Buttles,* 3 Ohio 309, 319, the Court, speaking of a contract made by the State, says:

"We agree that she can only do so upon the same terms, and subject to the same restrictions as a private individual. When she appears as a suitor in her courts, to enforce her rights of property, she comes shorn of her attributes of sovereignty, and as a body politic, capable of contracting, suing, and holding property, is subject to those rules of justice and right, which, in her sovereign character, she has prescribed for the government of her people.

"If she makes herself a party to the contract of her unauthorized agent, by ratifying his acts, she must take the contract as he has made it, and stand by all its provisions. If its inherent vices are such as to prevent its being enforced for an individual, it cannot be enforced for her."

In *C. R. I. & P. R. R. Co. v. Grinnell,* 51 Iowa 476, 485, the court construed the grant of lands made by act of Congress of May 15, 1856, and the amendatory act of June 2, 1864, and the facts under which it was claimed that the Company was not entitled to the land. Speaking to the point, the court says:

"The railroad was not completed within the time limited by the congressional

grant. It is insisted that plaintiff's title is defeated under this condition. But it will be observed that the title under the grant vested in the grantee upon the line of the road being definitely fixed and the indemnity lands being selected. The condition requiring the road to be constructed within a time prescribed was subsequent. It could be waived by the grantor, and a failure to enforce a forfeiture and the final certification of the lands would be regarded as a waiver. The United States having failed to enforce the forfeiture, no other party can; the title, therefore, remains unimpaired in plaintiff. Schulenberg et al. v. Harriman, 21 Wal. 44; Tucker v. Ferguson, 22 id. 527; Barrett v. Brooks, 21 Iowa, 144; Keltner v. Story County, 28 Id., 35."

In *Chicago, St. Paul etc., Ry. Co., v. Douglas County,* 134 Wis. 197, 205, the Court says:

"Perhaps no other technical legal term is more loosely used than the term "estoppel." It is used sometimes to merely indicate the existence of an ordinary prior paramount right in the opposite party, or a general rule of law, as where it is said that the state cannot be estopped except by a valid act of the legislature.

(Alexander v. State, 56 Ga. 478); or to indicate the conclusive effect of a judgment, or express the rule of law that courts will not enforce a demand contrary to public welfare or morals, or the rule of equity that he who hath committed iniquity shall not have equity, or that suitors who invoke relief from a court of equity must come into court with clean hands, or waiver, or acquiescence. Quite uniformly it is held to apply only to matters of fact; but cases are not wanting in which one is said to be estopped to set up a right under the constitution, or to take inconsistent legal positions, or to deny that he is an officer *de jure* in a criminal prosecution for acts done as such officer. *State v. Stone,* 40 Iowa 547; *People ex rel Dunn v. Bunker,* 70 Cal. 212; 11 Pac. 703; *U. S. v. Gale,* 109 U. S. 65, 3 Sup. Ct. 1. It has been denied and affirmed with equal confidence that an equitable estoppel can be applied to the government. *People v. Brown,* 67 Ill. 435; *State v. Bevers,* 86 N. C. 588; *Comm. v. Pittsburg F. & I Co.* 2 Pears, (Pa.) 374; *Montague's Adm'r v. Massey,* 76 Va. 307; *Board Co. Comm'rs v. Dickey* 86 Minn. 331, 90 N. W. 775; *Heidelberg v. St. Francois Co.* 100 Mo. 69, 12 S. W. 914; *U. S. v. Willamette C. & C.*

M. W. Co. 54 Fed. 807; *U. S. v. Stinson,* 125 Fed. 907, 60 C. C. A. 615; *Carr v. U. S.* 98 U. S. 433; *People ex rel. Chope v. D. & H. P. R. Co.* 37 Mich. 195. It is, however, quite well settled that when the state makes itself a party to an action or to a contract or grant in its proprietary capacity it is subject to the law of estoppel as other parties litigant or other contracting parties. *Cunningham v. Shanklin,* 60 Cal. 118; *State ex rel. Smyth v. Kennedy,* 60 Neb. 300; 83 N. W. 87; *Stone v. Bank of Ky.* 174 U. S. 799, 19 Sup. Ct. 881; *State v. Ober,* 34 La. Ann. 359; *State v. Taylor,* 28 La. Ann. 460; *St. Paul, S. & T. F. R. Co. v. St. Paul & Pac. R. Co.* 26 Minn. 31, 49 N. W. 303; *Railroad Co. v. Schurmeir,* 7 Wall 272; *Comm. v. Andre's Heirs,* 3 Pick. 224."

In *James v. Germania Iron Co.,* 107 Fed. 597, 600, Sanborn, Circuit Judge, speaking for the United States Circuit Court of Appeals for the Eighth Circuit, says:

"The land department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the

issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land. 9 *Stat.* 395, c. 108, sec. 3; *Rev. St.* secs. 441, 453; *U. S. v. Winona & St. P. R. Co.*, 67 Fed. 948, 955, 15 C. C. A. 96, 103, 32 U. S. App. 272, 283."

And speaking upon the subject of estoppel the Court further says:

"In the second place, the United States are the only parties that can claim the ownership or cancellation of this scrip, and they are estopped from so doing by their patent of the land for cash, by their refusal to take the scrip in payment for it, and by their return of it uncancelled. This scrip was assignable, and Hartmann had the right to rely, and doubtless he did rely, upon the result of these acts of the government, upon the absence of any cancellation or marks of location upon the scrip when he purchased it, and neither the government nor strangers to these transactions can successfully attack the validity of or the title to the scrip

on their account. *U. S. v. Winona & St. Paul R. Co.*, 67 Fed. 948, 960, 15 C. C. A. 96, 108, 32 U. S. App. 272, 291."

In *United States v. McLaughlin*, 12 Sawyer 179, 200, the Court says:

"Do the principles of equity jurisprudence require, that these patents, in either case, under the peculiar circumstances surrounding them, should be decreed void and vacated? It does not appear so, to us. The interests of all *these* pre-emptioners and purchasers from the government, as well as of the parties holding under the railroad grants, and the interests of public justice, generally, require, that this practical location of the vague, uncertain, impracticable eastern exterior boundary of the Moquelamos grant of 1855, acted upon by all departments of the government, by the public, and even by the claimant himself, for nearly a quarter of a century, should not now be disturbed—that the government should be now estopped from alleging that it is, or should be, located elsewhere. That the law of estoppel, in a proper case, applies to the government, see *Clark v. U. S.* 95 U. S. 539, 543; *Branson v. Wirth*, 17 Wall. 42; *Indiana v. Milk*, 11 Fed. Rep. 389, 397, and cases cited."

To apply the principle of law thus announced by Judge Sawyer; suppose that this was a suit to set aside these patents that had been issued from time to time as evidence that the lands have been earned and, as we claim, that the company at the time the patents were issued had performed and was performing all the conditions of the grant; suppose instead of bringing a suit as here, authorized under the joint resolution of April 30, 1908, to ascertain by judicial proceedings whether there had been a breach of this alleged condition subsequent, the United States in its capacity as a proprietor, in absence of an express statute authorizing such suit, or pursuant to the act of March 3, 1887, to adjust these grants had brought suit to set aside and cancel these patents, or if such suit had been brought after an act of Congress had been passed declaring a forfeiture for breach of this condition subsequent, and the United States desired to remove the cloud caused by these patents and sought to remove such cloud by a suit specifically grounded upon the act of Congress declaring a forfeiture and the failure of the company to comply with this alleged condition subsequent, would not the issuance of these patents after these many years, with knowledge imputed to the United States of the alleged breaches of this condi-

tion, be deemed strong and persuasive evidence of waiver, and would not the United States, upon principles of equity, be estopped to question that these patents evidenced an absolute and unconditional conveyance of the title without any reservation, restriction or limitation whatever.

In *United States v. Stinson,* 125 Fed. 907, 909, Grosscup, Circuit Judge, speaking for the Circuit Court of Appeals, Seventh Circuit, says:

> "These barriers, to the extent that they are thus artificial, cannot be set up against the government. It has not hitherto been supposed—at least no legislative action has been taken on such supposition—that government needed the spur intended, as between individuals, to bring controversies to a speedy close; or that government would press claims that ought not, by the obliteration of adequate sources of evidence through lapse of time, to be pressed. But when the government seeks its rights at the hands of a court, equity requires that the rights of others as well, should be protected. *Carr v. United States,* 98 U. S. 438, 25 L. Ed. 209. The government may not in conscience ask a court of equity to set on

foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals. *Chope v. Detroit Plank Road Company,* 37 Mich. 195, 26 Am. Rep. 512; *Commonwealth v. Andre,* 3 Pick 224.

In *Walker v. United States,* 139 Fed. 409, 412, the Court says:

"United States v. Arredondo, 6 Pet. 712, 8 L. Ed. 547, was a suit, under an act by which the United States consented to be sued, to determine whether certain lands in Florida were private property, or passed to the government by the cession from the King of Spain. The Supreme Court said:

'By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man on the same subject-matter.'

"When the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors. *King*

of Spain v. Hullett, 1 Clark & F. 333; *Rothschilds v. Queen of Portugal,* 1 Young & C. 594. In the latter case, a question arose as to the right of the Rothschilds to retain interest out of a fund in their hands against the Queen. Baron Alderson said:

'Now, if the conduct of her most faithful majesty, through her lawfully authorized agents, was such as to induce the Rothschilds as reasonable men to suppose that by such delay they were acting in conformity to her majesty's wishes, they would justly be entitled to charge her with that interest.'

"In The Newbattle, 10 Ct. App. Prob. Div. L. R. 33, the owners of the Marie Louise asked that the Belgian government, which had instituted proceedings in admiralty to recover damages for a collision with one of its ships, be required to give security for the payment of damages to defendants, who brought a counterclaim. The order was granted, and affirmed on appeal. Brett, Master of the Rolls, said:

'If a sovereign prince invokes the jurisdiction of the court as a plaintiff, the court can make all proper orders against

him. The court has never hesitated to exercise its powers against a foreign government to that extent.'

Cotton, L. J., said:

'When a government comes in as a suitor, it submits to the jurisdiction of the court and to all orders that may be properly made. Regard must, of course, be had to the fact that in this case the King of the Belgians is a sovereign prince, but the order, nevertheless, is a proper one. It is a reasonable principle that a plaintiff, whose ship cannot be seized, and against whom a cross-action has been brought, put the defendant in the position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security.'

"The Supreme Court of the United States upholds the rights of its citizens against its own government, when it enters its courts against them, quite as far as the courts of England go in enforcing the rights of English subjects in suits against them by foreign princes. Indeed, it would seem it has gone a little further. There is no statute which authorizes the courts of the United States to seize prop-

erty of the United States or to enforce liens thereon; yet, in The Davis, 10 Wall. 17, 19 L. Ed. 875, property of the United States on board of a vessel, which was seized by the marshal before it came into the actual possession of any officer of the United States, was subjected to a lien for salvage, against the objection of the United States. The Supreme Court said:

'The United States, without any violation of law by the marshal, was reduced to the necessity of becoming claimant and actor, to assert her claims to the cotton. Under the circumstances, we think it was the duty of the court to enforce the lien of the libelants for salvage before it restored the cotton to the officers of the government.'

"A like doctrine, upon like reasons, was applied in The Siren, 7 Wall. 159, 19 L. Ed. 129.

"The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or

subject, as determined by the jurisprudence of the forum in like subject-matter between man and man. The acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, and they have acted within the purview of their authority, may in a proper case work an estoppel against the government. *Lindsey v. Hawes,* 2 Black, 560, 17 L. Ed. 265; *Davis v. Gray,* 16 Wall. 203, 21 L. Ed. 447; *U. S. v. Bank of Metropolis,* 15 Pet. 392, 10 L. Ed. 774; *Sinking Fund Cases,* 99 U. S. 719, 25 L. Ed. 496; *U. S. v. Barker,* 12 Wheat. 559, 6 L. Ed. 728; *Cooke v. U. S.* 91 U. S. 398, 23 L. Ed. 237; *Duval v. U. S.* 25 Ct. Cl. 60; *Hartson v. U. S.* 21 Ct. Cl. 456. The principle that the sovereign is bound by his own acts, and those of his lawfully authorized agents within the purview of their authority, is a wholesome one, and requires the courts to visit an estoppel upon the sovereign in a proper case, where he invokes judicial action. While the application of the doctrine is attended with difficulty under our institutions, where sovereignty of the United States does not reside in any one person or collection of persons, that difficulty is no reason for rejecting the operation of the

> principle, if the facts of the particular case will admit of its application."

The case last cited was affirmed by the Circuit Court of Appeals, Fifth Circuit, November 3, 1906, for the reasons given by the Judge in the court below. United States v. Walker, 148 Fed. 1022.

In *United States v. Chandler-Dunbar Water Power Co.,* 152 Fed. 25, 40, Severens, Circuit Judge, speaking for the Circuit Court of Appeals, Sixth Circuit, then composed of Circuit Judges Lurton, Severens and Richards, grounded his opinion and the judgment of the court upon principles of estoppel. After noting the fact that no action had been taken by Congress for the construction of any works or the removal of any obstructions at the place which would be affected by the existence of the islands, the court says:

> "Thus far we have considered this question on its strictly legal aspects. The elements of equity in the attack on the Chandler patent are scant. His application was made May 17, 1881. The Land Office had it under advisement until December 15, 1883, when it granted the patent. It does not appear that the particular objection now made was presented by the Commissioner. But the

matter of the reservations in the locality, including the land applied for, must have been under his observation, and the issuance of the patent is at least prima facie evidence that no valid objection to its issuance was deemed to exist. The Land Office then had, and has continued to have in its possession, the same data for raising the question of the validity of the patent that are made the basis for the contention now made. Upon the faith of the grant, the patentee and his grantee have made permanent improvements upon the land costing from $135,000 to $150,000. Following the ancient common-law maxim, 'nullum tempus occurrit regi,' it has been settled as the rule here that the United States is not affected in respect to its pursuit of remedies by mere delay or general statutes of limitations. But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may never-

theless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

This case was affirmed by the Supreme Court of the United States in *United States v. Chandler-Dunbar Water Power Co.*, 209, U. S. 447. The Supreme Court of the United States in an opinion delivered by Mr. Justice Holmes, in effect holds that the issuance of a patent which has been allowed to stand for a period of five years after the passage of the act of March 3, 1891 (26 Stat. 1099), without any suit having been brought to cancel or set aside the same, is not only evidence of title, but is title itself.

The judgment of the Supreme Court was not grounded upon the doctrine of estoppel as such, but proceeded upon the theory that when a patent had been issued in due form and in the regular way, whether it was issued by authority or not, and impliedly, whether or not the patent was issued at a time when the United States could have asserted forfeiture for breach of the alleged condition subsequent, or at least refused to issue the patent and suspend the same, that the United

States by this statute of repose had in effect validated the transfer. The language of the act of March 3, 1891, it was pointed out, referred to "any patent heretofore issued," and such language described the purport and source of the document, not its legal effect. And so here, applying the rule of equitable estoppel to the facts in this case, it could have been decided upon equitable grounds that the United States was estopped both by acts *in pais* and because of the issuance of this patent and that it had been allowed to stand unchallenged beyond the period of the bar of the statute. It is for this reason that we insist that the uniform and regular issuance of these patents from 1871 down to 1905, with full knowledge of the way the grants were administered and the sales made, constitute conclusive evidence of waiver and estoppel.

In *Shaw v. Kellogg,* 170 U. S. 312, 331, the court recognizes the non-action of Congress in the face of reports made to Congress by the Surveyor General of the property, and applies the principle of estoppel by silence and acquiescence, although not using these words.

This court said, as it appears by the report of the Surveyor General and of the Land

Department, transmitted to Congress in 1864: "The fact that this land had been finally appropriated to the claim of the Baca heirs was disclosed. And mention of that fact was also made in subsequent reports to that body, and yet from that time to the present Congress has taken no action in the matter, and has thus by its silence confirmed the proceedings of the Land Department."

In *Commonwealth v. Turnpike Co.*, 153 Pa. St. 47, 54, the Court says:

> "In England, from whence we derived the great body of common law, and most of our principles in equity, it is well settled that while time will not run against the crown, yet time, together with other elements, may make up a species of fraud and estop even sovereignty from exercising its legal rights."

Speaking of the case of Attorney General v. The Delaware and Bound Brook Railway Co., 27 New Jersey Equity, 1, the Court further says:

> "In that case it was held that where a party acting bona fide, and upon its not unreasonable construction of a public grant, has been permitted to expend

a large sum of money in the construction of a public work, in the confidence that it possessed all requisite legislative authority, without a word of protest or remonstrance till the work is practically completed, equity will refuse its aid, even to the state, leaving it to its remedy at law. It was said by the chancellor in that case: 'The work has been, from its commencement, a matter of public notoriety, and yet no action has been taken on the part of the state authorities, nor even any warning offered by them against the work. The defendants have been permitted to make their immense expenditure upon their enterprise in the confidence of their convictions that they possessed all requisite legislative authority without even a word of protest or remonstrance. Under such circumstances, equity will refuse its aid, even to the state, leaving it to its remedy at law.' "

In the case under consideration, the United States, by its proper officers, in execution of the act under which these lands were granted, appointed Commissioners to examine the sections of road, from time to time. These Commissioners reported to the Department of the Interior as required, and the Secretary

of the Interior in turn reported to the President, that the company had constructed the road in accordance with the act, and recommended the acceptance of the constructed portions and the issuance of patents for the lands. This was done with knowledge that the company had in its attempt to administer these grants failed to sell these lands to actual settlers under the limitations of the "actual settler" clause, and that it was expending and was expecting to expend millions of dollars to complete construction of road and earn the lands. How can the United States equitably and in good conscience,—after having thus induced the expenditure of these vast sums of money, after thus having induced the company and its bondholders to believe that it had earned and was earning these lands, and that the title to the lands was indefeasible,—now be heard to say that during all this time they were violating the terms under which the title was conveyed to them, that they did not earn the grant, that it was subject to forfeiture at the very moment they were proceeding to earn the title to these lands? And now, after more than forty years have elapsed, large sums of money have been expended upon the faith of the full and complete title thus conveyed, after payment of large sums of money in taxes under the recognition of this title by the state in which the

lands are situated, the exercising of the taxing power of the state without regard to the limitations or restrictions of the "actual settler" clause, would it not be unconscionable for the United States now to be able to say that these lands are forfeited. A private person under such circumstances would have no standing in a court of equity.

As we have seen, the United States stands in the same relation as any private suitor, and must be governed by the same principles of equity which obtain and control the conduct of private parties.

In *Magee v. Doe,* 22 Ala. 699, 718, the court says:

> "The Price claim was inchoate and incomplete, and its location and survey were provided for by the acts of 1822 and 1829 (3 U. S. Statutes at Large 700; 4 ib. 359;) and as by this survey the south line of the Orange Grove tract, as run by Collins and Henshaw, was adopted as the north boundary of the Price grant, and the United States and the Kennedys having agreed to this survey, they must be regarded as parties to the selection of the land according to it, and are mutually

bound and respectively estopped by it. Menard v. Massey, 8 How. 293, 313."

Here, long after the alleged breaches based upon which the United States now seeks to forfeit these lands, the company paid large sums of money to the United States, as costs of survey, and in other ways relied upon the title which it thought it had earned, and to which it confidently believed it was entitled.

See also, *Menard v. Massey,* 8 How. 293, 313, where the Court makes use of this language:

> "This consideration depends on the fact, that the claimant and the United States were parties to the selection of the land; for, as they agreed to the survey, they are mutually bound and respectively estopped by it."

To the same effect:

> Lessieur v. Price, 12 How. 59, 76
> Lindsey v. Hawes, 2 Black, 554, 560

In *United States v. Winona, etc., R. R. Co.,* 165 U. S. 463, 474, the court says:

> "The land was free from all individual claims. It was within the absolute control of Congress. It belonged to the Gov-

ernment, and it is only in the assertion of a technical rule of construing land grants, first declared by this court long after the certification, that the Government now asks to have that set aside and the title to these lands restored. No fraud or wrong is imputable to the company. No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of the lands which, under such construction, it was entitled to receive. Conceding that that construction was erroneous, yet it was one made by the officers of the department charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act. Many years have passed since the certification, and since the company in reliance upon the title it believed it had acquired has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained—carried even to this court—and decrees and judgments entered and rendered in full reliance upon the title supposed to have

been conveyed. Surely after such a lapse of time, and after so many transactions in and in respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts.

* * * * * *

"Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the Government to insist upon the letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Gov-

ernment, such conveyances should, after the lapse of a prescribed time, be *conclusive* against the Government, and this notwithstanding any *errors, irregularities* or *improper action* of its officers therein."

In *United States v. Winona & St. Paul R. R. Co.,* 67 Fed. 948, 955, Sanborn, Circuit Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, particularly emphasizing the conclusive effect of the patent issued by the United States, says:

"All the lands certified for the Winona Company were within the place limits of its grants. The grants were in praesenti, and they attached upon the filing of its maps of the definite location of its line opposite to the lands. The certificates were evidence that the officers of the land department had adjudged that the grants to the Winona Railroad Company had attached to the lands in controversy, and their legal effect was the same as though patents to the state had been issued for the benefit of that company. Frasher v. O'Connor, 115 U. S. 102, 116, 5 Sup. Ct. 1141; Curtner v. U. S. 149 U. S. 662, 675, 13 Sup. Ct. 985, 1041. A patent issued by the officers of the land department of the United States in a case within the

scope of their power or jurisdiction, is dual in its effect; it is an adjudication of those officers that the patentee *is entitled to land under the laws of the United States,* and it is a conveyance of the title to that land to the patentee. By the Act of March 3, 1849 (9 Stat. c. 108, p. 395, sec. 3; Rev. St. sec. 441), the secretary of the interior is charged with the supervision of the public business of the United States relating to the public lands; and by the act of March 3, 1857, supra, as amended by the act of May 12, 1864, supra, the power was conferred and the duty imposed upon him to indicate the lands granted to the Winona Railroad Company by those acts of congress in all cases. By the act of July 4, 1836 (5 Stat. c. 352, sec. 1; Rev. St. sec. 453), the commissioner of the general land office is required to 'perform,' under the direction of the secretary of the interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all (agents) (grants) of land under the authority of the government.' The land department of the United States, then, including in that

term the secretary of the interior, the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal, under these and other provisions of the laws of the United States, vested with the judicial power to hear and determine the claims of all parties to the public lands it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. When a claim under a grant for a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant, whether or not it has so far *complied with its conditions* that it is entitled to its benefits, whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it."

* * * * * * *

"In all these cases the land that was the subject-matter of the patents or certificates, and the rights of the claimants to it, were not subject to the jurisdiction of the land department. That department had no jurisdiction to hear and determine these claims, or upon such determination to dispose of the lands. On the other

hand, in every case to which our attention has been called in which the power to hear and determine the claims of applicants for lands of the United States, and upon such determination to dispose of those lands, either under the pre-emption or homestead laws, under grants for railroads or other corporations, or by sale, or in any other recognized mode, has been vested in the land department, the supreme court has uniformly held that the patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack; Minter v. Crommelin, 18 How. 87, 89; U. S. v. Schurz, 102 U. S. 378, 401; French v. Fyan, 93 U. S. 169, 172; Quinby v. Conlan, 104 U. S. 420; Smelting Co. v. Kemp, 104 U. S. 636, 645, 647; Steel v. Refining Co., 106 U. S. 447, 450, 452, 1 Sup. Ct. 389; Heath v. Wallace, 138 U. S. 573, 585, 11 Sup. Ct. 380; Knight v. Association, 142 U. S. 161, 212, 12 Sup. Ct. 258; Noble v. Railroad Co., 147 U. S. 174, 13 Sup. Ct. 271; Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030."

* * * * * * *

"Moreover, the acts of congress under which the Winona Company claimed these lands expressly provided, as we have

seen, that the secretary of the interior should indicate the lands granted under them in all cases. The conclusion is irresistible that these acts conferred the power and imposed the duty upon the officers of the land department to hear and determine the ultimate question whether or not the railroad company was entitled to these lands under its grants, and to 'indicate' the lands granted by certificates or patents to the state. In other words they could have discharged the duties these acts imposed upon them. In deciding this question they necessarily considered whether or not the railroad company had so far complied with the acts granting the lands that it had earned them, the character of the lands themselves, and the class to which they belonged, the time of the definite location of the line of railroad, the homestead entries and pre-emption filings that were then upon the lands, the cancellation of all these entries and filings that had been made, and, finally, the legal effect of all these and all other material facts upon the claim of the railroad company to receive the lands under the acts of congress. It now appears that they were mistaken as to the legal effect of these facts, but the question they decided was one which the

acts of congress authorized and required them to decide,—one which they were obliged to decide before they issued the certificates; and, although their decision and their conveyances evidenced by these certificates may be voidable, they are not absolutely void. They are impregnable to collateral attack, and they conveyed the legal title to the lands to the state and its grantees.

"The next question is whether or not the United States had any equitable right to these lands superior to that of bona fide purchasers who acquired the legal title to them from the railroad company before the government gave any notice of the mistake of its officers, or of its claim to recover the lands. This is not a debatable question. The equities of the United States appeal to the conscience of the chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. Bona fide purchasers are the especial favorites of courts of equity. In Boone v. Chiles, 10 Pet. 177, 209, Mr. Justice Baldwin in delivering the opinion of the supreme court, said: 'A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no

demand can attach upon it, so as to give any jurisdiction. Sugd. Vend. 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief, (9 Ves. 30-34), which a court of equity imparts liberally.'"

* * * * * *

"The equitable right of the United States to recover these lands is not exceptionally strong in this case. If its land department had decided that the railroad was not entitled to them when it decided to the contrary, the company would have been entitled to an equal number of acres within its indemnity limits in lieu of them, so that the company obtained no more land than it was entitled to, although what it did obtain was undoubtedly somewhat more valuable than the land within its indemnity limits which it should have received. But the right of the government, in order to se-

> cure this difference in value, to recover these lands now, when lands in lieu of them can no longer be found within the indemnity limits to fill this grant, when the certificates of its land department have stood unchallenged for from 13 to 18 years, and when purchasers under these certificates have bought, improved, and paid taxes on these lands, is far inferior to the equities of such purchasers, and ought not to prevail against them."

The case last cited was affirmed by the Supreme Court in *United States v. Winona, etc. R. R. Co.*, 165 U. S. 463, supra, but not upon the distinct grounds expressed by Judge Sanborn, although his reasoning is not disapproved.

In *Maxwell Land-Grant Case*, 121 U. S. 325, 381, the Court says:

> "We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposi-

tion, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles depending on these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the title by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well under-

> stood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

The United States and the companies have acquiesced in the construction of this clause as practically administered by the company for more than forty years. If the acts of Congress were formal deeds to these lands made by one private party to another and the parties had acquiesced in the practical construction of the deeds and in the administration of sales contemplated by the deeds, in the same way and for the same length of time as the parties here, could there be any question but that the practical construction thus given to the contracts by the parties would be taken to be the proper construction of the actual settler clause, and if not the technical and proper construction that would have been given to the act in the beginning, the grantor, in this case the United States, would now be estopped to dispute the construction acted upon by the parties.

In *Irwin v. U. S.*, 16 How. 513, 523, the court recognizes this principle, where Mr. Justice Grier, speaking for the court, says:

> "We are of the opinion, therefore, that a reasonable construction of the deed to

the United States, having reference to the principles of hydraulics, necessarily requires that each party should have half the water, and conduct it in such pipes as they see fit and proper; and also, that assuming the deed to be capable of the construction contended for, the parties to it have construed it honestly and correctly; and that this practical construction having been acquiesced in by all parties interested for sixteen years, is conclusive."

In *State v. Railroad Company,* 89 Mich. 481, affirmed for want of jurisdiction in 152 U. S. 363, the Supreme Court of Michigan says:

"That the State, as well as individuals, may be estopped by its acts, conduct, silence, and acquiescence, is established by a line of well-adjudicated cases.

"In Massachusetts, in the year 1825, the commonwealth was held estopped from setting up alienage in a grantee to whom it had conveyed land. Com. v. Heirs of Andre, 3 Pick. 224. In that case the state had conveyed the land by deed to Andre. The court held:

'This deed must operate as a rebutter, as it would if an individual were the

grantor; and with more reason, because the commonwealth is not liable to an action. The commonwealth, if the land were recovered, would feel itself bound to repay the consideration money, with interest. This would be a claim which could not be resisted without degrading the country.'

"It has been held that the United States government was estopped from disputing certain boundary lines, and from denying that certain lands were within them. U. S. v. McLaughlin, 30 Fed. Rep. 147. The court in that case said:

'A construction of the law and understanding of the facts, acted upon by all departments of the government, by the public, and even by the claimant himself, for nearly a quarter of a century, should not now be disturbed. The government should be now estopped from alleging that it (the boundary line) is or should be located elsewhere. The law of estoppel, in a proper case, applies to the government.'

"In State v. Milk, 11 Fed. Rep. 389, it is said:

'Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel.' See, also, authorities there cited.

"Where the state granted its land as a part of a wagon-road grant, which had been conveyed to the state under the swamp-land act, it was held estopped to deny that the land was within the wagon-road grant. Cahn v. Barnes, 5 Fed. Rep. 326. In that case the state first granted the land to the plaintiff as wagon-road land, and subsequently conveyed it to the defendant as swamp land.

"The case of Hough v. Buchanan, 27 Fed. Rep. 328, arose under the swamp-land act, and the act of Congress granting certain lands to the state of Iowa to aid in the construction of railroads. That case is the exact parallel of this, so far as the indemnity lands are concerned. The complainants obtained their title from the railroad act, and the defendant claimed title under the swamp-land act. After reciting the facts, the court said:

'If, under these circumstances, it should now be held that the state is not

debarred from asserting a claim to these lands under the swamp-land act, it is clear that a fraud would thereby be perpetrated upon the company and its grantees. Should it, however, be held that it was open to the state, or its grantees, to contest the validity of the transfer to the railway company, such contest must certainly be made within a reasonable time. The county, upon its organization in 1859, caused these lands to be listed as swamp lands, and the list was forwarded through the proper channels to the department at Washington. The Commissioner refused to certify the lands under the swamp-land act, holding, as a matter of law, that the certification made thereof in 1858 to the railway company defeated the right to claim them under the swamp-land act. It does not appear that the county or its grantees have since taken any further action in the premises. They knew that the lands had been certified to the railway company in 1858; that the Commissioner of the Land-Office had refused to certify the lands under the swamp-land act; that the railway company and its grantees were claiming the land, and asserting title thereto by paying taxes assessed thereon; and yet for 25 years the defendant and his grantors

have done nothing to perfect the evidence of their title, or assert any right to the land. Certainly their claim must be regarded as stale, and not entitled to favorable consideration at this late day.'

"In Pengra v. Munz, 29 Fed. Rep. 830, the question raised was similar to that in Cahn v. Barnes, supra, and the same rule was enunciated.

"In U. S. vs. Railway Co., 37 Fed. Rep. 68, it is said:

'Parties place faith, and should place faith, in the action of the government, and rely upon the title which its patent conveys; and when, as appears in this case, many parties have purchased in perfect reliance upon the title of the patent, and many years have passed with it unchallenged, common fairness requires that the title thus apparently conveyed should be sustained, unless it be very clear that there was a want of authority to issue it.'

"In Attorney General v. Ruggles, 59 Mich. 124, the State asked for the cancellation of certain certificates for the purchase of agricultural college lands. There, as here, counsel for the State sought to

make a distinction in the doctrine of estoppel as applied to the State and individuals. But this Court, speaking through Mr. Justice Morse, said:

'I see no reason to distinguish this case although the State is a party, from like cases between individuals.' "

In *United States v. M. K. & T. Ry. Co.* 37 Fed. 68, 70, Mr. Justice Brewer says:

"Again, it is insisted that the road was not built on the line of the definite location, but deflects in some instances therefrom, and near the city of Humboldt to the distance of two miles and a half, and has been since that time operated on the line as built. Hence, by reason of its first failure to construct, and its subsequent failure to operate and maintain on the line of definite location, it is insisted that the grant never became operative, and the officers of the land department exceeded their powers in issuing patents, and *that there is a breach of a condition subsequent.* It must be noticed that this question does not arise upon an application of the road for patents for these lands, for they were issued in 1873. The department officers then accepted the road

as constructed so nearly upon the line as to comply with the conditions of the grant. Fourteen years thereafter, after the land thus patented has been largely, if not entirely, sold by the patentee, this bill is filed. It is obvious that the question presents itself under very different aspects now from what it would then. The executive officers of the government have certain duties of supervision in reference to the execution of grants made by congress, and when they have acted, and their action has been unchallenged for a long series of years, and rights of property have been built up on the faith of their action, a very clear case should be presented before the titles thus resting for years upon that action are disturbed. In the case from the supreme court, supra, it observes:

"And lastly, while we are not disposed to hold the action of the officers of the land department of the government as absolutely conclusive upon such a subject as this, we see no reason why their deliberate action, with careful attention, and all the means of ascertaining what was right, should be set aside in this case."

"Again, in the Maxwell Land Grant Case, 121 U. S. 381, 7 Sup. Ct. Rep. 1015, the supreme court makes these comments:

'We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated, and fully sustained by proof.'

"These observations of the supreme court admonish me that a patent once issued from the general government is not lightly to be disturbed, and that the perfect title supposed to be conveyed thereby must always be upheld, unless it be manifest that there has been in its issue a clear departure from the authority granted. If this be true in respect to a recent patent, much more is it true in reference to a patent so old as this. Parties place faith, and should place faith, in the action of the government, and rely upon the title which its patent conveys; and when, as appears in this case, many parties have purchased in perfect reliance upon the title of the patent, and many years have passed with it unchallenged, common fairness requires that the title thus apparently conveyed should be sustained, unless it be very clear that there was a want of authority to issue it. Now, generally, I may observe in this case that the construction of the various acts is not clear. The elaborate briefs prepared by counsel on each side indicate that the matter of construction is a doubtful one. When the officers charged with the primary execution of the duty of construction have discharged that duty, and placed a certain construction upon those

> acts, and issued patents in accordance therewith, and that construction has been accepted unchallenged for a long series of years, then the court may well hesitate before it says that that construction was improper, and the patent issued without authority."

While it is true that this case was reversed by the Supreme Court of the United States in United States v. Mo. etc. Ry. Co., 141, U. S. 358, the reasoning by Mr. Justice Brewer is not controverted. The decision of the case by the Supreme Court proceeded upon other grounds. The decree of the court below was reversed and the case was remanded with directions to overrule the several demurrers to the bill and to require answers from the defendants upon the facts. This, in effect, is a recognition of the equitable ground upon which the opinion of the court below was grounded.

The case of United States v. McLaughlin, 30 Fed. 147, 161, was affirmed by the Supreme Court of the United States in 127 U. S. 428, and, as we have seen, the rule of estoppel was applied to the United States by Judge Sawyer. This is a recognition of the application of the rule in cases in which the United States is a party.

In *Hooper v. Cummings,* 45 Maine, 359, 365, the general rule of law applicable to conditions subsequent is well stated where the court says:

> "We may assume that the proviso in the deed created a condition subsequent, and, in this, we are sustained by most, if not all, the authorities, ancient and modern; notwithstanding it is to be construed strictly and most strongly against the grantor to prevent, if possible, a forfeiture of the estate. 'If the word proviso be the speaking of the grantor, feoffor, donor, etc., and obliges the grantee, etc., to any act, [Not so in the case now before this court; the Settlers' Clause, it is conceded by the Government, does not oblige the grantee to any act—does not compel the grantee to make sales to settlers] it makes a condition, in whatever part of the deed it stands; and, though there be covenants before or after, is not material.' 3 Com. Dig. 84, (Condition).
>
> "And, we may further assume, that the evidence discloses a breach of the condition, inasmuch as the land has never been fenced on the highway, and has remained in that situation for more than half a century. And, in the mean time,

the grantor, living in the vicinity, has permitted the meeting-house to be erected and maintained, and the pews and corresponding portions of the lot to be conveyed to members of the parish, at different periods from the date of his deed to the present time. And all this was done without complaint, or any action on his part to reclaim the land. If ever there could be a waiver of a condition evidenced from the conduct of a party, this would seem to be such a case; certainly, as much so as those cases where a person stands silently by and permits property to be conveyed to which he has a legal claim. Lord Coke remarks, 1 Co. Litt. 218, 'Regularly, when any man will take advantage of a condition, if he may (can) enter, he must enter; and, when he cannot enter, he must make a claim; and the reason is, for that a freehold shall not cease without entry or claim, *and also feoffor or grantor may waive the condition at his pleasure.*' Vide Willard v. Henry, 2 N. H. 120, where a non-claim for a much shorter period of time, was held to be a waiver of the condition."

In *United States v. Arredondo,* 6 Pet. 691, 728, a patent issued by the United States

purporting to convey lands was early recognized as final. The court says:

> "A patent under the seal of the United States, or a state, is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. Patterson v. Winn, 5 Pet. 241. The grants of colonial governors, before the revolution, have always been, and yet are, taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation or denial by the king, and his consequent acquiescence and *presumed ratification*, are sufficient proof, in the absence of any to the contrary (subsequent to the grant), of the royal assent to the exercise of his prerogative by his local governors. This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider, that it exists in the officers or tribunal who exercises it, by making grants, and that it is fully evidenced by occupation, enjoyment and transfers of property, had and made under them, without disturbance by any superior

> power, and respected by all co-ordinate and inferior officers and tribunals throughout the state, colony or province where it lies."

In *Titus* v. *United States,* 20 Wall. 475, 485, Mr. Chief Justice Waite, speaking for the court, says:

> "Very different questions, and very different principles of estoppel, will have to be considered if the United States or the commission shall ever attempt to assert title against the purchasers at the sale. They claim under the sale, and have paid their money in consequence of the offer of the United States to sell in that way."

Jones v. United States, 96 U. S. 24, 29, recognizes that estoppel applies in a proper case to the United States, and also recognizes that conditions impossible to be performed are not binding upon the parties. Mr. Justice Clifford, speaking for the court in that case, says:

> "Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impos-

sibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control. Chitty, Contr. 663; Jervis v. Tompkinson, 1 H. & N. 208.

"Other defences failing, the petitioner insists that the United States are estopped to deny that the time of performance was extended, as set up in his second assignment of error; but the court is unable to sustain that proposition, as the remark of the head of the bureau does not amount to a contract for such an extension, being nothing more than the expression of an opinion that the assistant-quartermaster would grant the applicant some indulgence.

"Viewed in that light, it is clear that the United States did not do any thing to warrant the contractor in changing his position, and, if not, then it is settled law that the principle of estoppel does not apply. Packard v. Sears, 8 Ad. & E. 474; Freeman v. Cook, 2 Exch. 654; Foster v. Dawber, 6 id. 854; Edwards v.

Chapman, 1 Mee. & W. 231; Swain v. Seamans, 9 Wall. 254.

> "Estoppel does not arise in such a case, unless the party for whom the service is to be performed induced the other party by some means to change his position and act to his prejudice in consequence of the inducement."

In *Minneapolis & St. Cloud R. Co. v. Duluth & Winnipeg R. Co.,* 45 Minn. 104, 106, the Court says:

> "It is elementary law that such a grant is not forfeited by mere default of the grantee in the conditions, but only by some affirmative act of the state, after the breach or default, declaring or asserting the forfeiture. The right of the state to a forfeiture must be asserted by judicial proceedings, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging a restoration of the estate on that ground; or there must be some legislative assertion of ownership of the property for the breach of the condition; and until this is done the grant remains vested in the grantee, notwithstanding the breach of the condition. Moreover, if, after the

breach, the grantee proceeds and earns the grant by the construction of its road, before any action on the part of the state asserting or declaring a forfeiture, the state cannot afterwards divest the grantee of the land by declaring a forfeiture. These propositions, as applied to land grants, have become so familiar, especially since the decision in Schulenberg v. Harriman, 21 Wall. 44, that a discussion of them, or a citation of authorities in their support, would be worse than useless. The intervenor was not in default in any of the conditions of its grant in March, 1878, or for nearly a year afterwards. In 1879, it did default, not having, as the court finds, located its line, or filed a map of it, until the spring of 1882. But the state has never declared or asserted any forfeiture, either by legislative act or by judicial proceedings, and in the mean time the intervenor has gone on and earned its grant by the construction of its road, so that it is now beyond the power of the state to declare a forfeiture."

This is, in effect, a recognition of the rule that where the state has a right to declare a forfeiture for breach of condition subsequent, and permits the grantee of an estate thus

burdened to proceed with the completion of the work for which the lands are granted, even though the condition has been broken, that then after the performance of the thing for which the grant was made, it is too late for the state to undertake to declare a forfeiture. This road was not completed within the time required by the act under which these lands were earned. That clause in the act was clearly a condition subsequent. For breach of that, before completion of road and acceptance of same, clearly Congress could have declared a forfeiture as to the lands opposite to and co-terminous with the unconstructed portion, and possibly could have declared a forfeiture of the entire grant for failure to construct the entire road. This breach would have determined the estate as much as the breach of the actual settler clause if that shall be construed as a condition subsequent, for breach of which re-entry may be had. If Congress could not declare a forfeiture after the lands had been earned by construction of road, even though there had been a continuous breach of that condition subsequent for many years, it is clear that Congress cannot, after a knowledge of the breach of a condition subsequent as to the disposition of integral parts of these lands many years after such continuous breaches have been brought to the attention of the United States,

declare a forfeiture for such breaches, and particularly where, as here, these breaches occurred before completion of road and before the expenditure of vast sums of money in a bona fide attempt to earn the lands.

In *Barrie v. Smith,* 47 Mich. 130, 131, the Court says:

> "It is familiar doctrine and well settled that 'conditions subsequent are not favoured in law, and are construed strictly, because they tend to destroy estates; and the rigorous exaction of them is a species of *summum jus,* and in many cases hardly reconcilable with conscience.' 4 Kent. Com. 129; Mich. State Bank v. Hastings, 1 Doug. (Mich.) 257; Clakins v. Smith's Estate, 41 Mich. 412.
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> "It is well settled that a condition subsequent may be waived, where broken, by the party who has the right to avail himself of it, and this may be proven as well by the acts and conduct as by an express agreement, and where once waived it is gone forever. If therefore it appeared that the grantor of the defendant had used these premises or the buildings thereon for the purposes of selling intoxicating liquors, therein, to the knowledge

of the plaintiffs, or either of them, and the defendant subsequently purchased the premises, and made valuable improvements thereon without objection, or any steps being taken by the plaintiffs to insist upon a forfeiture, this would constitute a waiver of the condition and forfeiture. Gray v. Blanchard, 8 Pick. 284.

"That the plaintiffs could waive the condition there can be no question, and if they permitted the premises to be used in violation thereof, they could not stand by, see the property change hands, and after valuable improvements had been made thereon, then step in, insist upon a forfeiture, and thus acquire the improvements made upon the strength of their seeming acquiescence."

In *Wisconsin Central R. R. Co., v. Forsythe,* 159 U. S. 46, 60, Mr. Justice Brewer, speaking for the court says:

"Still, again, it must be noticed that the State of Wisconsin, the grantee named in both the acts of 1856 and 1864, the plaintiff within whose place limits the land in controversy is situated, and the Omaha Company, within whose indemnity limits it is, all three long since agreed that the land passed by this grant,

and dealt with it as belonging to the plaintiff. Both roads have been constructed, and, undoubtedly largely through the instrumentality of their construction, population has poured into that part of the State, and the value of all real estate so increased that this particular tract is found by the jury to be worth $8000. After years have passed, and all the parties interested in the matter, other than the United States, have treated it as the property of the plaintiff, the defendant, relying upon a technical construction of the statutes, seeks to enter the tract, and thus, for no more than the paltry sum of $400, two dollars and a half per acre being the double minimum price of land within the limits of railroad grants, to obtain title to property worth, as we have seen, at least $8000. The railroad company, under this construction, loses the land it supposed it was entitled to, which it has treated as its own, and has helped to make valuable; the government does not receive the $8000, nor indeed anything if the land be entered under the homestead laws, but a stranger comes in, who has done nothing to create that value, and appropriates it to his own benefit.

> The iniquity of such a result is at least suggestive."

We are not, however, without authority upon this question in this jurisdiction.

In United States v. Wallamet V. & C. M. Wagon Road Co. et al., 42 Fed. 351, Judge Deady says:

> "When the United States comes into a court of equity to assert a claim, it is subject, and must submit to, the rules of procedure and principles of jurisprudence which obtain in suits between private parties. U. S. v. Arredondo, 6 Pet. 711; U. S. v. Flint, 4 Sawy. 58; U. S. v. Tichenor, 8 Sawy. 156, 12 Fed. Rep. 499. * * * The grant, however, was a conditional one, the condition being that the road should be completed in the manner provided within five years from the date of the act. This was a condition subsequent and, unless it was complied with, the complainant as grantor, might, by proper legislation or judicial proceedings, have enforced the forfeiture of the grant on account of such failure."

It appears that in that case the defendants Weill and Cahn filed two pleas to the bill and their joint and several answers in support

thereof. Speaking of these pleas, Judge Deady says:

> "The first plea may be called an estoppel.
>
> "Briefly, it alleges that after these defendants had acquired the title to the lands in question, as stated in the bill, and in March, 1878, a complaint was received at the office of the secretary of the interior to the effect that the road had not been constructed as required by the act of July, 1866, in consequence of which the commissioner of the general land office, with the approval of said secretary, appointed a special agent to examine the road, and report thereon; that in October, 1880, said agent reported that the road had not been constructed as required by law; that said report, and the evidence accompanying the same, was laid before congress, and in the house of representatives was referred to the committee on military affairs, which committee, upon consideration of said report and evidence, and evidence contradictory thereof, made a report in February, 1881, recommending that no action of congress be had in the premises.

"In their report the committee say they 'do not feel called upon to investigate the disputed question of fraud arising from the ex parte testimony submitted, or warranted in expressing an opinion in regard to the same, but believe that to be a matter within the province of the judicial, and not the legislative, department of the government,' and conclude as follows:

(1) That the act of congress approved July 5, 1866, vested a present title to the land in question in the state of Oregon; (2) that by the act of the legislature and the acts of the governors of Oregon, the title to said land was vested in the Wallamet Valley & Cascade Mountain Wagon Road Company; (3) that by the deed of said company to Clarke, and the subsequent deeds from Clarke and others, the title of said land is now lawfully vested in the present claimant, Alexander Weill; (4) that said title cannot be forfeited or annulled, or reinvested in the United States, excepting by a judicial proceeding; and that the same has become a vested right, which congress cannot impair or take away.

"That afterwards, on February 8, 1882, a communication from the secretary of

the interior was laid before Congress, containing further charges, and alleged proofs that the road was not constructed as required by the act of July 5, 1866; and the matter was referred in the house of representatives to the committee on public lands, and in the senate to the committee on military affairs, which committees reported, recommending that congress take no action in the premises. Both of these reports are annexed to the plea, and made a part thereof; and each states that the title to this land passed to the state and its assigns under the act of congress and the state legislature.

"The senate committee say that 'it is impossible' for them 'to take such an investigation as will justify action by congress which would do justice and equity in the premises,' and that 'the executive department of the government had ample authority in law' to investigate the matter, and, if necessary, to institute legal proceedings in the courts of the United States to secure a forfeiture of the grant, or any part thereof, for failure to comply with the terms and conditions thereof, 'without any legislation or instructions from the legislative department.'

"That by the proceedings thus had the matter of the completion of the road was referred to the executive department of the government, whereupon the secretary of the interior, after due investigation of the subject, including the hearing of argument thereon, did on July 5, 1882, direct the commissioner of the general land office to proceed and certify the lands for patent under the act of June 18, 1874, and thereafter, in October, 1882, said patent for 440,856 acres was duly issued to the wagon road company; that these defendants relying in good faith upon the action of the legislative and executive department of the government, were induced to, and did, before the passage of the act of 1889, 'so alter and change their position in reference to said lands' as to 'render it inequitable and unconscionable for the complainant to assert any right * * * to forfeit or reclaim said lands;' that these changes consist, in part, in the expenditure of $2,660.62 in securing the issue of patents therefor; in the payment of $29,885.79 of taxes levied thereon; in the payment of $109,800.97 to agents and attorneys for grading, selecting, and platting said lands, and defending the possession of the same from adverse claimants and

trespassers; by the sale of sundry parcels of said lands with warranty of title, on which the liability of the defendants exceeds the sum of $22,609.71; in the expenditure of $86,805.75 in rebuilding and improving said road through its entire length, which has greatly increased the value of the lands along the line thereof, a very large portion of which still belongs to the complainant, and in the payment of $31,651.71 interest on said sums of money, making in all the sum of $280,754.03."

Speaking of the legal effect of the plea, Judge Deady further says:

"As appears from the first plea, congress has repeatedly refused to declare the forfeiture of the grant, or take upon itself the investigation of the question whether the condition had been complied with or not. The attorney general declined to institute judicial proceedings to that end until required to do so by the act of 1889, which appears to have been passed on the memorial of the legislature of the state. It is also well understood that congress was influenced to the passage of the act by the desire of these defendants to have a speedy and complete

determination of their rights in the premises.

"On the facts stated in this plea, the demand made by this suit for the forfeiture of this grant on the ground stated in the bill is what is known in equity as a 'stale claim,' and therefore ought not to be allowed. The period prescribed for the construction of this road expired in July, 1871, full 18 years before the commencement of this suit. During all this time, it was open to the complainant to bring suit, by its attorney general, to have this grant declared forfeited on the grounds now stated in its bill. U. S. v. Throckmorton, 98 U. S. 70; U. S. v. Tin Co., 125 U. S. 278, 8 Sup. Ct. Rep. 850.

"This, in my judgment, is such a delay or lapse of time as renders the claim stale, and constitutes, under the circumstances, a bar to the relief sought.

"Lapse of time, particularly when coupled with possession, as in this case, is a defense, in equity, in cases not within the reach of the statute of limitation. Story, Eq. Pl. Sec. 813; 2 Story, Eq. Jur. Sec. 1520; U. S. v. Tichenor, 8 Sawy.

156, 12 Fed. Rep. 449; U. S. v. Beebe, 4 McCrary, 12, 17 Fed. Rep. 36.

"For seven years after the expiration of the time prescribed for the construction of the road and filing of the certificates of the governors, in which its completion was formally and officially declared, nothing appears to have been said or suggested to the contrary by any one, when a trespasser on the lands made a complaint to the secretary of the interior that the road had not been constructed according to law. Investigation ensued under the direction of the secretary, and the matter was submitted to congress, who referred it back to the executive department in 1882, where, after due consideration, patents were ordered issued to the company under the act of 1874, which was done, as to the greater portion of the lands.

"The statute of limitations does not ordinarily run against the United States. But this suit is required by the act of congress to be tried and adjudicated as a suit between private parties; and therefore, in my judgment, the lapse of time, or the bar of the statute of limitations, is to have the same effect as in a suit between such parties.

"Since 1878 the analogous action at law, to recover the possession of these lands on account of a breach of the condition on which they were granted, would be barred in 10 years, and prior to that time in 20 years; and although the statute of limitations does not apply, proprio vigore, to suits in equity, yet in cases like this, of concurrent jurisdiction at law, the court will apply the same limitation to one as the other. Hall v. Russell, 3 Sawy. 515; Manning v. Hayden, 5 Sawy. 379.

"No case has been cited from the supreme court in which it has been distinctly held that the defense of estoppel can be made against the national government. But in many cases it is so assumed, even where the term is not used.

"For instance, in Clark v. U. S., 95 U. S. 543, it was held that a defense to a claim against the government for the use of a steamboat, which involved bad faith on its part, could not be made.

"In Branson v. Wirth, 17 Wall. 39, it is assumed in the opinion of the court that the United States may be estopped.

"In U. S. v. McLaughlin, 12 Sawy. 201, 30 Fed. Rep. 147, it was said by

Judge Sawyer, 'that the law of estoppel, in a proper case, applies to the government.'

"In Indiana v. Milk, 11 Biss. 209, 11 Fed. Rep. 389, the court having found that the state, by its conduct, had recognized the validity of the defendant's title, and thereby induced them to alter their position, by investing their money on the strength of it, Judge Gresham said:

" 'The state cannot now, in fairness or law, assert its validity.

" 'Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel.'

"In my judgment, the complainant ought not, in fairness and justice, to be allowed to assert, as against these defendants, that this road was not completed as required by law, and claim a forfeiture of the grant on that ground.

"In the first place, the certificates of the governors to the completion of the road are the acts of the agent of the complainant. By the express terms of

the grant, the governor of the state was authorized and required to determine if and when the road was constructed, as provided therein, and his certificate to that effect is the necessary and only legal evidence of that fact.

"On the faith of these certificates, the truth of which does not appear to have been questioned then, or for long after, these defendants invested their money in their lands.

"By this means the complainant proclaimed to these defendants: 'This road has been constructed according to law. The condition on which this grant was made has been complied with, and the same has become absolute.' And it ought not now to be heard to allege anything to the contrary, even if it should be true, to the prejudice or injury of those who, like these defendants, have in good faith acted upon such representations as true.

"In the second place, after the investigation in congress and the department of the interior, between the years 1878 and 1882, concerning the effect and verity of these certificates, and the fact of the compliance of the wagon road company

with the conditions of the grant, the complainant practically affirmed the right of the company to the lands, and listed the same for patent under the act of 1874, and actually issued such patent for the greater portion of the grant, on the faith of all which these defendants were induced to materially change their position in relation to the property by expending large sums of money thereon and thereabout, including the payment of $29,885.79 taxes levied thereon by the authority of the state, and $86,805.75 disbursed in the repair and improvement of the road.

"In addition to the grounds above stated, on which this estoppel ought to be allowed as against the United States, there is the express provision in the act of 1889 to the effect that this suit shall be tried and adjudicated as a suit in equity between private individuals. This direction is without qualification or exception, and, in my judgment, includes the setting up of an estoppel, as well as any other procedure or defense known to equity practice or jurisprudence. By this provision the complainant consents in advance that an estoppel for conduct may be availed of against it in this suit.

"And even admitting, what is denied by the plea, that their certificates are false in fact, and were procured by the fraud of the wagon road company, and that these defendants had notice of the same when they made the purchase, and therefore the complainant is not estopped to show these facts in any litigation between it and them in which they may be pertinent and material, still, by the deliberate action of the complainant, the inquiry has become immaterial.

"Congress had the same right to waive the performance of the condition subsequent to the grant as to make it in the first place. When, therefore, congress decided by the act of 1874 that patents should issue for these lands in case it was shown by the certificates of the governors of Oregon that the road was 'constructed and completed,' in effect it thereby affirmed, for the purpose of the grant, the integrity and efficacy of said certificates, and accepted them as final and conclusive evidence of the performance of the terms and conditions of the grant, or waived the same. Again, admitting that the complainant could as a matter of fact, and notwithstanding the certificates to the contrary, show that the road was not com-

pleted in all respects according to law, and that these defendants had notice thereof, still, the complainant having subsequently investigated the question upon evidence taken pro and con thereon and decided, by and through its proper officers, that the grantee or its assignee, the wagon road company, was entitled to a patent for the lands under the act of 1874, either on the ground that the road had been sufficiently constructed, or that under said act the certificates were conclusive of that fact, in consequence of which these defendants made the expenditures and incurred the liabilities on and about the property as above stated, the complainant would be estopped to show such failure or notice in this suit."

In addition to the plea of estoppel which Judge Deady discusses, it also includes what in equity is known as a "stale claim," resulting from lapse of time. There was a second plea which he held to be good and which contained all the elements of a bona fide purchase. As a result the pleas were both sustained and a decree entered dismissing the bill.

The opinion of Judge Deady was announced May 12, 1890. From the decree in this case

and a like decree rendered in the case of United States v. Dalles Military Road Co. and United States v. Oregon Central Military Road Co., an appeal was taken by the United States to the Supreme Court of the United States and the cases were reversed.

In United States v. Willamette Valley and Cascade Mountain Wagon Road Co., 140 U. S. 599, 622, speaking of the first plea of Weill and Cahn, Mr. Justice Blatchford, who delivered the opinion of the court, says:

> "The first plea of Weill and Cahn was treated by the Circuit Court as a plea of estoppel. On the facts stated in that plea, the court held that the claim made in the bill was a stale claim; and that the delay or lapse of time constituted a bar to the relief sought, and ought to have the same effect as in a suit between private parties. The court also held that the second plea of Weill and Cahn was good, because it set up all the elements of a bona fide purchase for a valuable consideration; that the certificates of the governors were conclusive as to the fact of the completion of the road; and that the lands could not be forfeited to the United States, even if the certificates of the governors should be proved to

have been false and fraudulent. The opinion of the court further says, that the facts stated in the pleas are manifestly true; that it is extremely improbable, under the circumstances, that the defendants Weill and Cahn had notice of the falsity of the certificates; and that, admitting that their falsity might be shown, in conjunction with notice to the defendants of that fact, it would be extremely difficult, in view of the lapse of time and of the absence of any resident population along the line of the road at the time, to make any satisfactory proof on the subject. The opinion then refers, as an authority applicable to the cases generally, to the opinion of Judge Sawyer in No. 1218, United States v. Dalles Military Road Co., 41 Fed. Rep. 493.

"For the reasons hereinbefore set forth in regard to case No. 1218, we are of the opinion that the United States were entitled, on the sustaining of the pleas in the present case, to take issue as to the matters of fact alleged in them; and that the decrees in No. 1248 must be reversed, in so far as they dismiss the bill as to the defendants who put in pleas, and the case be remanded with a direction to allow

the plaintiffs to reply to and join issue on the pleas."

Speaking of the other cases which justify the language just quoted, Mr. Justice Blatchford, says:

"We are of the opinion that the Circuit Court erred in not permitting the plaintiffs to reply to the pleas, and in dismissing the bill absolutely. It is provided by rule 33 of the Rules of Practice in Equity, that the plaintiff may set down a plea to be argued, or may take issue upon it. This does not mean that the plaintiff is to make thereby such a conclusive election that, if he sets down the plea to be argued and it is sustained on the argument, he cannot afterwards take issue on it. By rule 34, on the overruling of a plea on hearing, the defendant has a right to answer the bill. The object of having a plea set down for hearing is to induce the presentation to the court, as a question of law, of the matters set up in the plea, so that assuming those matters to be true in point of fact, the whole controversy may, perhaps, be determined as a question of law. But this practice would be discouraged, if the plaintiff were not to be allowed, in case

> the plea be sustained in matter of law, to take issue upon it as matter of fact. Rule 35 provides that, in case upon a hearing a plea is allowed, the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill. But there is no restriction put upon the right of the plaintiff to take issue upon a plea after it is allowed on a hearing; and such is the view which has been adopted by this court."

It is thus seen that the case was reversed upon a question of practice.

Speaking, however, of the law which should govern the case, the court further says:

> "It is manifest that, although the act says that the suits are to be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity, Congress intended a full investigation of the facts, and did not intend that the important interests involved should be determined upon the untested allegations of the defendants. They set up, to avoid an actual investigation, staleness of claim, estoppel, laches, the certificates of the governors, and allegations of bona fide purchase. It must

be held that, in passing the statute of 1889, Congress gave full effect to its three granting acts and to its act of June 18, 1874, to the reports made by its committees and to the acts and proceedings of the Secretary of the Interior, the Commissioner of the General Land Office and other executive officers. An assertion that the claim of the United States is a stale claim is an assertion that Congress deliberately directed suit to be brought upon a stale claim. If laches be a good defense, it must be declared that Congress directed suits which would be defeated by showing prior delays by Congress. Besides, the defences of stale claim and laches cannot be set up against the government. United States v. Kirkpatrick, 9 Wheat. 720; United States v. Van Zandt, 11 Wheat. 184; United States v. Nicholl, 12 Wheat. 505; Dox v. Postmaster General, 1 Pet. 318; Lindsey v. Miller, 6 Pet. 666; Gibson v. Chouteau, 13 Wall. 92; Gaussen v. United States, 97 U. S. 584; Steele v. United States, 113 U. S. 128; United States v. Insley, 130 U. S. 263.

"The government has had no opportunity to prove the charges of fraud made in the bill, and there is no proof

but the allegations of the pleas as to the bona fides of the defendants, and as to the amounts expended by them in good faith in connection with the roads or the lands. It cannot be properly held that, under the act of 1889, final adjudication can be made, on such pleadings alone, as to the extensive interests involved in this litigation. The claims of the United States cannot be treated as stale claims, in view of the act of 1889, especially as to those portions of the lands which remain unpatented, and as to those certificates of the governors which were false and fraudulent to the knowledge of those who made them and to the knowledge of the several defendants, or in view of the alleged defects of the certificates in cases Nos. 1219 and 1248."

It thus appears that the Supreme Court of the United States, while holding that the defense of stale claim and laches could not be set up against the government, necessarily ruled that the facts stated in the first plea, called by Judge Deady a plea of estoppel, was a good defense. This case is further considered in United States v. California Land Co., 148 U. S. 31, 38, in an opinion by Mr. Justice Brewer, to be noticed later under the discussion of this point.

Judge Sawyer in United States v. Dalles Military Road Co., 41 Fed. 493, sustained both pleas to the bill of complaint in that case. While ruling that the statutes of limitations would not run against the United States, Judge Sawyer uses this impressive language:

> "Had the land grant been made for the same purposes, and upon the same conditions, by a private citizen, and the subsequent action both of the grantee and grantor been precisely the same as in this case, there can be little doubt, I apprehend, that a court of equity, in view of all the circumstances would, at this late day, refuse to decree a forfeiture, and to restore the lands to the grantor for breach of the conditions subsequent, on the ground that it would be inequitable to enforce so stale a claim against parties who had subsequently purchased, in full view of the affirmative public action, as well as the non-action of the grantor, and thereby had good reason to suppose, that all the conditions of the grant whether in fact well performed, or not, had been satisfactorily performed, Bowman v. Wathen, 1 How. 189; Piatt v. Vattier, 9 Pet. 416; Badger v. Badger, 2 Wall. 93; Sullivan v. Railroad Co., 94 U. S. 811; Clarke v. Boorman's Ex'rs, 18 Wall. 509.

Whatever is inequitable, as between man and man, in their dealings with each other, should, also, be deemed inequitable, as between the United States, and those with whom they condescend to deal, under like circumstances; and, I take it, that the same decree is proper in this case, that would have been proper, had a private party been the grantor, and had he by both his positive affirmative action, and his non-action, for so long a time, given purchasers from his grantee so good reason to believe, that he was fully satisfied with the performance of the conditions of the grant.

"In my judgment, all subsequent purchasers were entitled to rely, implicitly, upon the certificate of the governor, who was alone authorized to determine the fact of the completion of the road; and, especially, after its confirmation by congress in the act, peremptorily requiring patents to issue in all cases where certificates had been, in fact, issued. If there were suspicious circumstances before the passage of this act, which purchasers might be called upon to notice, the passage of this act assured them that congress had informed itself of the action of the state, and its grantees under it,

> and was satisfied as to the full performance of the work, or, at least, if it found any defects or shortcomings, that they were waived, and the work accepted. Martin purchased of the Dalles Company two years after the passage of the act of 1874, and was therefore, a subsequent purchaser. Subsequent purchasers, certainly, had a right to rely upon the action had from time to time by congress, and its agents duly authorized, and the public record of it so made. It is now estopped from alleging the non-fulfillment of the statutory conditions of the grant."

This case recognizes a rule of law particularly applicable to the Union Trust Company, representing the bondholders, securing the unpaid bonds, amounting to $17,745,000.00, and likewise is applicable to the present holders of the stock of the Oregon and California Railroad Company, which stock was received in satisfaction of the bonded indebtedness that entered into the construction of the road up to 1881; and it will be remembered that under the pleadings and proofs it appears that instead of foreclosure of the outstanding mortgages in 1881, then securing the indebtedness held by the German bondholders, and being a first lien upon both of these land grants, their bonds were surrendered, mort-

gages satisfied, the original stock cancelled and new stock issued in satisfaction of this indebtedness which secured the construction funds that up to that date had constructed both roads. This equitably created the owners of that stock—the owners by purchase of both land grants—and they became in law bona fide purchasers of these grants, and as such the Oregon and California Railroad Company is a bona fide purchaser and entitled to stand in the position of such purchaser, and especially to rely upon the action and non-action of the United States as to the administration of these grants as an estoppel. The United States must be deemed to have assented to the construction placed upon the actual settler clause by the company and to the performance of the conditions subsequent, if it shall be so construed, as satisfactory to the United States, and it cannot now be heard to claim a forfeiture for any alleged breach thereof.

These cases have been reversed, as stated, for the reasons stated. The case of United States v. Willamette Valley and Cascade Mountain Wagon Road Co., et al., came on for hearing before Judge Gilbert. After the case was reversed, in 140 U. S. 599, 622, 630, the defendants answered on the merits and the case was heard on exceptions to the an-

swer. Judge Gilbert, discussing the history of the case, in 54 Fed. 807, 809, says:

> "To this bill the defendants Weill and Cahn first filed two pleas, with accompanying answers. The first plea set up that the patent of October, 1882, was issued after due examination by the secretary of the interior, and in pursuance of the act of June, 1874, and that said defendants, relying thereon, had paid taxes and other expenses on said lands, and had sold portions thereof with warranty of title, and that it would be inequitable for the United States to claim a forfeiture of the lands. The second plea averred that in 1871 these defendants, believing that the road had been fully completed, as certified by the governors of Oregon, made purchase of the lands in good faith, and paid therefor $161,400. The pleas were set down for argument upon their sufficiency, and it was held upon the facts contained in the first plea that the claim of the government was a stale claim, and that lapse of time was a bar to the suit, and that the second plea was good, for that it showed that the defendants were bona fide purchasers. (42 Fed. Rep. 351;) and the bill was dismissed. Appeal was

taken to the Supreme Court, and the decision of the circuit court was reversed; the supreme court holding that the defense of laches could not be made as against the government, and that the United States should have the opportunity to file replication, and put in issue the allegations of the pleas, (11 Sup. Ct. Rep. 988). When the case was remanded to this court, the defendants Weill and Cahn, instead of relying upon the pleas, answered the bill upon its merits, and the case now comes before the court on exception to portions of the answer, for impertinence.

"The first exception is to that portion of the answer which responds to the allegation of the bill that the defendant corporation, in constructing the wagon road, was bound to construct the same in the manner prescribed by an existing statute of the state of Oregon, enacted October 14, 1862. The points involved in this exception were ably discussed by Judge Sawyer in the case of U. S. v. Dalles Military Road Co., 40 Fed. Rep. 114, in which he held that the act of congress of February 25, 1867, granting the lands to the state, and the act of the legislature of Oregon of October 20, 1868, trans-

ferring the grant to the defendant corporation, formed the entire statutory contract with the road company, and that in the method of constructing the road the company was entirely unaffected by the act of the legislature of October 20, 1868. No doubt can be entertained of the correctness of that decision, and the first exception is denied.

"The second exception is to the allegation in the answer that long before congress passed the act of March 2, 1889, authorizing this suit, the defendants had entirely rebuilt the road in a substantial manner. It is claimed on behalf of the complainant that a construction of the road by the defendants after the expiration of the time limited in the act therefor comes too late, and will not avoid the forfeiture. This question has also been decided in this court in the previous decisions of this case, (42 Fed. Rep, 351), where Judge Deady upon the authority of numerous decisions, held that the grant from the government was a grant in praesenti, with condition subsequent, and could only be defeated upon breach of such condition, the condition subsequent here being that the road be completed in

the manner provided for by the act within five years from the date thereof; and that, if this condition were not complied with, the United States might, by legislative enactment, or judicial proceedings, have enforced the forfeiture; but that, until such action by the government, the title remains in the grantee. It is not claimed that any forfeiture was declared or sought prior to the passage of the act of March 2, 1889. If the road was constructed at any time before that date, the defendants should be allowed to show that fact, and the exception will be denied.

"The remaining exceptions are taken to the defenses which are, in substance, as follows: That in 1878 complaint was made to the department of the interior that the road had not been built, and thereupon the commissioner of the general land office appointed an agent to report upon the same; that the agent reported that the complaint was true; that in 1880 the report, with the accompanying evidence, was laid before both houses of congress, and referred to the appropriate committees of the same; that the committees, after examination, each reported that no action be taken; that the

secretary of the interior thereafter examined the report and evidence, and in 1882 made decision that the evidence showed that the road was properly constructed, and directed the commissioner of the general land office to certify the same for issuance of patent and thereupon patent issued; that the defendants, relying on the result of the investigation and the issuance of the patent, did alter their position with reference to the lands, so as to render it inequitable for the government, after such lapse of time, to assert title to the lands, pleading—First, laches; second, estoppel. So far as estoppel is concerned, these changes consist in part in the expenditure of $2,660.62; second, by payment of $29,853.79 for taxes; third, by payment of $109,800.97 for grading, selecting, and platting lands, and protecting their title; fourth, by selling and conveying portions of the lands with warranty of title. These defenses so pleaded consist of—First, laches; second, estoppel. So far as laches is concerned, the decision of the supreme court in this case, and in U. S. v. Insley, 130 U. S. 263, 9 Sup. Ct. Rep. 485, (reversing 25 Fed. Rep. 804, and Van Brocklin v. State of Tennessee, 117 U. S. 151, 6 Sup. Ct. Rep. 670, re-

versing the judgment of the supreme court of Tennessee, and U. S. v. Nashville, C. & St. L. Ry. Co., 118 U. S. 120, 6 Sup. Ct. Rep. 1006), must be regarded as finally settling the doctrine that laches or staleness of claim cannot be set up as a defense to any suit in equity brought by the United States to assert rights vested in them as a sovereign government, unless congress has clearly manifested its intention otherwise.

"It is contended that congress has expressed a contrary contention in this instance by providing in the act of March 2, 1889, which authorizes the prosecution of this suit, that it shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried; and it seems difficult to give any meaning to these words without giving them the construction contended for; but, in the light of the decision of the supreme court in this case, it must be held that the 'other suits in equity' to which reference is made are suits in which the United States is a party, and that it was not the intention of the statute that the defendants in this suit should avail themselves of defenses not open to defendants

in other suits brought by the United States.

"These portions of the answer, however, set up matter by way of estoppel, and it remains to be considered whether that defense is applicable to this case. The government is not ordinarily bound by an estoppel. While individuals may be estopped by the unauthorized acts of their agents, apparently within the scope of their agency, the sovereign power, being the trustee of the people, is rarely, if ever, bound by the acts of its agents; but while it is true that for the neglect or the illegal or unauthorized acts of its agents the government should not ordinarily be estopped to show the truth, there is good authority, based upon sound reasoning, to support the doctrine that where the government has acted by legislative enactment, resolution, or grant, or otherwise than through the unauthorized or illegal acts of its agents, and the parties dealing with the government have relied upon the same, and in good faith have so changed their relation to the subject matter thereof that it would be inequitable to declare such action or grant illegal, the government will be estopped. Com. v. Andre, 3 Pick. 224; Cahn v.

Barnes, 7 Sawy. 48, 5 Fed. Rep. 326; State v. Milk, 11 Fed. Rep. 397; Pengra v. Munz, 29 Fed. Rep. 830; Woodruff v. Trapnall, 10 How. 190. No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. The defense of estoppel stands upon different ground from that of laches. It is held that laches is not imputable to the government upon grounds of public policy. The common law rule that no lapse of time can bar the right of the king is not recognized in the United States, but is deemed to be applicable with added reason, from the fact that here property is held, not as by a monarch for personal or private purposes, but in trust for the common welfare; and, where the agencies of the people are so numerous and scattered, the utmost vigilance would not save the public from loss; but, when matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain. It was well said in Woodruff v. Trapnall that we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to

justice and a higher morality than belong to the ordinary transactions of individuals.

"If it be true that the matters involved in this suit were investigated, as set forth in the answer, and the patents were thereafter issued, and the defendants, assuming that such action was a final determination of the question of title, and relying on the same, made the expenditures they claim to have made, the government should be estopped from enforcing the forfeiture. The Supreme Court, in reversing the decree in this case, and remanding the cause, expressly refrained from deciding the questions involved in the controversy, but reversed the case, that its merits might be investigated; and I hold it to be in harmony with the construction thus given by the supreme court to the provisions of the act of March 2, 1889, as well as conformable to the general principles of equity that should govern the trial of this and all similar cases, to allow the defendants the benefit of all the defenses here pleaded."

The opinion of Judge Gilbert, just quoted, was delivered May 18, 1892. On December

16, 1892, Judge Gilbert disposed of the case on the merits and in the course of his opinion in United States v. Willamette Valley and Cascade Mountain Wagon Road Co., 55 Fed. 711, 718, says:

> "On exceptions to parts of the answer it was held that the defense of estoppel as pleaded therein was available to these defendants as against the United States, and it is unnecessary here to repeat the reasoning or the authorities upon which that conclusion was reached. 54 Fed. Rep. 807. It is shown by the evidence that the defendants relied upon the action of congress as expressed in the act of 1874, directing the issuance of patents, its subsequent treatment of the complaint against the road, and its report that no action be taken, the result of the investigation by the secretary of the interior and the subsequent issuance of patents, and that in consequence thereof they altered their relation to the subject matter of this suit by expending large sums in repairing the road, in paying fees to the government, in payment of taxes, and expenses of caring for the lands, amounting in the aggregate to $142,315.38.
>
> "These facts render it inequitable that the United States should at this late date,

> and after such long nonaction and acquiescence, assert title to the lands, or claim a forfeiture of the same for a failure to construct the road within the five years succeeding the land grant of July 5, 1866."

It thus appears in that case that the road should have been completed by July 5, 1871. The suit to forfeit the grant was commenced August 29, 1889,—a period of 18 years after the cause of forfeiture arose.

In the case at bar it was shown that the breaches of the actual settler clause have continued from the beginning of the administration of the grants, and that the actual settler clause was, in fact, not observed at any time. It appears from the proofs also that sales began in the early seventies and continued without interruption down to 1905. That deeds evidencing these sales were placed upon the public records in the various counties in which the lands sold were situated, and that as early as 1879, pursuant to an Act of Congress requiring these reports, the company reported the transactions of the Land Department upon blanks furnished by the Interior Department, which showed sales continuously made without regard to and in violation of the actual settler clause. Notwithstanding this the United States, although

passing the General Forfeiture Act of September 29, 1890, by which the United States forfeited all lands opposite to and co-terminous with the unconstructed portion of any railroad to which the lands had been granted, and notwithstanding Congress had changed its policy in respect to the settlement of lands of this character by the Act of June 3, 1878, and notwithstanding the policy of adjustment of railroad grants directed by the Act of March 3, 1887, and notwithstanding the completion of construction of this road after the time limited by the Act, and the expenditure of large sums of money by the Oregon and California Railroad Company thereafter, and with full knowledge of all of these breaches, did not, until April 30, 1908, take any affirmative and direct action looking towards an attempt to ascertain whether a forfeiture of these grants had occurred by reason of the alleged breaches of the actual settler clause. In other words, from 1870 down to 1908,—during a period of 38 years—no attempt was made by the United States to enforce the provisions of the actual settler clause. Congress was silent in respect to the administration of these grants. It permitted the company to rely upon the patents issued to it; to mortgage these lands to secure construction funds or in redemption of construction indebtedness; and to sell these lands at the best market price, to whomsoever would buy, in order to redeem these construction bonds

issued to refund same. Under these circumstances, in the face of its own modification of the contract which it made in the Act of July 25, 1866, changing the terms under which the even sections could be taken under non-settlement laws, the case seems to us clearly to fall within the reasoning of the rule and within the facts as held to be legally sufficient in the case of United States v. Willamette Valley and Cascade Mountain Wagon Road Co., 55 Fed. 711, 718.

Judge Gilbert in United States v. Willamette Valley and Cascade Mountain Wagon Road Co., 54 Fed. 807, 811, cites the following cases:

Com. v. Andre, 3 Pick. 224;

Cahn v. Barnes, 7 Sawy. 48, 5 Fed. Rep. 326;

State v. Milk, 11 Fed. Rep. 397;

Pengra v. Munz, 29 Fed. Rep. 830;

Woodruff v. Trapnall, 10 How. 190.

In Woodruff v. Trapnall, 10 How. 190, 206, Mr. Justice McLean, speaking for the court, says:

> "A state can no more impair by legislation, the obligation of its own contracts, than it can impair the obligation of the

> contracts of individuals. We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals."

Why may the United States withdraw its even sections within the limits of this grant, by the Act of June 3, 1878, known as the Timber and Stone Act, from the limitations and restrictions contained in the contract between the United States and the companies, evidenced by the Act of July 25, 1866, (14 Stat. 239)? Why may the United States offer the even sections under the Timber and Stone Act to any one who may care to buy such of these lands as are chiefly valuable for timber, in quantities of 160 acres or less, at the price of $2.50 per acre, without any settlement or pretense of settlement, or without any residence, and at the same time insist that under the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, the companies must sell to actual settlers in quantities not exceeding 160 acres and at a price not exceeding $2.50 an acre, lands of the same character in the odd sections? If the United States may thus change its policy in respect to the even sections, thereby impairing or modifying the contract, the companies, from that date, were

justified in refusing to observe the provisions of the actual settler clause. This action upon the part of the United States is persuasive to the point that the United States had changed its policy in respect to the settlement of these lands, and in respect to their disposition. This must be considered as especially true, when for 38 years, it has remained otherwise silent and has permitted the companies to expend large sums of money in completing the construction of the road, in the belief that the lands were thereby being earned, and has permitted the companies to pay to the state large sums of money in annual taxes, upon the belief that the grants were being administered and the lands sold in accordance with the terms and provisions of the acts granting the same.

In Commonwealth v. Andre, 3 Pick. 224, cited by Judge Gilbert, supra, Chief Justice Parker says:

> "Without undertaking to decide what would be the effect of the alienage of these heirs under the several treaties which have been cited, we decide the cause upon the ground that the commonwealth, having conveyed the land to Andre, then a French subject, and received the full consideration therefor,

cannot reclaim the land from him or his heirs for the cause of alienage in him or them. The deed was made by a committee fully authorized thereto by a resolve of the legislature, and by the deed the commonwealth has covenanted to warrant and defend Andre, his heirs and assigns, against the lawful claims of all persons whatsoever. This deed must operate as a rebutter, as it would if an individual were the grantor; and with more reason, because the commonwealth is not liable to an action. The commonwealth, if the land were recovered, would feel itself bound to repay the consideration money, with interest. This would be a claim which could not be resisted without degrading the country. But there is no need of resorting to this remedy; for the deed of the commonwealth to the very persons now defending as heirs to Andre, to whom and to whose heirs the grant was made, is, we think, an estoppel against setting up the alienage of those persons as the ground of recovery."

Applying this principle to the case at bar, how can the United States, after having received the consideration resulting from the construction of these roads, enhancing the

value of the even sections of land owned by the United States, after having used this road as a public highway for the transportation of the troops, munitions of war, and property of the United States free of charge and to the amounts of millions of dollars, after having received large sums of money to cover the cost of the survey of these railroad lands, after having issued patents in due course, as required by law, after having permitted the company to pledge and mortgage these lands to secure construction funds, or to refund construction indebtedness still unpaid, after having attempted to adjust, by the Act of March 3, 1887, the rights of all parties to these land grants, after having passed the General Forfeiture Act for breach of condition subsequent as to construction of road, after having acquiesced, with full knowledge of the way and manner in which these land grants have been administered for more than 40 years, how can it be said that the government is not bound, as a private person under like circumstances would now be bound, not to claim a forfeiture of these unsold lands?

In Cahn v. Barnes, 7 Sawy. 48, cited by Judge Gilbert, supra, Judge Deady held that the state was estopped to deny that the premises were included in the wagon road grant and rested his opinion upon the ground that in 1871 the premises in controversy were

selected and approved by the Land Department as a part of the wagon road grant, without objection on the part of the state or any attempt to show that the lands were swamp. Thereafter, in 1872, the state sold the lands involved to the defendant Barnes as swamp. It was held that he had no title and could not prove title in the state under the Swamp Land Act, because the state was estopped to deny, under the facts, that the premises were within the wagon road grant.

The President of the United States, pursuant to the terms of these acts granting these lands to the companies, appointed Commissioners to examine and report upon the constructed portions of the road. These reports were filed with the Secretary of the Interior. Upon his recommendation the President approved the reports and accepted the roads as having been completed in accordance with the contracts and directed patents to issue to the companies for the lands, as earned. These reports were made from time to time, covering the period of first construction up to period of completion of the road. The first section of the road, (East Side) was completed December 25, 1869, and the first report was made December 31, 1869; filed with the Secretary of the Interior January 26, 1870, and approved by the President January 29,

1870. The last report was filed with the Secretary of the Interior and by him transmitted to the President October 23, 1889, and approved by the President November 8, 1889.

It thus appears that between the acceptance of the first section on January 29, 1870, and the acceptance of the last section November 8, 1889, a period of nearly 20 years elapsed. That during all that time the United States knew of the way and manner in which these grants were being administered and these lands sold and knew that they were being sold without regard to the actual settler clause in either act, and yet, notwithstanding this knowledge in execution of these acts, the President of the United States, charged with the duty of executing the laws, accepted these roads as having been completed in accordance with the terms of the act and directed patents to issue for the lands earned thereby.

In State v. Milk, 11 Fed. 397, cited by Judge Gilbert, supra, Judge Gresham says:

> "Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals of law, that will exempt them from the doctrine of estoppel." (Citing cases.)

In Pengra v. Munz, 29 Fed, 830, also cited by Judge Gilbert, supra, it appears that certain land grants were involved. In the course of his opinion in that case, Judge Deady says:

> "The state was the grantee in both these grants. It accepted the land as part of the wagon road grant, or allowed its grantee or agent to do so. At least there is no evidence that it ever selected this section under the swamp land grant, and presented it for certification as part thereof. And while this may have been done, it is morally certain that it was not done until after the premises were certified to the grantee of the state under the wagon road grant, nor until the grant had lapsed, for want of selection, within the time prescribed. The non-action of the state in this matter probably arose from the fact that it was thought best that the land should go to the construction of the wagon road, which was then regarded as a meritorious enterprise. For long after this swamp land grant was made no interest was taken in it, nor was it generally understood that there was any considerable quantity of land in the state to which it was at all applicable. For 10 years the state took no steps to secure any land under it, preferring as

it appears, to make its selections under the grants for the benefit of the roads and schools. The fact that some portions of these selections were damp enough to be called swamp was no objection to them, but often a recommendation; and in my judgment, it would have been well if that policy had been continued. But, be that as it may, in the meantime this land was formally selected and certified to the state as wagon road land, with its acquiescence, if not active concurrence, and it is now estopped, as against the plaintiff, to deny that the premises are included in such grant, or to assert that it acquired them under the swamp land grant. And if the state is so estopped, so is its grantee, the defendant."

The authorities thus cited and followed by this court would seem to be conclusive to the point that the United States is bound by estoppel or waiver in the same way and in the same manner as a private party in like circumstances would be bound, and that the United States as a suitor stands in the same position as a private party, and its rights must be determined by the same policy which would govern and apply in the case of individuals.

In concluding this discussion applicable to the law, the attention of the court is called to the case of the State of Michigan v. Jackson, L. & S. R. Co., et al., 69 Fed. 116; reported in 16 C. C. A. 345, and to the note found in 16 C. C. A. 353.

The Circuit Court of Appeals, Sixth Circuit, was composed of Circuit Judges Taft and Lurton and District Judge Severens. The opinion of the court was delivered by District Judge Severens. Judge Severens, speaking for the court in that case, says:

> "What had preceded in the execution of both grants was very much a matter of administration between the United States and the state, under the statutes of both, upon the true construction of which there had at the outset been doubt and difference of opinion. In such a case the courts will 'lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.' U. S. v. Alabama G. S. R. Co. 142

U. S. 615, 621, 12 Sup. Ct. 306. In U. S. v. Hill, 120 U. S. 169, 7 Sup. Ct. 510, it was said that this principle 'has been applied by the supreme court as a wholesome one for the establishment and enforcement of justice between the government and those who put faith in the action of its constitutional authorities, judicial, executive, and administrative.' And see, also, U. S. v. MacDaniel, 7 Pet. 1, and U. S. v. Union Pac. Ry. Co. 37 Fed. 551, where Mr. Justice Brewer, at page 555, collected a large number of authorities of the same import, and noted the growth of this principle of law. This is not precisely the ground upon which an estoppel in pais, in its ordinary sense, is based, but the doctrine rests ultimately upon the same rule of reason,—that of concluding the principal by the action of its agents, when such action has been of long continuance with the knowledge of, and without dissent from, the principal, and where other parties have shaped their conduct accordingly and founded their interests thereon. * * * The state cannot be permitted to say that it has slept during all this long period, and abandoned its sovereign duties to its citizens, as well as its reciprocal moral obligations to the government which had

made to it so magnificent a gift. The state is not to be regarded as a mere machine, incapable of intelligence or conscience. And, while it is necessary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time, after long continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the state itself shall be precluded from despoiling others by the assertion of its original rights.

"With respect to this defendant, the railroad company, it is shown that the state employed the grant made by congress to aid the state as an inducement to the building of the road, and in thus securing a public improvement; that these identical lands were certified to the state as passing by the grant in lists which remained on file in the state's land office for several years before they were at length patented by the United States to the company upon the completion of the work; and that the railroad company earned the lands is not questioned. Nor is there any room for doubt that it earned and received them in reliance upon the right of the general government to grant

them and give a good title. It was equivalent in substance and effect to a purchase for value, and its good faith is not questioned except by the suggestion that the railroad company had notice by public record that the title was in the state. Here, too, as in the matter of the adjustment of the swamp land grant, the executive officials participated in the appropriation of these very lands to the objects of the grant to aid the state in building railroads. The time has long gone by when the railroad company could obtain indemnity for the lands, and the state has given no sign of dissent until the filing of this bill. The fact that these lands had been certified to the state, to be conferred upon the railroad company of its adoption, and that they had been so conferred, had been manifest from the state's public records for more than 20 years. * * * The distinction established by these cases and the former, cited as supporting the general rule, is one which we approve as resting on solid grounds of public and private justice and convenience. The principles operating to create the distinction have been many times recognized in the federal courts and in those of other states. A large number of such cases are collected in

Bigelow, Estop. (4th Ed.) p. 331, in support of the proposition that, in a proper case, an estoppel is applicable to the state. In the case of State v. Flint & P. M. R. Co., 89 Mich. 481, 51 N. W. 103, the state of Michigan filed its bill in the state circuit court against the Flint & Pere Marquette Railroad Company for a purpose similar to that of the present bill. The supreme court, when the case reached it, putting aside all other questions, held that the state was estopped by its own conduct from asserting a claim so injurious to the defendant and in emphatic language rejected the bill as having no foundation in equity, justice, or good conscience. The court cites its own previous decision in Attorney General v. Ruggles, 59 Mich. 124, 26 N. W. 419, and the following cases from the federal courts: U. S. v. McLaughlin, 30 Fed. 147; State v. Milk, 11 Fed. 389; Cahn v. Barnes, 5 Fed. 326; Hough v. Buchanan, 27 Fed. 328; Pengra v. Munz, 29 Fed. 830; U. S. v. Missouri, K. & T. R. Co., 37 Fed. 68. To which may be added the more recent case of U. S. v. Willamette Val. & C. M. Wagon-Road Co., 54 Fed. 807, 55 Fed. 711, 718."

In the note to this case, written by H. Campbell Black, the learned author of Black on Judgments, there is a full discussion of the doctrine of estoppel against the state or the United States. It is there declared that according to the doctrines of the English common law, no estoppel in pais could ever be set up as against the crown, and that in this country, in some few of the states, a similar rule has been laid down. Speaking on this subject Mr. Black says:

> "But it is well settled, on the highest authority, that when a state waives its sovereign prerogatives, and enters into business relations and makes contracts and has other such dealings with private persons or corporations, it is to be treated as a private person, and subject to all the ordinary rules and principles of law applicable as between two individuals, save only in respect to its immunity from suit. See Curran v. Arkansas, 15 How. 304; Hall v. Wisconsin, 103 U. S. 5; Davis v. Gray, 16 Wall, 203. And hence, as will abundantly appear from the citations presently to be made, the prevailing opinion is that the state like any private person, may be estopped in a proper case, with only the necessary differences arising from the different manner in

which its determinations are manifested and its actions performed. 'Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason, in morals or law, that will exempt them from the doctrine of estoppel.' State v. Milk, 11 Fed. 389. So, also, in Michigan, it is established by a line of well adjudicated cases that the state, as well as a private person, may be estopped by its acts, conduct, silence, or acquiescence. State v. Flint & P. M. R. Co., 51 N. W. 103, 89 Mich. 481. Although there is still some uncertainty on the subject of the availability of an estoppel as against the United States, the tendency of the later authorities is to hold that there is no difference, in this particular, between the general government and one of the states. See U. S. v. McLaughlin, 30, Fed. 147; U. S. v. Willamette Val. & C. M. Wagon-Road Co., 54 Fed. 807."

The cases of United States v. Willamette Valley and Cascade Mountain Wagon Road Co., 54 Fed. 807, and United States v. Winona & St. P. R. Co., 67 Fed. 969, are cited in support of the doctrine that an estoppel against the United States may be relied upon.

In United States v. California etc. Land Co., 148 U. S. 31, 38, the decision of the court in United States v. Willamette Valley and Cascade Mountain Wagon Road Co., 140 U. S. 599, 630, was again considered. Speaking of this, Mr. Justice Brewer says:

> "There was no error in this ruling. The decision of this court, as reported in 140 U. S. 599, was that 'the decree of the Circuit Court, so far as it dismisses the bill, must be reversed and the case be remanded to that court with a direction to allow the plaintiffs to reply to and join issue on the pleas,' and the mandate which was sent to the Circuit Court recited this direction. That decision was the law of this case for the subsequent proceedings in that court. *There was no adjudication that the pleas were insufficient in law; on the contrary, the plain implication of the opinion was that they were sufficient,* and the question which was remanded to that court for inquiry was as to their truthfulness. There was no adjudication of insufficiency and no rehearing ordered on that question. If the government was not satisfied with the decision, it should have called our attention to it, and have sought a modification or enlargement of the decree. The Circuit Court properly construed it,

> and proceeded in obedience thereto to permit the government to join issue on the pleas, and to entertain an inquiry as to their truthfulness, and that was the only matter *open for inquiry.*"

It thus appears that the Supreme Court of the United States has in this way directly recognized the doctrine of estoppel as applied to the United States.

A leading case recently decided is that of the State of Iowa v. Carr, 191 Fed. 257, 266, where Sanborn, Circuit Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, then composed of Judges Sanborn, Van Devanter and Pollock, says:

> "They (counsel for appellants) also contend that every sovereignty is exempted from the rule of equitable estoppel. But the great weight of authority, the stronger reason, and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are

judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.

"The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. United States v. Stinson, 197 U. S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v. Detroit Timber & Lumber Co., 67 C. C. A. 1, 10, 131 Fed. 668, 677; United States v. Chicago, M. & St. P. Ry. Co. (C. C.) 172 Fed. 271, 276; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C. C. A. 221, 222, 223, 233, 234, 236, 237; United States v. Stinson, 125 Fed. 907, 910, 60 C. C. A. 615, 616; Herman on Estoppel, Sections 676, 677; State of Michigan v. Jackson L. & S. R. Co., 16 C. C. A. 345, 351, 69 Fed. 116, 122; State v. Flint & P. M. R. Co., 89 Mich. 481, 51 N. W. 103, 106; United States v. California & Oregon Land Co., 148 U. S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354; Carr v. United States, 98 U. S. 433, 438, 25 L. Ed. 209; United States v. Walker (C. C.) 139 Fed. 409, 411, 412,

413; United States v. Willamette Valley & C. M. Wagon Road Co. (C. C.) 55 Fed. 711, 717; Attorney General v. Central Railway Co., 68 N. J. Eq. 198, 59 Atl. 348. Thus a state is estopped from ousting a city organized under a void law after the city has been exercising its assumed powers for only four years, but has levied and collected taxes and assessments, constructed bridges and streets, and made other improvements meanwhile without protest or objection on the part of the state. State v. City of Des Moines, 96 Iowa, 521, 532, 533, 65 N. W. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381. And a state is estopped from ousting a private corporation for illegality in its organization after a delay of a few years while the corporation has been exercising, without objection on the part of the state, its assumed corporate powers, has been collecting and expending money and changing its financial relations to its stockholders and creditors in reliance upon the acquiescence of the state. Commonwealth v. Bala & Bryn Mawr Turnpike Co., 153 Pa. 47, 25 Atl. 1105; State of Wisconsin v. Janesville Water Power Co., 92 Wis. 496, 66 N. W. 512, 515, 32 L. R. A. 391; State v. Lincoln Street Ry. Co., 80 Neb. 333, 114 N. W. 422, 427, 14

L. R. A. (N. S.) 336; State v. School District No. 108, 85 Minn. 230; 88 N. W. 751; Attorney General v. Delaware & Bound Brook R. R. Co., 27 N. J. Eq. 1, 24; People v. Alturas County, 6 Idaho, 418, 55 Pac. 1067, 1068, 44 L. R. A. 122; Vermont v. Society for the Propagation of the Gospel, 2 Paine (C. C.) 545, Fed. Cas. No. 16,920. According to the decisions of the highest judicial tribunal of the state of Iowa a city may be estopped from claiming a street or an alley, or from maintaining the original lines thereof, by acquiescing in the possession, occupation and improvement of it, or of a part of it, by a citizen who claims title thereto by possession and estoppel only. Corey v. City of Fort Dodge, 118 Iowa 742, 749, 92 N. W. 704. The same court holds that a like estoppel may arise against a city by its taxation of the property when the claimant in possession pays the taxes. Smith v. City of Osage, 80 Iowa 84, 89, 45 N. W. 404, 8 L. R. A. 633; Dillon on Corporations, Sec. 533; Audubon County v. Emigrant Co., 40 Iowa 460; Page County v. B. & M. R. R. Co., 40 Iowa, 520; Austin v. Bremer County, 44 Iowa, 155; Adams County v. B. & M. R. R. Co., 39 Iowa 507."

Among other cases cited by Judge Sanborn in case last mentioned, are—

United States v. Willamette Valley and Cascade Mountain Wagon Road Co., 55 Fed. 711,

United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 677

United States v. Chicago, M. & St. P. R. Co. et al., 172 Fed. 271

United States v. Stinson, 197 U. S. 200, 204, 205

In United States v. Stinson, 197 U. S. 200, 204, 205, Mr. Justice Brewer, speaking for the court, says:

> "While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent; the presumption that all the preceding steps required by law have been observed before its issue; the immense importance and necessity of the stability of titles depending upon these official in-

struments demand that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. Maxwell Land-Grant Case, 121 U. S. 325; Colorado Coal Company v. United States, 123 U. S. 307; United States v. San Jacinto Tin Company, 125 U. S. 273; United States v. Des Moines etc. Company, 142 U. S. 510; United States v. Budd, 144 U. S. 154; United States v. American Bell Telephone Company, 167 U. S. 224.

"Second, The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' Maxwell Land Grant Case, supra, p. 381; United States v. Iron Silver Mining Co., 128 U. S. 673, 677; United States v. Des Moines etc. Company, supra, p. 541.

"Third, It is a good defense to an action to set aside a patent that the title

has passed to a bona fide purchaser, for value, without notice. And, generally speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the Government, but also will protect the rights and interests of innocent parties. United States v. Burlington & Missouri River Railroad Company, 98 U. S. 334, 342; Colorado Coal Company v. United States, supra, p. 313—a case in which, as here, suit was brought to set aside land patents on the ground that they had been obtained by fraud, and in which we said:

"'But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a bona fide purchaser for value without notice is perfect.' United States v. Marshall Mining Company, 129 U. S. 579, 589; United States v. California etc. Land Company, 148 U. S. 31, 41; United States v. Winona etc. Railroad Company, 165 U. S. 463, 479.

"Waiving any inquiry as to the claim of ignorance on the part of the Government in respect to the matters complained of until shortly before suit, and

> simply noting the fact that there was fragmentary testimony tending to show notice at about the time of the entries sufficient to put upon the Government the duty of inquiry, we pass to consider the merits of the case. Forty years intervened between the time of the alleged fraud and the commencement of this suit."

It will thus be seen that while this was a case brought by the government to set aside patents alleged to have been fraudulently issued as to lands fraudulently acquired, the same rule, with even greater strictness, ought to be enforced in a case where, as here, the suit is not brought in terms to set aside the patents issued for many years, commencing in 1871, but to declare a forfeiture from acts dehors the patents, constituting alleged breaches of a doubtful condition subsequent, the effect of which, if sustained, is to reinvest title in the United States and in this indirect way destroy the verity and legal effect of these patents. It will be noticed that in the case under consideration, patents to some of the lands within the limits of the grant of July 25, 1866, were issued when General Grant was President of the United States in the year 1871—44 years ago.

The case just cited is also in point and to the effect that there was testimony in that case tending to show notice at about the time of the entries sufficient to put upon the government the duty of inquiry. And so in the case at bar, the Government was a proprietor of these lands thus patented in the sense that the Government, if the contention of the United States now made is true, had the right of re-entry as to all of these lands for breach of the alleged condition subsequent, and as such owner it was bound by the same rules of property which bind other owners in the State of Oregon. The United States is bound by the registration imputing notice of the conveyance of these lands by the company; the United States is bound by its knowledge obtained in due course by documents filed in the office of the Secretary of the Interior and in the office of the Commissioner of the General Land Office, such as a deed made of the entire East Side grant by or to the European & Oregon Land Company; of the trust deed made to Atherton and others; of the various trust deeds made to the Farmers Loan & Trust Company and to the Union Trust Company; of the sales made as shown by the reports to Congress, evidenced by Exhibit "A" to the amendment to the answer and admitted in the "Stipulation as to the Facts," subdivision 21, page 41 to 74, both inclusive, and

of various other matters of record. The unusual delay in taking advantage of the alleged breaches, makes pertinent here what was said, in the case just cited, by Mr. Justice Brewer:

> "40 years intervened between the time of the alleged fraud and the commencement of this suit."

He then proceeds to discuss the facts under which it was held that the purchasers from the defendant Stinson were entitled to be protected by a court of equity, and under which it was shown that Stinson acted in good faith; that "the lands, at the time of the entry, were in the forest, with only scanty population within a reasonable distance, and apparently were worth no more than the purchase price. Now that Superior has grown to be a city, they have increased largely in value." And so here, at the time these grants were made, and for 20 years or more thereafter, these lands involved in suit, now chiefly valuable for timber, were not worth the minimum price of $1.25 per acre. They were unsalable at any price. It was only by exploitation, extremely liberal terms, and by constant effort that the relatively small area of 163,430.28 acres could be sold prior to May 12, 1887. It was impossible for the European & Oregon Land Company, although agreeing to

purchase these lands at $1.25 per acre, to carry out its contract and to sell sufficient of these lands to keep its obligation. That company was compelled to reconvey the lands to the Oregon and California Railroad Company. Within recent years, and since these lands have become valuable by reason of the construction of railroad lines, and because of the demand for timber, the Government comes into Court, under the pretense that they are to be used for settlement purposes, and that they are adapted to such purposes, and seeks to recover these lands because the railroad company has been unable to sell them under the restrictions and limitations of the actual settler clause. The act is one that does not appeal to the conscience of the chancellor, and if a private party was now seeking to take advantage of a condition in his deed, of the kind under consideration, and the proofs showed that such private party was seeking to recover these lands for the purposes of exploitation or because they were chiefly valuable for timber and not for settlement purposes, that the lands were not adapted to settlement, that his grantor had been unable to make such sales of these lands and that he had known of the grantor's inability to sell in accordance with the settlement laws, and that the grantor had from the beginning sold these lands to various persons without

particular regard or any regard to the restrictions and limitations of the actual settler clause, it is submitted that no court, under such circumstances, would allow a private party thus to stand by and permit his grantor to pursue this course for a period of 40 years, incur large expenditures on the faith of the grantee's acquiescence, on the faith of the grantee's change of policy, on the faith of the grantee's full knowledge of the way and manner in which sales were made, and then recover these lands for the purpose of withdrawing them from settlement and later placing them within the limits of a great forest reserve or selling them for the timber only.

In United States v. Chicago, M. & St. P. Ry. Co., 172 Fed. 271, 276, Willard, District Judge, says:

> "The fact that the complainant in this case is the United States cannot affect the result. In the case of United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 67 C. C. A. 1, decided in the Circuit Court of Appeals, Eighth Circuit, on July 28, 1904, the court said at page 677 of 131 Fed., on page 10, of 67 C. C. A.:
>
> " 'Finally, this is a suit in equity. The equitable claims of the United States ap-

peal to the conscience of a chancellor, with the same, but with no greater or less, force than would those of an individual in like circumstances. Bona fide purchasers are the especial favorites of courts of equity.'

"In the case of United States v. Stinson, 197 U. S. 200, the court said on page 204, 25 Sup. Ct. 426, 49 L. Ed. 724:

" 'While the government, like an individual, may maintain an appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been duly established * *

" 'Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumption of law and fact that attend the prosecution of a like action by an individual. * * * *

" 'Third. It is a good defense to an action to set aside a patent that the title has passed to a bona fide purchaser for value without notice. And, generally

speaking, equity will not simply consider the question whether the title has been fraudulently obtained from the government, but also will protect the rights and interests of innocent parties'."

In United States v. Detroit Timber & Lumber Co., 131 Fed. 668, Sanborn, Circuit Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, then composed of Judges Sanborn, Hook and Amidon, says:

"Finally, this is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of an individual in like circumstances. Bona fide purchasers are the especial favorites of courts of equity. In Boone v. Chiles, 10 Pet. 177, 209, 9 L. Ed. 388, Mr. Justice Baldwin, in delivering the opinion of the Supreme Court, said:

" 'A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction. Sugd. Vend. 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchas-

> ing a title and paying a valuable consideration without any notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief (9 Ves. 30-34), which a court of equity imparts liberally.' "

In Deseret Salt Company v. Tarpey, 142 U. S. 241, Mr. Justice Field, speaking for the court, says:

> "We do not think the provision was designed to impair the force of the operative words of transfer in the grants of the United States, or invalidate the numerous conveyances by sale and mortgage of the lands made by the railroad company, *with the express or implied assent of the government.*"

Non-action of the United States in the particular circumstances of the case will operate as a waiver of the rights of the United States and will estop the United States to claim to the contrary.

In United States v. Northern Pacific Ry. Co., 177 U. S. 435, 441, Mr. Justice Shiras, speaking for the court, says:

"This view of the case renders it unnecessary for us to consider whether the United States could be estopped by the acts of the executive department, in recognizing the rights of the railroad company as continuing in full force after the expiration of the time named in the statute; or to consider whether the ordinary doctrines of courts of equity, which relieve a contracting party from forfeiture by reason of a failure to complete the contract within a time fixed, when the work is subsequently completed and accepted, would apply to a case like the present. *Undoubtedly there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approval of the same. It is not, as put by the counsel of the Government in his able brief, the case of a waiver presumed from mere non-action, but from non-action in the special circumstances disclosed.*"

In the very recent case of United States vs. Midwest Oil Co., sometimes referred to as the "Withdrawal Case," and decided by this court on February 23, 1915, a withdrawal order made by the President, affecting large

quantities of public land opened under the statute to mineral exploration, was sustained upon the clear ground of the acquiescence of Congress in executive action taken in similar cases over a long period of years. The failure of Congress upon various prior occasions to disaffirm or object to the action of the Executive Department in withdrawing public lands from entry—this negative aspect of the case—was treated by this court as importantly bearing upon the implied assent of Congress to the action of the Executive Department. "Congress," said this court, "did not repudiate the power, the claim, or the withdrawal orders made. On the contrary, it uniformly and repeatedly acquiesced in the practice, and, as shown by these records, there had been, prior to 1910, at least two hundred and fifty-two executive orders making reservations for useful though non-statutory purposes."

The opinions of the Attorney-General are referred to by this court, touching the validity of such executive orders of withdrawal, and such validity is said in one of the opinions to be rested on "a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, portions of the public domain."

Another opinion is mentioned by this court, in which it is said that "The power of the President was recognized by Congress, and that such recognition was equivalent to a grant."

And this court further said, with much appositeness to the facts and the long history of the case at bar:

> "It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

And again, quoting from an early decision of this court:

> "Practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

And this court further says, in the opinion in the Withdrawal Case:

> "Nor do these decisions mean that the Executive can by his course of action create a power. But they do clearly indicate that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands. This is particularly true in view of the fact that the land is property of the United States, and that the land laws are not of a legislative character in the highest sense of the term (Art. 4, Sec. 3), 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.'"

And again, and to the point here:

> "It must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein. Congress 'may deal with such lands precisely as an ordinary individual may deal with farming property. It may sell or withhold them from sale.' Camfield vs. United States, 167 U. S. 524; Light vs. United States, 220 U. S. 536. Like any other owner it may provide when, how and to whom its land can be sold. It can permit it to be withdrawn from sale. Like any other owner, it can waive its strict rights, as it did when the valuable privilege of grazing cattle on this public land was held to be based upon an 'implied license growing out of the custom of nearly a hundred years.' Buford vs. Houtz, 133 U. S. 326. So, too, in the early days the 'Government, by its silent acquiescence assented to the general occupation of the public lands for mining.' Atchison vs. Peterson, 20 Wall. 512."

Speaking of the numerous executive orders of withdrawal affecting vast bodies of land, the court said:

> "These orders were known to Congress, as principal, and *in not a single instance was the act of the agent disapproved.*"

The court goes on to notice the transmission of public documents to Congress, calling the attention of that body to the withdrawal of coal lands, and observes upon the acquiescence of Congress in the transactions of which knowledge was thus communicated to that body:

> "In the message of the President," says this court, "to the 2nd session of the 59th Congress, attention was called to the withdrawal of coal lands in aid of legislation. There was no repudiation of the order or of the practice either at that session or at any succeeding session of Congress."

And further:

> "Whether, in a particular case, Congress acted or not, nothing was done by it which could, in any way, be construed as a denial of the right of the Executive to make temporary withdrawals of public land in the public interest. Considering the size of the tracts affected and the length of time they remained in force,

without objection, these orders by which *islands, isolated tracts, coal, phosphate and oil lands were withdrawn in aid of legislation,* furnish, in and of themselves, ample proof of congressional recognition of the power to withdraw."

And finally, speaking of the report of the Commissioner of the Land Office, transmitted by the Secretary of the Interior to the Senate, this court said:

"This report refers to *Withdrawals* and not to *Reservations.* It is most important in connection with the present inquiry as to whether Congress knew of the practice to make temporary withdrawals and knowingly assented thereto. It will be noted that the Resolution called on the Department to state the extent of such withdrawals and the authority by which they were made. The officer of the Land Department in his answer shows that there have been a large number of withdrawals made for good but for non-statutory reasons. He shows that these 92 orders had been made by virtue of a long-continued practice and under claim of a right to take such action in the public interest 'as exigencies might demand * * *' Congress, with no-

tice of this practice and of this claim of authority, received the Report. Neither at that session nor afterwards did it ever repudiate the action taken, or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."

See also, 2 Pom. Eq., Sec. 818;

Louisiana vs. Taylor, 28 La. Ann. 460;

Louisiana vs. Ober, 34 La. Ann. 359;

State vs. New Orleans Railroad Co., 104 La. 683;

2 Elliott on Railroads, Sec. 806;

Central Trust Co. vs. Treat, 192 Fed. 942;

McKnight vs. United States, 98 U. S. 179;

United States vs. Bostwick, 94 U. S. 53, 66;

United States vs. Bank of Metropolis, 40 Id. 377, 392;

Clark vs. United States, 95 Id. 539, 543-4;

The State vs. Bailey, 19 Ind. 452-4;

Verdier vs. Railroad Co., 15 S. C. 476, 482-3;

Peck vs. Burr, 10 N. Y. 297;

Jewell Nursery Co. vs. State, 4 S. D. 213, 218;

Chope vs. Detroit, 37 Mich. 195, 198;

State vs. Kennedy, 60 Neb. 300, 305-6;

State vs. City of Des Moines, 96 Ia. 521, 534;

State vs. Janesville Water Power Co., 92 Wis. 496, 504-5;

Duffield vs. Hue, 129 Pa. St. 94;

Lehigh Coal Co. vs. Early, 162 Pa. St. 338.

We are not, in the case at bar, dealing with the mere silence or inaction of a landlord in respect to the breach of a condition in a lease, where such condition is one of continuing obligation. As to such conditions, it has been held that mere silent acquiescence in the breach thereof will not discharge the condition, or disable the landlord from proceeding against a subsequent breach. Such rule has no application in any event to

a condition subsequent "which, if taken advantage of, destroys the whole estate", since such condition, "if once dispensed with, in whole or in part, is gone forever; for a condition being an entire thing cannot be apportioned except by act of law." (2 Washburn on Real Property, Sec. 962.)

"A condition against assignment, once dispensed with, is dispensed with forever." (Murray vs. Harway, 56 N. Y. 342.)

"This is clear law." (Sharon vs. Erie, 41 Pa. St. 351; McKildoe vs. Darracott, 13 Gratt. 278.)

The case at bar is not the case of mere silence and inaction in the presence of a breach of a continuing obligation. It is a case of "non-action in the special circumstances disclosed." (United States vs. Northern Pacific Railway Co., 176 U. S. 441.) It is a case of the express or implied assent of the Government (Deseret vs. Tarpey, 142 U. S. 241); it is a case of accumulated and affirmative acts and conduct upon the part of the Government, pointing irresistibly to the express or implied assent of the Government to the administration of the grant as the Company consistently administered it. ("Withdrawal Case," *ubi supra.*)

The facts in this record showing waiver, acquiescence and estoppel are so numerous and convincing that it is difficult to summarize them without possible omission of some fact or circumstance that may be controlling. A summary, however, at least of some of the important features of the case in this behalf, may be made as follows:

First: Expenditure of more than $9,000,000.00 in construction of roads from 1870 to 1873—197 miles to Roseburg and 47½ miles to McMinnville. (Subdivision V, Stipulation as to the Facts. Vol. IV pp. 1560-1562 Transcript)

Second: Surrender of all the first mortgage bonds and securities and cancellation of same on account of principal and interest due, in May, 1881, by the bondholders, and their acceptance of $12,000,000.00 preferred and $7,000,000.00 common stock in lieu of foreclosure, thereby making the then purchasers of this stock now owned by the Southern Pacific Company, purchasers in good faith of both land grants as well as both of the constructed lines. (Subdivision VI, Stipulation as to the Facts, Vol. IV pp. 1562-1566 Transcript)

Third: Expenditure of about $5,000,000.00 additional construction funds secured

under the mortgages of June 1, 1881, and May 26, 1883, from June 1, 1881, to January, 1884, in constructing about 145 miles of railroad from Roseburg to a point 1¼ miles south of Ashland. (Subdivision VI, Stipulation as to the Facts, Vol. IV pp. 1563-4 Transcript)

Fourth: Expenditure of about $2,500,000.00 between March 28, 1887, and January 3, 1888, in construction of 24.135 miles from a point 1½ miles south of Ashland to the Oregon and California state line, and purchase by Pacific Improvement Company, assignor of Southern Pacific Company of the stock of Oregon and California Railroad Company, and the guaranty of Southern Pacific Company of the principal and interest of the bonds issued under the mortgage of July 1, 1887, providing for the issue of $20,000,000 of bonds used in refunding prior construction indebtedness, and in completing the construction of the road, and of which $17,745,000 are outstanding; and in accordance with Exhibit No. 9 to the Stipulation as to the Facts, Exhibit No. 1 to the Joint and Several Answers of the Defendants herein, Exhibit "E" to the Bill of Complaint, subdivision VII, item 20, page 25, Stipulation as to the Facts; said Exhibit No. 9 being the agreement of date July 31, 1885, of Oregon and California Railroad Company and Central Pacific Railroad Com-

pany, and said Exhibit No. 1 being the agreement of date October 11, 1886, of Central Pacific Railroad Company, Pacific Improvement Company and Southern Pacific Company, and said Exhibit "E" being the agreement of date March 28, 1887, signed by the stockholders' Re-construction Committee of the Oregon and California Railroad Company, the London Boldholders' Committee, and the Frankfort Bondholders' Committee, the Southern Pacific Company and the Union Trust Company.

Fifth: Expenditure of $34,784.85 in advertising these lands; $142,651.40 in examining, cruising and grading these lands; $145,977.26 in payment of surveying fees to the United States, and payment of $1,827,234.10 in taxes on these lands from April 1, 1870, to April 30, 1911. (Vol. II pp. 914-15 Transcript), defendants' Exhibit 289; (Vol. XIII p. 6836 Transcript) and testimony of Robert Adams, (Vol. V p. 2137 Transcript); testimony of J. B. Eddy, (Vol. V p. 2552 Transcript); and defendants' Exhibits 319, 320, 321, 331, 359; (Vol. XIII pp. 7146-7199-7251 Vol. XIV p. 7263—p 7346 Transcript); and testimony of P. A. Worthington, (Vol. V p. 2552 Transcript).

Sixth: Expenditure of $315,828.34, (defendants' Exhibit 288, (Vol. XIII p. 6835

Transcript) between 1906 and 1910, and estimated like amount prior to 1906, on so much of this road as lies between Portland and Oregon-California state line, (See testimony of C. P. Lincoln, (Vol. V p 2126 and J. N. Sherburne, Vol. V, page 2404 Transcript) all said sums being amount of free movement of traffic for the United States, as required by the Act of July 25, 1866; section 5, (14 Stat. 239); and for the entire line between Roseville Junction and Portland, the amount is more than $1,250,000.00.

Seventh: Issuance of patents conveying title in fee simple, from 1871 down to 1909, and particularly since the Act of September 29, 1890, (26 Stat. 496). (See Exhibit 11 to answer, subdivision XIX, (Vol. II pp. 1152-1154, item 3, Stipulation as to the Facts. Vol. IV p. 1589 Transcript).

Eighth: Modification of the contract contained in the Act of July 25, 1866, (14 Stat. 239) and the Act of May 4, 1870, (16 Stat. 94) made as to quantity to be entered by homestead settlers under these acts, which modification was made by the Act of March 3, 1879, (20 Stat. 472) by which such homestead settlers could enter 160 acres.

Ninth: The Timber and Stone Act of June 3, 1878, (20 Stat. 89) being an implied waiver

of the actual settler clause in the Acts of April 10, 1869, and May 4, 1870.

Tenth: The General Forfeiture Act of September 29, 1890, (26 Stat. 496) being an implied waiver of the actual settler clause in the Acts of April 10, 1869, and May 4, 1870.

Eleventh: The Act of March 3, 1891, (26 Stat. 1097) repealing the pre-emption laws, being an implied waiver of the actual settler clause in the Acts of April 10, 1869, and May 4, 1870, and Section 24 thereof, (26 Stat. 1103) which authorizes the President to "set apart and reserve in any state or territory having public lands bearing forests, any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations," being clearly an implied waiver of the actual settler clause of the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870. The establishment of extensive forest reserves within the indemnity limits of and adjacent to these grants, is conclusive evidence of the timber character of these lands in suit and should estop the United States to claim that the limitations of the actual settler clause in these acts apply to these lands.

Twelfth: The act of June 4, 1897, (30 Stat. 1136) contained this provision, "That in cases

in which a tract covered by an unperfected bona fide claim or by a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof, a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent." Under this statute the Land Department accepted title to 10,376.01 acres sold by the company for $49,769.56, and by direction of the Attorney General in 1907, after the Department of Justice had begun to investigate these lands grants, the Secretary of the Interior suspended selections so pending for 23,012.77 acres sold by the company for $67,594.69. (See Exhibit 9 to the answer; Vol. II p. 1143 Exhibit No. 17 to Stipulation as to the Facts, Vol. IV pp. 1730-31 Transcript.) The section of the act quoted gave to the grantees of the company the absolute right to relinquish these tracts to the United States and select in lieu thereof any vacant public land. All these deeds under which the Land Department took title to the acreage sold by the company from the granted lands were filed in the Interior Department in conformity with its established practice and with the requirements of its rules and regulations. Under the provisions of the Act of Congress of June 4, 1897, a record was kept in the In-

terior Department of the steps taken in the selection of forest reserve lieu lands, including a statement of the action taken by the Secretary in approving or disapproving the lieu selections, and the deeds filed as bases therefor. Both the statute and the action of the Land Department waived the actual settler clause in the Act of April 10, 1869, and the Act of May 4, 1870. These lands were all within the Cascade Forest Reserve, and this was likewise a waiver of this clause, even if the company had retained the title to these lands.

U. S. Rev. Stat. Sec. 441;

Knight vs. Land Association, 142 U. S. 161, 177-8;

McDonald vs. U. P. R. Co., 70 Neb. 346, 352;

5 Land Dec. 494;

Michigan Land Co. vs. Rust, 68 Fed. 155, 165;

United States vs. Schwalby, 8 Tex. Civ. App. 679;

People vs. Woodruff, 77 N. Y. S. 722;

Scofield vs. State, 54 Ga. 635, 642-3;

State vs. New Orleans, 104 La. 685, 690;

State vs. Bailey, 19 Ind. 452;

State vs. Flint R. Co., 89 Mich. 481, 491-2.

Thirteenth: The Act of February 10, 1909, (25 Stat. 609), the Act of June 17, 1910, (36 Stat. 531), the Act of June 6, 1912, (37 Stat. 123) all amending the Homestead Act of May 20, 1862, (12 Stat. 392) and the due administration thereof applied to the character and class of lands involved in this suit, chiefly valuable for timber and unfit for settlement, applied to these unsold lands now owned by the company, would prevent the company from further compliance with the provisions of the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870.

Fourteenth: The Act of August 20, 1912, entitled, "Public No. 278, H. R. 22002," commonly known as the Innocent Purchasers Act, is a substantial waiver of the alleged breaches of the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, and is a recognition of the non-settlement character of the lands involved in suit, and that such lands, at the time they were sold to the so-called innocent purchasers described in forty-five suits brought by the United States against said purchasers and these defendants in this court, are unfit for

settlement and were so unfit for settlement and could not be sold to actual settlers at the time they were so sold by the company to such purchasers.

Fifteenth: Notice of the interpretation of the companies placed upon the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, and of the purposes of the mortgage of April 15, 1870, and of the intention of the company to mortgage said lands to secure construction funds, as shown by the correspondence. Government's Exhibits 109, 109-A, 109-B, 109-C, 109-D (Vol. X pp. 5322-5370 Transcript) and which correspondence was brought to the attention of the United States and particularly to the Department of Justice, the Commissioner of the General Land Office and the Secretary of the Interior, and the acquiescence of the Government in respect to the same, and mortgaging these lands to secure construction funds, from May 20, 1872, to April 30, 1908.

Sixteenth: Notice to the United States and acquiescence in the alleged breaches thereby shown, as contained in the reports made by the Oregon and California Railroad Company, required by law, to the Commissioner of Railroads, transmitted to the Secretary of

the Interior and by him to Congress and published in the official documents, showing knowledge of and acquiescence in the alleged breaches in the sale of these lands, in violation of the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, from December 31, 1879, down to and including the year ending June 30, 1903. (Subdivision XXI, pages 41 to 74 inclusive, Stipulation as to the Facts.)

In the stipulation as to the facts (Vol. 4, Transcript of Record, p. 1612) it appears that the reports of the Secretary of the Interior, in which the reports of the Auditor of Railroad Accounts were embodied, were transmitted to the President and were by him laid before both Houses of Congress, and after they were referred to the appropriate committee in each House they were then printed as executive documents.

Congress is the agency through which the Government acts in the disposal of the public lands. Knowledge acquired by Congress in connection with the disposal of these lands, or with any matter appertaining to their disposal, is the knowledge of the Government. Through the filing with Congress of these reports of the Secretary of the Interior, embodying the reports of the Auditor of Rail-

road Accounts, or the Commissioner of Railroads, such reports being made permanent records of Congress, direct and actual notice and knowledge of the contents thereof, and of the numerous alleged breaches of condition from the beginning which they disclosed, was brought home to Congress. And the notice and the knowledge of Congress so acquired in respect to these matters was the notice and knowledge of the Government.

It has been frequently held by the courts that the legislature of the state, or the state itself through its legislature, is affected with knowledge of the facts stated in reports of public officers of the state, on the filing of such reports with the legislature, and more than that, in cases where such reports are not transmitted to or filed with the legislature. The principle of these decisions must likewise apply to Congress and to the Government of the United States. Facts set forth in the reports of public officers of the United States, and in such reports as are directly made to and filed with Congress and kept on record with that body, must be taken to be known both by Congress and by the Government.

In the case of State vs. Hallock, 20 Nev. 73, it was held that the legislature of the state

acquired knowledge of the methods pursued by the fiscal officers of the state in dealing with appropriations made by it for the carrying on of the Government, through the reports of the Comptroller which were annually transmitted to the legislature. At page 74 of the opinion the court says:

> "At each biennial session the legislature appropriates money for the purpose of carrying on the government for the two years then running. * * * The fiscal officers of the state government have uniformly construed these laws, by usage, as intending an appropriation for the limited time only; that is to say, the appropriation is to meet, within the named fiscal years, the liabilities incurred during those years. Unexpended balances against which no warrants have been drawn are considered as having lapsed, and are carried to the general fund of the treasury. This manner of treating appropriations made for the support of the civil government *is known to the legislature from the annual reports of the comptroller, submitted at each session for its information.*"

Michigan Land & Lumber Co. vs. Rust, 68 Fed. 155, was an action by the grantee of the

State of Michigan to recover possession of a parcel of land to which, it was claimed, the State had acquired title under the Swamp Land Act passed by Congress on September 28, 1850. It appears from the statement of facts that the surveys of the public lands in the State of Michigan, which the Government had originally caused to be made, were in various particulars fraudulent and erroneous; that the errors and frauds in these surveys were discovered before the passage of the Swamp Land Act, and that the Government, by reason of these errors and frauds, and at the request of the State, had ordered new surveys of the public lands to be made in various parts of the State; and that the Commissioner of the State Land Office stated in his report for the year 1855 that his office had been notified of the resurvey by the General Government of considerable tracts in the lists of Swamp Lands, principally in the Ionia District, and that the same had been marked suspended on the books of his office, as directed by the General Land Office; and further, that the State Commissioner in his annual report of the following year in relation to the Swamp Lands had stated as follows:

> "Patents are now received for all these lands in the state, except those situated in the Ionia Land District, comprising

> about 1,200,000 acres, and for these we are assured the patents will soon be forwarded, the making of which has been delayed in consequence of extensive resurveys by the General Government, which in some instances change the amount and character of the land."

It further appeared that the proceedings for the adjustment of the grant went on from that time until 1869, and that the State Commissioner in his report for that year reported that the entire amount of swamp lands conveyed to the State had been patented, with the exception of some 35,000 acres. At page 164 of the opinion the court says:

> "The state * * * in its legislative capacity knew how the adjustment (of the state land grant) was going forward. The reports of the Commissioner of the State Land Office showed it, and the legislature of 1857 enacted a statute to forbid sales of lands before patents were received."

Referring to this same subject-matter with which the case just cited was concerned, the Circuit Court of Appeals of the Sixth Circuit, in Michigan vs. Jackson etc. R. Co., 69, Fed. 116, 121, said:

"It would seem that what was well known to those at all conversant with the general subject, and being of facts and transactions extending through so many years, should be regarded as known to the state. But it is not necessary to rely upon presumptions. *Express knowledge was communicated to successive legislatures by the reports of the Commissioner of the State Land Office, and messages from the Executive.* It was informed, as early as 1869, that by the method which had been pursued and with which it had been previously made acquainted, the land grant had been practically adjusted and substantially closed up. It had then received the 'nearly 6,000,000 acres of swamp lands' which Governor Crapo said, in his message to the legislature in 1867, 'were donated to the state by the Act of Congress of 1850.' That communication indubitably showed the understanding of the Governor to be that the state had then acquired substantially all the lands due to it under the grant."

In the two cases just cited it does not appear that the reports of the State Land Commissioner were sent to or filed with the state legislature, but, assuming that they were, these cases are clear and pointed authority

that when such reports are transmitted to the legislature, knowledge of the facts therein contained must be taken to have been communicated to the legislature and to the state.

This court, in Shaw vs. Kellogg, 170 U. S. 339, has held precisely the same way in respect to reports of the Surveyor-General and of the Land Department made to Congress, as being notice of their contents to the legislative body.

> "As it appears," this court said, "by the report of the Surveyor-General and of the Land Department, transmitted to Congress in 1864, the fact that this land had been finally appropriated to the claim of the Baca heirs was disclosed. *Mention of that fact was also made in subsequent reports to that body, and yet from that time to the present Congress has taken no action in the matter, and has thus by its silence confirmed the proceedings of the Land Department.*"

To the same effect, and indeed being the basis of the judgment of this court, is the very recent "Withdrawal Case" from which we have already quoted.

It is manifest, then, that the transmission to Congress of these annual reports of the

Secretary of the Interior, embodying the reports of the Auditor of Railroad Accounts and the Commissioner of Railroads, and the reference of these reports to the proper committees of the two Houses, and the filing of these reports with Congress in printed form as permanent records in the annual volumes of congressional documents, constituted notice to Congress and to the Government of the facts therein appearing, and by consequence, that notice was directly imparted to Congress, to each of the two Houses that in practically every year of the period between 1879 and 1904 the Oregon and California Railroad Company had sold the land-grant lands for average and maximum prices in excess of $2.50 an acre.

During this entire period, 1879 to 1904, annual and semi-annual reports were made by the Oregon and California Railroad Company, pursuant to the statute creating the Auditor of Railroad Accounts and Commissioner of Railroads; and these annual and semi-annual reports of the Railroad Company were in turn embodied in the reports of the Auditor and Commissioner to the Secretary of the Interior, and they showed that for practically every year of the period the Company had been selling the granted lands for

average and maximum prices in excess of $2.50 an acre.

We have had occasion to refer to these reports in discussing the practical interpretation placed by the parties (the Railroad Company and the Government) upon the Settlers' Clause as not being a condition subsequent entailing forfeiture. It is enough here to say that in each of these reports, with possibly a few exceptions between 1879 and 1882, it appeared that for practically the entire period 1879 to 1904 the average price which the Company received for the lands sold by it during the yearly or half-yearly period covered by the particular report was in excess of $2.50 an acre; and in every one of such reports, during all those years and half years, it appeared without exception that the maximum price received by the Company from the sale of these granted lands was considerably in excess of $2.50 an acre. It appeared unmistakably from all of those reports that the Railroad Company, during the periods to which they respectively related, had consistently disregarded the Settlers' Clause as it is now sought to be interpreted, by making sales of the granted lands at prices in excess of the maximum price named in the Settlers' Clause.

The Auditor of Railroad Accounts, subsequently called the Commissioner of Railroads,

was an officer of the Government. His office was established by the Act of Congress of June 19, 1878, as a bureau of the Interior Department. He was the officer specially designated by statute as the one to whom these annual and semi-annual reports of the Oregon and California Railroad Company should be made. These reports were made by the Company and transmitted in conformity with the express requirements of the Act of Congress. From these reports this officer necessarily acquired knowledge of their contents and of the consistent and continuous departures from the alleged condition subsequent which they disclosed, and his knowledge of such matters was, as matter of law, the knowledge of Congress and of the Government.

Throughout this whole period, 1879 to 1904, the Auditor of Railroad Accounts, as required by the provisions of Section 3 of the Act of June 19, 1878, rendered annual reports to the Secretary of the Interior, of the condition of the roads, accounts and affairs of the Oregon and California Railroad Company and other railroad companies which had received grants of land or subsidies in other form from the United States. The Auditor embodied in these reports all the data and information contained in the above-men-

tioned reports which the Oregon and California Railroad Company from year to year and from half-year to half-year had made to him, and each of his reports to the Secretary showed that during the period covered by the same the alleged condition subsequent had been disregarded by the railroad companies in the making of sales of the granted lands at prices in excess of $2.50 an acre. (Transcript of Record, Vol. IV, pp. 1612 et seq.)

It must be taken that the Secretary of the Interior knew of this continuous course of administration of the land grant by the railroad company, in departure from the alleged alleged condition subsequent, which these reports disclosed. It was the duty of the Secretary to know of the facts appearing in those reports; he had actual knowledge of them; the very annual reports which he himself in turn transmitted to Congress, or to the President to be laid before Congress, were based upon these reports to the Auditor. Not only was the Secretary the designated officer of the statute to whom these reports of the Auditor should be made, but he was the official head of the Land Department—the officer to whom Congress had committed the general supervision of "all public business relating to the public lands." His knowledge of these alleged breaches of con-

dition, as shown in the reports made by the Railroad Company to the Auditor, pursuant to the statute, and in the reports of the Auditor made in turn to the Secretary, must, as in the case of the Auditor's reports, and of the notice thereby imparted, be imputed to Congress and the Government.

It was the same public officer—the Secretary of the Interior—who, until these land grants were challenged in 1907, over forty years after they were made, consistently approved the deeds filed with him which conveyed as lieu lands, under the Forest Reserve Act, various parcels of these granted lands, each of which parcels had been purchased by the grantor in the deed to the Government, on terms and at prices which disregarded the requirements of the Settlers' Clause; and it was the same Secretary of the Interior who entered such transactions of record in the General Land Office.

The Oregon and California Railroad Company had made a number of deeds to purchasers of land-grant lands situated within the limits of forest reserves, conveying to such purchasers land in quantities greater than 160 acres to a single purchaser, and at prices exceeding $2.50 an acre. Certified copies of such deeds were, in regular course,

submitted by the purchasers or by their grantees to the Secretary of the Interior, as statutory base for the selection of other lands in lieu of the lands thereby conveyed, pursuant to the Act of Congress of June 4, 1897, (the Forest Reserve Act) found in Volume 30 U. S. Statutes, pp. 11-62; see particularly p. 36, paragraph 11.)

For the most part, these deeds so filed with the Secretary of the Interior conveyed to the Government tracts of the granted lands ranging from 500 to 20,000 acres in a single sale, and all at prices in excess of $2.50 an acre. From time to time, between 1897 and 1898, the Secretary of the Interior, acting in execution of the Forest Reserve Act of Congress, and carrying out the will of Congress as expressed in such Act, accepted and approved these deeds as base for the selection of lieu lands, and further approved the lieu selections which were grounded upon such deeds and for which those deeds were the sole consideration.

Exhibit 9 to the answer (Transcript of Record, Vol. II, pp. 1143-8) contains some of the instances in which these deeds of granted land within the limits of a forest reserve were accepted and approved by the Secretary of the Interior. It cannot be presumed that

the Secretary blindly approved these deeds without examination or knowledge of their contents. He must be deemed to have known of the alleged breaches disclosed by the deeds, for such alleged breach appeared upon the face of the papers submitted to him, and constituting what is called "Forest Reserve Scrip", and his knowledge of such alleged breaches must be held to be the knowledge of Congress and of the Government.

The administration of the public land laws has been committed by Congress to the Land Department; (McDonald vs. Union Pacific R. Co., 70 Neb. 346, 352) and the Secretary of the Interior, as the head of that department, was charged by Congress with the supervision of all public business relating to the public lands. (U. S. R. S., Sec. 441; Knight vs. U. S. Land Association, 142 U. S. 161, 177-8; 5 Land Dec. 494.) It was the official duty of the Secretary, as the head of the Department, to pass upon and to approve or disapprove all of these various selections of lands made under the Act of Congress in lieu of granted lands falling within the limits of forest reserves, and to pass upon and approve or disapprove the deeds constituting the base for such selections. In the performance of that duty, as indeed in all matters connected with the supervision of the public

business relating to the public lands, the Secretary acted and acts as the agent of the Government, duly and specially authorized to represent it in such matters. "He represents the Government, which is a party in interest, in every case involving the surveying and disposal of the public lands." (Michigan Land Co. vs. Rust, 68 Fed. 155-165; Knight vs. Land Association, 142 U. S. 161, 191.) His knowledge, therefore, in acting in respect to these various selections, and in acting upon the deeds constituting the base therefor, was the knowledge of the Government through its authorized representative, and the Government and Congress must be charged with notice of any alleged breaches of what is now claimed to be a condition subsequent, which came to his knowledge while he was so acting.

In United States vs. Schwalby, 8 Tex. Civ. App. 679, it was held that where the attorney of the United States, representing it in the purchase of certain land forming the subject of the suit, knew of a prior sale and deed of the land having been made, the United States was not an innocent purchaser of the land as against the prior grantee; that the knowledge which its attorney had acquired concerning such previous sale and deed was its knowledge. In that case, the Government had

taken possession of the land after making the purchase, and had made valuable improvements on it. The court said, at page 684 of the opinion:

> "We are of the opinion * * * that the United States was not, in contemplation of law, an innocent purchaser without notice. A. J. Evans, the attorney who represented them in the purchase of the lot from the City of San Antonio, testified that he had information of the sale to Duncan B. McMillan, but had satisfied himself that McMillan had not paid the purchase money. *Actual notice was thus brought home to the United States,* and it would not matter what the character of the deed may have been, they could not claim to be innocent purchasers. If McMillan had not paid the purchase money, that did not place appellants in any better position as to notice. *They had actual notice of his claim,* and took the risk in making the improvements."

> "Where the Land Commissioners, while representing the State in acquiring the title to land, had notice of an unrecorded lien thereon, the State is bound by such notice, and holds the same sub-

ject to such lien." (People vs. Woodruff, 77 N. Y. S. 722.)

In Scofield vs. State, 54 Ga. 635, 642-3, the State of Georgia had brought suit against the Scofield Rolling Mill Company, one Harris, one Wood, and others, to recover the sum of $57.156 which it alleged was unlawfully and fraudulently collected by the Rolling Mill Company from the treasury of the Western & Atlantic Railway Company, that road being at the time the property of the State of Georgia, and from the treasury of the State, for certain rails and other supplies which were represented to have been furnished for the use of the road, but which in fact were never furnished. It was claimed that the other defendants had aided in the perpetration of the fraud. Judgment went in favor of the State in the trial court, and upon appeal the Supreme Court of the State, at the place cited, said:

"As this road belonged to the State at the time, the agents of the road were agents of the State, hence public agents. * * * In a case of this sort, when a State descends from her throne of sovereignty, where, like a king, she can do no wrong, and becomes to all intents and purposes a railroad company, and when,

moreover, she enters her own courts and sues one of her citizens, or an artificial person, the creature of her breath, her railroad agents, as to matters in litigation connected with the business of that road, are like other agents; and in respect to their conduct she is bound like other principals. But to bind her, her agents must be acting within the scope and on the line of their duties.

Therefore, if Harris, who is charged as being complicated with Cook in this fraud upon the road, had been its treasurer, and had paid the money out for the road, knowing that it was wrongfully paid, the road *and the State would have been charged with this knowledge on the part of this officer,* and would have been estopped by this fraud of her own agent in the discharge of his duty of paying out her money."

These various deeds, constituting the base for the lieu selections, were filed in the Interior Department in conformity with its established practice and with the requirements of its rules and regulations. Under the provisions of the Act of Congress of June 4, 1897, (30 Stats. 36) a record was kept in that department of the steps taken in the

selection of forest reserve lieu-lands, and this record included a statement of the action taken by the Secretary in approving or disapproving the lieu selections and the deeds filed as the base therefor. The filing of such deeds and the record of these transactions in the Department to which the subject-matter had been committed by law constituted in themselves legal notice to Congress and the Government of all the facts appearing from such deeds and records, and consequently of the fact therefrom appearing that the granted lands had been sold in quantities exceeding 160 acres to a single purchaser, and at prices in excess of $2.50 an acre.

In State vs. New Orleans, 104 La. 685, 690, wherein it appeared that the State had granted to a railroad company a right of way for its road over some public land adjoining a canal, and the Company had subsequently transferred this right to another company, the court said:

> "The State was formally notified of what had been done, and was apprised not only of the fact that its grantee had transferred all the rights granted, including the free use of the land in question, but was informed of the manner of the transfer and the consideration there-

for, *by the filing in the office of the Secretary of State in January, 1876, of a copy of the instrument by which the said transfer was effected.*"

See also, State vs. Bailey, 19 Ind. 453, as to notice to the State by the filing on the part of a corporation of its articles in the office designated by statute for that purpose—namely, the office of the Secretary of State.

In State vs. Flint etc. Railroad Co., 89 Mich. 481, 491-2, certificates prepared by the Department of the Interior, attesting that the lands in controversy had been granted to the State under the Railroad Act of June 3, 1856, were filed in the appropriate state department; and it was held that the filing in the department of these certificates was notice to the State that it had acquired the lands under the Act referred to.

"The identification of these lands," said the court, "and their certification to the State, were a solemn declaration on the part of the United States that they came to the State under the railroad grant, and not under the swamp-land grant. This declaration stood for 28 years without challenge from the State, and *with the evidence thereof on file in*

its own department. It knew that the railroad company took these lands under the railroad act."

In United States vs. Stimson, 197 U. S. 200, 205, this court proceeds to "note the fact that there was * * * testimony tending to show notice at about the time of the entries (under the preemption laws of the land there involved) sufficient to put upon the Government the duty of inquiry."

There is vastly more in this case than a simple sufficiency of fact to put the Government upon inquiry. There is here compelling and conclusive evidence of actual notice to and full acquiescence by the Government. And the rule that the Government is chargeable with such knowledge as would have resulted from inquiry, where the Government is put upon inquiry, is a corollary from the general and settled doctrine that, except as to laches and limitation, the Government, on coming into its own court, and particularly a court of equity, as a suitor, is bound by all the rules and equities which are administered as between man and man.

There was further notice to the United States through the Department of Justice, in various suits brought by the Government

against the Oregon and California Railroad Company in the United States Circuit Court for the District of Oregon. These suits are enumerated in Exhibit No. 10 to the joint and several answer (Transcript of Record, Vol. No. II, pp. 1149-1151); and it is stipulated that the suits so enumerated are correctly stated (Transcript of Record, Vol. IV, p. 1585).

It appears therefore, as admitted facts in the case, that the Government brought suits "to quiet title to, or cancel patents for, lands of the said company's East Side Land Grant, in which the pleadings or proofs showed sales by said company of lands in suits, in quantities exceeding 160 acres to single purchasers, or at prices exceeding $2.50 an acre, without objection made by the United States to any such sale because of land quantities sold to one purchaser, or sale price." (Exhibit No. 10 *supra;* stipulation of facts, Vol. IV, p. 1585, *ubi supra.*) It thus appears from the Government suit filed on February 3, 1892, that a sale had been made to John A. Hurlburt for 240 acres at $3 an acre; from the suit of February 19, 1901, that 80 acres had been sold to S. O. Owen at $3 an acre; 40 acres to John Alfred for $4.50 an acre; 40 acres to E. L. Trullinger for $2.80 an acre; 26 acres to O. W. Sturgess in excess of $3

an acre; 40 acres to Ludwig Dane in excess of $5 an acre; 80 acres to E. L. McCormick in excess of $6 an acre; 80 acres to J. W. Fidler in excess of $7 an acre; 80 acres to G. Petzold in excess of $7 an acre; 80 acres to T. O. Bevens in excess of $4 an acre; and 40 acres to J. H. Watson in excess of $5 an acre.

From the Government suit of February 25, 1901, it appears that 80 acres were sold to A. D. Gibbs in excess of $3 an acre; 40 acres to Mrs. Kine at $5 an acre; 40 acres to A. W. Scott at $5 an acre.

In all these cases, although the Government bill was filed "to quiet title to or cancel patents for lands of the said Company's East Side grant," including the parcels which were the subjects of these various sales, and they were all cases where the pleadings or proofs show these sales, the Government suits proceeded "without objection made by the United States to any such sale because of land quantities sold to one purchaser, or sale price."

In the Hurlburt case first above-mentioned, where 240 acres had been sold to Hurlburt at $3 an acre, the case went to this court, where the issues were finally determined. (United States vs. Oregon & California R. Co. et al., 176 U. S. 28.)

Seventeenth: Notice to the United States of the assignment or conveyance of these grants by the deed from the Oregon and California Railroad Company to the European & Oregon Land Company; deed from the Oregon Central Railroad Company East Side to the Oregon and California Railroad Company, of date March 29, 1870; conveyance from the Oregon Central Railroad Company West Side to the Oregon and California Railroad Company by deed dated October 6, 1880; the various construction mortgages, from the first mortgage down to and including the mortgage of July 1, 1887; by the recordation of these deeds and mortgages in the office of the County Clerk or County Recorder, of conveyances in the various counties in Oregon in which the lands or any part thereof were situated; and the filing of such deeds and mortgages with the Secretary of the Interior at or about the time they were executed; and the same were brought to the attention of the Department of the Interior by requests for reconveyances and joinder therein by the various trustees under said mortgages; and the recordation of the numerous conveyances to purchasers, and of contracts of sale to purchasers, and the expression therein of the land quantity and of the sale price; and all through the administration of the grant, as exhibited in these transactions and convey-

ances, the full acquiescense of the United States in *the execution of all such instruments.* (Deseret vs. Tarpey, 142 U. S. 241; United States vs. N. P. R'y Co., 177 U. S. 435, 431; Fletcher vs. Peck, 6 Cranch 87, 132-3; Walker vs. United States, 139 Fed. 409, 412-13; Sanitary District vs. Railroad Co., 249 Ill. 622, 645; Bengra vs. Munz, 29 Fed. 830, 836; Shaw vs. Kellogg, 170 U. S. 312; United States vs. Hill, 120 U. S. 169, 180; Nicholas vs. Austin, 82 Va. 817, 824-4; United States vs. Midwest Oil Co. et al., October Term of this court, 1914, No. 278."

There can be but one conclusion as to the assent of the Government under these circumstances, whether that assent be said to be expressed or implied. As this court said in Deseret vs. Tarpey, 142 U. S. 241:

> "We do not think the provision (of the Act of Congress there in question) was designed to impair the force of the operative words of transfer in the grants of the United States, or invalidate the numerous conveyances by sale and mortgage of the lands made by the railroad company *with the express or implied assent of the Government.*"

Defendant's Exhibit No. 257 (Transcript of Record, Vol. XI, pp. 5789 et seq.) con-

tains the "List of deeds, contracts and other conveyances covering Oregon and California Railroad Company's granted lands which were recorded in the county records of Columbia County, Oregon, prior to January 16, 1907, being in completion of sales made by or in behalf of Oregon and California Railroad Company, but not including trust deeds, blanket deeds, mortgages and leases, executed by said company." At pages 5797 et seq., *supra,* appears a similar list with respect to Washington County, Oregon; at pages 5831 et seq., a similar list in respect to Multnomah County, Oregon; at pages 5855 et seq., a similar list in respect to Tillamook County, Oregon; at pages 5859 et seq., a similar list in respect to Yamhill County, Oregon; at pages 5897 et seq., a similar list in respect to Polk County, Oregon; at pages 5917 et seq., a similar list in respect to Marion County, Oregon; at pages 5957 et seq., a similar list in respect to Lincoln County, Oregon; at pages 5963 et seq., a similar list in respect to Bennett County, Oregon; at pages 5979 et seq., a similar list in respect to Linn County, Oregon; at pages 6037 et seq., Volume XII *supra,* a similar list in respect to Douglas County, Oregon; at pages 6159 et seq., a similar list in respect to Clackamas County, Oregon; at pages 6253 et seq., a similar list in respect to Coos County, Oregon;

at pages 6265 et seq., a similar list in respect to Lane County, Oregon; at pages 6360 et seq., a similar list in respect to Curry County, Oregon; at pages 6363 et seq., a similar list in respect to Josephine County, Oregon; at pages 6398 et seq., a similar list in respect to Jackson County, Oregon; at pages 6441 et seq., a similar list in respect to Klamath County, Oregon; at pages 6449 et seq., a similar list in respect to Clark County, Oregon.

These multitudinous transactions thus listed are manifested by instruments containing a description of the land, its acreage, and the consideration paid therefor, with a reference to the book wherein each transaction is recorded, and the date of recordation. It thus appears that from 1873 to 1907 the Company sold these lands, claiming to hold title in fee simple, and without regard to the so-called Settlers' Clause, and that the action of the Company was open, consistent and repeated, and known of all men. The case is a much more persuasive one for the implied or express assent to the Government than was the case which this court had before it when it made the statement which we have just quoted from Deseret vs. Tarpey, *supra*.

Eighteenth: Exhibit No. 257 Vol. XI 5789 Vol. XII p. 6449 Transcript) which shows

conveyances made by the Oregon and California Railroad Company to various purchasers, from 1873 to January 16, 1907, and consideration therefor, showing that the company sold these lands, claiming to hold title in fee simple without particular regard to the provisions of the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870, unless the same shall be construed to apply to actual settlers on these lands prior to issuance of patents and prior to the acceptance of the completed sections of the road.

VI.

A condition subsequent must be, not only express or implied, but legal, definite, and certain, reasonably possible of performance, and not repugnant to the nature of the estate to which it is annexed. In the absence of express limitation, a condition subsequent must be capable of performance within a reasonable time, and continually and regularly kept thereafter. If, therefore, within a reasonable time after the title vested in the company, to any part of these lands, it could not sell these lands to "actual settlers" for the price named, in the quantities specified, the condition became impossible of performance, and was thereby discharged. The same result would follow where performance of the condition was rendered im-

possible, or its performance by the company made practically impossible, by legislation enacted by the United States. The proof shows that there was at no time since the title vested in the company, practical ability or possibility to sell these lands to "actual settlers" for the price named, in the quantities specified. The character of the granted lands, their situation and location, rendered them unfit for disposition under the settlement laws in accordance with the terms of the condition. Proof of these facts to the satisfaction of the court by the voluminous record, is competent and convincing, to show that even though the language used shall be construed as a condition subsequent, such condition was impossible of performance.

The proof also shows that the even sections within the limits of the grants were of the same character, and that they were unfit for disposition under the settlement laws, in effect on April 10, 1869, and on May 4, 1870, and in recognition of this, Congress, on June 3, 1878, (20 Stat. 89) passed the Timber and Stone Act, and on March 3, 1891, (26 Stat. 1097) repealed the Pre-emption Law of 1841, and all other laws allowing pre-emptions of the public lands, and on August 20, 1912, enacted the so-called Innocent Purchaser's Act, (37 Stat. 123) based upon the report of the House Committee of Public Lands, to the effect that these lands sold

in alleged violation of the "actual settlers" clause, were chiefly valuable for timber, and were not adapted to appropriation under the settlement laws.

The proof also shows that the even sections within the limits of these grants, have been mainly appropriated by entrymen under the Timber and Stone Act, or in fraudulent evasion of the Homestead Act, and as soon as title had been obtained, the entrymen conveyed the lands to timber investors.

The testimony as to the timber character of this land, its soil and topography, conclusively shows that—

(a) The unsold lands of any market value are chiefly valuable for timber.

(b) The cost of clearing the land and preparing the same for cultivation is prohibitive.

(c) That not exceeding fifty per cent. of the whole upon an average, even when cleared, could be used for any agricultural purpose, and then chiefly for grazing in large areas, wholly inconsistent with the requirements and purposes of the settlement laws.

(d) That the only demand for these lands for alleged settlement arose about 1907, after the Legislative Memorial, and that these so-called "settlers" have applied to purchase and pretended to settle upon these lands solely because of their timber value and with no bona fide intention to observe the spirit or even the letter of the settlement laws.

(e) That the title to the even sections has mainly been acquired under the Timber and Stone Act or under fraudulent homestead or pre-emption entries, and immediately sold to timber speculators, manufacturers and investors, who now own the same.

(f) That the lands involved in suit have been on the market since April 10, 1869, or shortly thereafter, as the construction of the road progressed, and that up to 1903 the only sales that had been or could have been made, were made in substantial compliance with the settler clause, and that only 163,430.28 acres were sold prior to May 12, 1887, and that the company was unable, after a period of more than 24 years, to sell these unsold lands to actual settlers for the

> reasons that, (1) there were no actual settlers who applied to purchase the same. (2) the lands were not suitable for or adapted to settlement, and (3) they were substantially without any value for any purpose.

If therefore, these lands could not be sold to actual settlers upon the terms of the act for these substantial reasons, the company, being entitled to apply the lands in aid of the construction of the road, and having exhausted its power to sell under the terms of the statute, must necessarily hold the lands indefinitely without power or ability to sell, or may sell without regard to the actual settler clause. Under such circumstances the condition, if it is so to be construed, was actually and legally impossible of performance and was discharged. Thereafter and thereupon the estate became absolute, freed from the condition.

Preliminary to a discussion of the facts as applicable to the legal questions involved, the status of the settlement laws at the time these grants were made and their status at this time, as well as the changed policy of the United States in respect to the disposition of this character of land, must be considered. The pre-emption law was in effect on July

25, 1866, and on May 4, 1870. This was repealed on the 3rd day of March, 1891, (26 Stat. 1097). The Homestead Act was passed May 20, 1862, (12 Stat. 392), and consists of Sections 2289, 2290, 2291, etc., Revised Statutes of the United States, 6 Fed. Stat. Ann., pages 285, 286, 287, 298. The Act of July 25, 1866, (14 Stat. 239) so amended the homestead law, as applicable to the even sections, within the limits of this grant, as to increase the price from $1.25 per acre to $2.50 per acre, and also provided that settlers under the provisions of the Homestead Act should be entitled, within the limits of the grant, to patent for an amount not exceeding 80 acres of the land within the even sections. It would seem from the provisions of Section 2 of the Act of July 25, 1866, (14 Stat. 239) that under the pre-emption law, a bona fide actual settler could acquire 160 acres of these lands in the even sections, by paying the double minimum price or by paying $2.50 per acre, and otherwise complying with the pre-emption law, but that a homestead applicant, although paying $2.50 per acre, could only secure 80 acres. The Homestead Act has been amended or enlarged or limited from time to time. On February 19, 1909, (35 Stat. 639) and on June 17, 1910, (36 Stat. 531) Congress passed acts providing for enlarged homesteads. On February 11, 1918, (Public No. 369) Congress

passed an act amending Sections 3 and 4 of the acts of February 19, 1909, and June 17, 1910. Congress, on June 6, 1912 (37 Stat. 123) passed the so-called three-year homestead law. Circular No. 208, issued February 13, 1913, by the Secretary of the Interior, says:

> "By the act of June 6, 1912, (37 Stat., 123) the period of residence necessary to be shown in order to entitle a person to patent under the homestead laws is reduced from five to three years, and the period within which a homestead entry may be completed is reduced from seven to five years. The three-year period of residence, however, is fixed not from the date of the entry but 'from the time of establishing actual permanent residence upon the land.' It follows as a consequence that credit cannot be given for constructive residence for the period that may elapse between the date of the entry and that of establishing actual permanent residence upon the land."

Upon the subject of cultivation the circular issued by the Secretary of the Interior, says:

> "Prior to the passage of this act no specific amount of cultivation had been required respecting a homestead entry

made under the general law; that is, an entry for 160 acres. With respect to every such entry section 2291 of the Revised Statutes had required proof of 'cultivating the same for the term of five years immediately succeeding the time of filing affidavit.' The words 'the same' could refer only to the entry, and literally construed would require the cultivation of the entire tract entered for the term of five years. But a more liberal interpretation has properly obtained in the Land Department, and proof has been accepted upon a showing that the tract has been used in a husbandlike manner, even though a smaller part of the entire entry has been actually cultivated than was in fact susceptible of cultivation. * * * * * Under exceptional circumstances grazing land has been accepted as the equivalent of cultivation, where the lands were valuable only for grazing purposes. * * * * * Where such lands are in fact physically and climatically susceptible of tillage, the cultivation provisions of the new homestead law must be applied. By that law it is required that the claimant 'cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth begin-

> ning with the third year of the entry, and until final proof, except that in the case of entries under section 6 of the enlarged homestead laws, double the area of cultivation herein provided shall be required, but the Secretary may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation.'"

The enlarged Homestead Acts, (35 Stat. 336; 36 Stat. 531) authorize entries of 320 acres of lands designated for this purpose by the Secretary of the Interior, and require proof "that at least one-eighth of the area embraced in the entry was continuously cultivated to agricultural crops, other than native grasses, beginning with the second year of the entry, and at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry."

The Secretary of the Interior, in this circular, speaking of the character of cultivation required, says:

> "In reducing the period of residence required in perfecting title to a tract of land entered under the homestead law from five to three years, Congress has re-

quired that it be shown that an actual cultivation has been accomplished of at least certain specified portions of the land entered. This amount has been fixed at one-sixteenth, beginning with the second year of the entry, and one-eighth the following year and until proof is offered. In view of the liberal reduction in the period of residence, making it possible to secure title in three years, which would require a showing of but two years' cultivation of one-sixteenth of the area entered and an additional one-sixteenth for but one year, a mere breaking of the soil will not meet the terms of the statute, but such breaking or stirring of the soil must also be accompanied by planting or the sowing of seed and tillage for a crop other than native grasses."

It would be practically impossible, under this construction of the homestead law, without a reduction of the area required to be cultivated, for any one to enter any portion of these unsold lands. It is in effect a legislative declaration that the provisions of the Homestead Act, as amended, shall not be deemed applicable to lands that are chiefly valuable for timber.

Circular No. 218, issued March 17, 1913, by the Department of the Interior, and addressed

to the Registers and Receivers of the United States Land Offices, in various states, including the State of Oregon, refers to the Act of Congress approved February 11, 1913, amending Sections 3 and 4 of the Acts of February 19, 1909, (35 Stat. 369) and June 17, 1910, (36 Stat. 531) providing for enlarged homesteads. This act reduces to one-sixteenth of the area embraced in the entry, beginning with the second year of such entry, and one-eighth of the area, beginning with the third year, thus carrying into the enlarged homestead laws the reduction of cultivation effected by the three-year homestead law of June 6, 1912, (37 Stat. 123).

The Secretary of the Interior rules that a person who has made original entry under Section 2289 of the Revised Statutes,—that is, under the original Homestead Act—and has subsequently made an additional entry under Section 3 of the enlarged homestead acts, may make proof under certain conditions, as to cultivation.

The Act of February 11, 1913, being Public No. 369, requires that the entryman, under the act, shall, "in addition to the proofs and affidavits required under said section (2291) prove by two credible witnesses that at least one-sixteenth of the area embraced in such

entry, was continuously cultivated for agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-eighth of the area embraced in the area was so continuously cultivated beginning with the third year of the entry."

The Act of June 6, 1912, (37 Stat. 123) amendatory of Sections 2291 and 2297 of the Revised Statutes, requires that the entryman, in order to comply with the requirements of cultivation, shall cultivate not less than one-sixteenth of his entry beginning with the second year, and not less than one-eighth beginning with the third year, except that in cases of entries under Section 6 of the enlarged homestead law, double the area of cultivation required by the Act of June 6, 1912, shall be required. The act expressly provides that the provision as to cultivation shall not apply to entries under the Act of April 28, 1904, commonly known as the "Kinkaid Act," or entries under the reclamation act of June 17, 1902.

It is thus apparent that Congress has so modified the Homestead Act as that, read in connection with the provisions of Section 27 of the Act of July 25, 1866, as to application of the Homestead Act limiting the applicant

to 80 acres, the even sections within the limits of this grant are practically withdrawn from entry under the Homestead Act, thus recognizing, as we claim, the non-settlement character of the odd sections involved in this suit, and thus characterizing and defining the character of actual settlers to whom the company was required to sell under the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870.

It should also be borne in mind that Congress, on June 3, 1878, (20 Stat. 89) in recognition of the non-settlement character of lands that are chiefly valuable for timber and stone, passed an act commonly known as the "Timber and Stone Act." This act is applicable to and provides for the sale of timber lands in the States of California, Oregon, Nevada and Washington, and in so far as it applied to the even sections within the limits of the grant of July 25, 1866, or May 4, 1870, was a modification of the contract under which the even sections within the limits of these grants were to be disposed of by the United States under the homestead and pre-emption law. The proof shows that a considerable percentage of the even sections of lands owned by the United States within the limits of these grants has been disposed of under the Timber and Stone Act and has passed into the hands of timber owners. The Timber and Stone Act

provided for the sale of lands chiefly valuable for timber or stone but unfit for cultivation, and that they could be sold in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of $2.50 per acre. No settlement was required, and the lands could be entered by persons other than an individual settler. An association of persons could acquire these lands, and presumably a corporation composed of an association of persons would be a qualified purchaser.

The Act of June 3, 1878, was, by the Act of August 4, 1892, (27 Stat. 348) amended so as to be made applicable to all the "public land states," this indicating a marked and definite policy of the United States as to lands of the character known as timberlands, chiefly valuable for timber, or lands chiefly valuable for stone, and was particularly applicable to lands of the kind involved in this suit, which, as the proof will show, are chiefly valuable for timber and are unfit for and not adapted to settlement.

The actual settler clause of the Act of April 10, 1869, (16 Stat. 47) contemplated that, if the proviso is reasonably clear, definite and certain so as to be enforceable, and if the same is effective, the company should sell these

lands "to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre." The term "actual settler" must be held to refer to the same class of persons and to require the same character of settlement as contemplated by the settlement laws then in effect, namely, the Homestead Act, which, at that time, required a five-year residence, settlement and cultivation, unless commuted, and the Pre-emption Act, which required a fixed time of residence, settlement and cultivation.

The status of such actual settler, in respect to standing timber, under the Homestead Act as it existed at the time the case was decided, has been settled by the decisions of the Supreme Court of the United States.

In Shiver v. United States, 159 U. S. 491, 497, Mr. Justice Brewer, speaking for the court, says:

> "The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultiva-

tion, and to that extent the act limits and modifies the act of 1831, now embraced in Rev. Stat. Sec. 2461. It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it.

"With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. In this connection, it is said, by Washburn in his work upon Real Property, (1st ed.) vol. I, p. 108: 'In the United States, whether cutting of any kind of trees in any particular case is waste, seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether doing it would diminish the value of the land as an estate.'

" 'Questions of this kind have frequently arisen in those States where the lands are new and covered with forests, and where they cannot be cultivated until

cleared of the timber. In such case, it seems to be lawful for the tenant to clear the land if it would be in conformity with good husbandry to do so, the question depending upon the custom of farmers, the situation of the country, and the value of the timber. . . . Wood cut by a tenant in clearing the land belongs to him, and he may sell it, though he cannot cut the wood for purposes of sale; it is a waste if he does.'

"By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money except so far as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifest abuses, and be made an excuse for stripping the land of all its valuable timber. One man might be content with a house worth $100, while another might, under the guise of using the

> proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute—a construction consonant both with the protection of the property of the government in the land and of the rights of the settler—we think restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation."

In Stone v. United States, 167 U. S. 178, 193, the court quotes with approval the charge of the jury given by Judge Hanford in the court below, and speaking of this, Mr. Justice Harlan says:

> "The court proceeded in its charge: 'A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off forty acres, it should be in pursuance to a definite plan that the plough shall follow the axe, and that the entire forty acres shall be put to use for the purpose of cultivation or in such manner as a

farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim, a claim covered with timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith. But a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber by reason of his having filed in the land office a declaration of his intention to take the land under the preemption law than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration and is supported by compliance with the requirements of the law, by making a home upon the land, actually living upon it and actually proceeding in the regular way by regular process of improving the land and putting it in cultivation, and until he has perfected his right by full compliance with the law, he has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put into cultivation. As between the Government and

the settler, the title to the land until the conditions of the law are fulfilled remains in the United States, but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected. The fact that claimants to lands under the homestead and pre-emption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise, then such sale would be lawful.'

"It is not, in our judgment, necessary to add anything to this clear and satisfactory statement of the law as applica-

ble to the matters referred to by the trial court. They are in accord with the views of this court as expressed in Shiver v. United States, 159 U. S. 491, 497, 498. See also United States v. Cook, 19 Wall. 591."

In United States v. Ball, 31 Fed. 667, 668, Judge Deady says:

"A settler on the public lands, under the homestead act, must reside on and cultivate the same for five consecutive years before he is entitled to a certificate. Section 2291, Rev. St. In the meantime, the legal title to the land, and the timber thereon, is in the United States, and the occupant is not entitled to cut or remove any timber therefrom, except as allowed by Section 4 of the act of June 3, 1878 (20 St. 90) which provides, in effect, that an "agriculturist' on the public land—a homesteader or pre-emptioner—shall not cut or remove timber therefrom except in the ordinary preparation of his 'farm for tillage;' the manifest meaning of which is that the timber shall not be cut for the sale of the timber, but for the improvement of the land. And this implies that the cutting and tillage shall not be far apart: that the plow must fol-

low the axe. U. S. v. Williams, 9 Sawy. 377, 18 Fed. Rep. 473."

In that case there was some pretense in the pleadings that the timber was cut for the purpose of clearing the land for cultivation. Speaking of this Judge Deady says:

> "There is an allegation tagged on to this defense, to the effect that this timber was cut for the purpose of clearing the land for 'agriculture,' to which no attention has been paid."

Of course, the claim that the timber was cut for that purpose was a pretense, as it must be in every case where lands are chiefly valuable for timber, and were chiefly valuable for timber at the time of the timber entry.

In United States v. Murphy, 32 Fed. 376, 379, Judge Jackson, afterwards a Justice of the Supreme Court of the United States, says:

> "While in the occupation of the premises with the 'bona fide' intention of completing his homestead, it is held that the homesteader may clear any portion of the land for the purpose of cultivation and settlement. In making clearing for these objects he may cut and remove the tim-

ber, and such portions of the timber so cut and removed from the clearings intended for cultivation or tillage as may be needed on the place for the improvements thereon he may sell; but not further or otherwise. He may also use the timber in the erection of buildings necessary for the convenient occupation of the land, and its improvement, that is to say, better adapting it to convenient occupation. The timber may also be used for necessary and proper fencing and repairs. In other words, the homesteader may use or dispose of timber as an incident to his settlement, cultivation, and improvement of the land. He has only those rights in or over the property which are necessary to the perfecting of his title. His title can only be perfected by settling upon and improving the land for cultivation. For these purposes he may exercise ownership over the timber, but he is not allowed to sever the timber from the land for the purpose of sale and traffic. As held in the Timber Cases, 11 Fed. Rep. 81, 'a settler on the public lands has no authority to go outside of the improvements, cut or sell timber, and thus denude the land, and destroy the value of the public domain, even though he intends to acquire the title under his claim.' The authorities, which

need not be commented on in detail, fully sustain and support this statement of the law, and the proposition above stated. U. S. v. Cook, 19 Wall. 591; U. S. v. McEntee, 23 Int. Rev. Rec. 368; The Timber Cases, 11 Fed. Rep. 81; U. S. v. Stores, 14 Fed. Rep. 824; U. S. v. Williams, 18 Fed. Rep. 478; U. S. v. Lane, 19 Fed. Rep. 910; Bly v. U. S., 4 Dill. 465; and U. S. v. Smith, (U. S. Dist. Court Ark., April Term, 1882).

In Stone v. United States, 64 Fed. 667, 676, The Circuit Court of Appeals, Ninth Circuit, speaking by Judge Hawley, after quoting the lucid charge of Judge Hanford in the court below, says:

> "This portion of the charge must be considered in the light of the fact that the court had, at great length, correctly charged the jury as to the rights of the bona fide settlers upon the public lands, and that, under the peculiar facts of this case, it became the duty of the court to charge the jury as to the limitations and exceptions to certain general rules he had enunciated, and to submit to the jury the question whether the persons from whom defendant had purchased the timber were actual settlers in good faith, and whether

they had, under the pre-emption or homestead laws, acquired any right to the lands. The testimony was to the effect that the settlements had been made upon lands that were not well adapted for cultivation; that the improvements which had been made were very slight, consisting only of small cabins; that there was no such clearing of the land as to indicate that the timber had been cut and removed for the purpose of cultivating the soil; that the cutting of the timber had been done indiscriminately all over the claim; that the limbs and brush and tops of the trees had been left upon the ground; that the parties who had filed their declarations of settlement, after cutting and selling the timber off the land, had departed therefrom, etc. It is conceded by the defendant that all the testimony which tended to establish fraud and bad faith of these settlers was admissible in evidence. It would have been error to exclude any testimony which tended to establish such facts. U. S. v. Steenerson, 1 C. C. A. 552, 50 Fed. 504, and authorities there cited. The charge of the court, under consideration, was applicable to the facts of the case, and, in our opinion, correctly stated the principles of law that applied to such facts. U. S. v. Cook, 19

Wall. 591; U. S. v. Williams, 18 Fed. 475; U. S. v. Ball, 31 Fed. 668."

This case was affirmed by the Supreme Court of the United States in Stone v. United States, 167 U. S. 178, 193, supra.

In United States v. Niemeyer, 94 Fed. 147, 150, Judge Williams, charging the jury, says:

> "The congress of the United States, as I have told you, after that passed the homestead laws, which permit and encourage every citizen of the United States, or any one who has declared his intention to become a citizen, who in good faith—and that is always an important part of it—who in good faith intends to make a home for himself and his family, to go upon any 160 acres of vacant lands belonging to the government, and live upon it, cultivate it, and after he has lived upon it continuously for five years, he may have a patent to it, which gives him the land in fee simple. The congress of the United States, or the government of the United States, as I may say, having passed a law of this kind giving to the citizen the land, certainly has a right to prescribe how he shall occupy it until his five years of continuous residence has

given him the title. It has by law and by the decisions of the highest courts prescribed rules and regulations to govern his conduct while in this occupancy for the five years. Upon going upon the land after getting his proper papers from the local land officers, he may use timber growing upon the land for the purpose of building a house upon it, and outhouses that are necessary. He may use timber for making rails to fence in the land, in order to put it into cultivation, and he may use enough for his firewood. The law goes further than that in its munificence, according to the decisions of the courts of the United States, and says that where a man in good faith has taken up a homestead, and is in good faith clearing up a part of it to put it into immediate cultivation, if there is more timber upon that piece of ground than has been necessary for the building of his house, his outhouses, his fences, and his firewood, the law does not say that he must burn it, but he may sell it; not off of the entire tract of land, but from that piece of land that he is going to put into immediate cultivation. It is immediate cultivation, not two years or three years thence, but immediate cultivation; the Supreme Court using a very apt phrase by saying,

'Upon the ground where the plow is to follow the axe.' Not only may he sell the timber from that piece of ground, but he may exchange it for lumber; that is, the timber from the piece of ground he is putting into cultivation. * * * * * I said to you before that congress passed this law having in consideration the customs and conditions of the men who had taken up pre-emption claims upon the vacant lands of the United States. It did not contemplate and this law does not authorize, a man to take up a homestead, and sit down upon it, and do nothing, sell the timber off of it, hire men to put up a house, hire men to make the rails, hire men to cut the firewood that he burns, hire men to do everything that is done about the place, and pay for it with the timber on the place. The homesteader is expected to do something himself. The government gives him the timber to build his house, make his rails, and to keep himself comfortable in cold weather by the firewood that he cuts himself, or that he does himself; not that he hires this one and that one to do by giving them other timber from the lands to pay for these things being done. * * *

> "The court calls your attention again to the question of the land being put in cultivation. Cultivation means cultivation. Making a stock farm or stock range of land is not putting it into cultivation. Fitting it for grazing, cutting the trees for the purpose of putting it in condition for grazing purposes, is not putting it in cultivation. That is not what the law contemplates when it says cultivation. It means plowing and preparing it for crops, or the raising of something that grows from the ground, besides grass."

It will thus be seen that the court emphasizes cultivation and declares that making a stock farm or stock range of land is not putting it into cultivation. That preparing it for grazing purposes is likewise not cultivation.

The amended homestead acts of February 11, 1913, (Public No. 369) and of February 19, 1909, (35 Stat. 639) and June 17, 1910, (36 Stat. 523) and June 6, 1912, (33 Stat. 123) all embrace the character and extent of cultivation, indicating a settled legislative policy as evidenced by the continuous sales of these lands under the Timber and Stone Act of June 3, 1878, and the Forest Reserve policy that the United States does not consider that

these lands, of the character involved in this suit, are adapted to entry under the settlement law.

Judicial construction of these various statutes make it practically impossible for such land to be entered under the homestead act, and in fact, the courts hold that lands that are chiefly valuable for timber and entered as such by a homestead entryman, are not subject to entry under the settlement laws. The policy of the Land Department is in harmony with these decisions and with this trend of legislation. It may well be claimed that these various statutes indicate a change of legislative policy and amount to a waiver by operation of law of the claim that the companies are obligated or bound to sell these lands under the limitation and restrictions of the actual settler clauses of the Act of April 10, 1869, and the Act of May 4, 1870. It is fundamental that where a condition becomes impossible of performance, or such performance is excused by law, that the condition is discharged. It is also elementary that if the condition is impossible of performance in fact to the knowledge of both parties to the grant or deed, and this impossibility of performance in fact is acquiesced in and other methods of sale of lands are adopted, that this impossibility or performance in fact will be

assumed and the condition discharged, or if not assumed, the condition will be discharged because of impossibility of performance.

As further bearing upon the requirements of the settlement laws, attention is called to the case of Conway v. United States, 95 Fed. 615, 617, where Judge Adams, speaking for the Circuit Court of Appeals, Eighth Circuit, says:

> "It is a well-settled construction of the homestead statute that while a settler acquires no title to the lands entered by him until the issue of the patent, at the expiration of five years after the entry, he has nevertheless a right during these five years to treat the lands as his own, in a certain qualified sense,—to the extent, at least, of performing those acts which are required under the law to entitle him to a patent therefor. He must reside and continue to reside upon the lands entered, and cultivate and continue to cultivate the same for a period of five years. To perform these conditions necessary to the acquisition of title, he clearly has the right to utilize the timber growing upon the land for the purpose of building himself a house to live in, and such outhouses and fences as may be reasonably neces-

sary for his initial and progressive farming operations. He may also, and must, in the performance of the condition of cultivation, first prepare the land therefor. If there be growing trees or dead timber, which are impediments to successful husbandry, he may clearly remove the same, or cause them to be removed, so far as the legitimate purpose of cultivation reasonably warrants; and he may, subject to such limitations, sell the same, and appropriate the money realized therefrom. While a settler may avail himself of these necessary privileges, he must at all times act in good faith in the exercise of them. He cannot invoke or pretend to exercise them as a cover to despoil the lands of their timber, or to make profit out of them, without regard to the legitimate purpose of building him a home, outbuildings, and fences, and fitting the soil for cultivation and use. Shiver v. U. S., 159 U. S. 491, 16 Sup. Ct. 54; The Timber Cases, 11 Fed. 81; U. S. v. Yoder, 18 Fed. 372; U. S. v. Lane, 19 Fed. 910; U. S. v. Ball, 31 Fed. 667; U. S. v. Murphy, 32 Fed. 376; U. S. v. Nelson, 5 Sawy. 68, Fed. Cas. No. 15,864. In the case of Shiver v. U. S., supra, the supreme court remarks as follows:

" 'With respect to the standing timber, his (the settler's) privileges are analogous to those of a tenant for life or years.'

"Quoting from Washburn, in his work on Real Property, the court, referring to lands which are new and covered with forests, and which cannot be cultivated until cleared of the timber, continues as follows:

" 'In such case it seems to be lawful for the tenant to clear the land, if it would be in conformity with good husbandry to do so; the question depending upon the custom of farmers, the situation of the country, and the value of the timber. * * * By analogy, we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation. * * * A reasonable construction of the statute,—a construction consonant both with the pro-

tection of the property of the government in the land and of the rights of the settler,—we think, restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber, and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation.' "

In United States v. Budd, et al., 43 Fed. 630, Judge Hanford, construing the Timber and Stone Act, and the character of lands involved in that case, says:

"Most of the testimony introduced on the part of the government was directed to support the second proposition,—that is, as to the character of the land, whether it is in fact unfit for cultivation, and chiefly valuable for timber; and the efforts of counsel in the argument were mainly directed towards this branch of the case. In the argument it has been contended that a proper interpretation of the statute would exclude from entry and sale, under its provisions, all lands capable of being improved or redeemed from their natural unfitness for cultivation, and rendered incapable of yielding crops of vegetation, grain, and fruit, and which have any element of value other than timber or stone; in other words, the court

is asked to judicially determine that congress, by the use of the words 'valuable chiefly for timber, but unfit for cultivation,' in the first section of the act, and the words 'unfit for cultivation, and valunable chiefly for its timber or stone,' in the second section, failed to express the meaning intended, and that the reading of the act to express its true intent and meaning requires the rejection of those words, and the substitution in their place of such words as the following: 'Unfit and incapable of being made fit for cultivation, and of no value except for timber or stone.' In support of this contention, the opinion of Mr. Secretary Teller, in the case of Spithill v. Gowen, 2 Dec. Dep. Int. 631, has been cited, in which he says:

"'This act contemplates such timber lands as are found in broken, rugged, or mountainous regions, where the soil, when the timber is cleared off, is unfit for cultivation, and not lands, though heavily timbered, where the soil is susceptible for cultivation.'

"The act in terms makes no reference to broken, rugged, or mountainous regions, and does not allude to the condition of the soil, after the removal of the

timber; and I am not aware of any rule or reason requiring the court so to construe the statute as to enlarge the limitations which it imposes, or narrow its application so as to exclude all lands in the states and territories named, except the inaccessible portions in the broken and mountainous regions. For the production of valuable timber, strength and fertility of soil, and conditions favorable for the growth of vegetation, are necessary, and there are no timber lands in this state which will not, after the removal of the timber, yield crops of vegetation, grains, and fruit, and there are no broken, rugged, or mountainous regions unfit for cultivation where valuable timber can be found; and to give the statute the construction contended for makes it a self-contradiction, and impracticable, and thereby nullifies it. It is plain, also, upon the face of the statute that congress intended that it should be understood according to the ordinary meaning of the words and phrases used. The introductory words in the first section are 'that surveyed public lands of the United States * * * may be sold. * * *' This language of the statute itself carries a direct contradiction of the assertion made in the opinion of Mr.

Secretary Teller, above cited, that the act contemplates such timber lands as are found in broken, rugged, or mountainous regions. The act was made to go into immediate effect upon its passage, and by its terms it embraces and authorizes the sale of surveyed lands, which are not to be found in broken, rugged, or mountainous regions; for it is a matter of history in this country that settlements and improvements usually precede the surveys, and it is a matter of continual complaint that the government fails to extend its surveys as rapidly as the agricultural, lumbering, and mining industrial enterprises of the country demand, and it is a matter of common knowledge that the remote and more inaccessible regions, where the land is unfit for cultivation, have not been surveyed, and no provision for the survey thereof appears to have been contemplated. To fairly interpret this statute, the general descriptive features of the country to which it applies must be taken into account. In each of the states named there is a diversity of climate, soils, timber, and natural formations. This is especially true of Washington, which may be taken as a representative of all, for the purpose of a more minute and particular descrip-

tion. Within this state are mountains, plains, hills, valleys, rivers, lakes, seas, forests, prairies, and mines of coal, iron, and almost every kind of minerals. It is divided by the Cascade range of mountains, running north and south across its entire breadth. East of the mountains the country is generally timberless, and the land is good, and easily brought under cultivation. However, it is not all of this description. There are in this part of the state small areas of timber in good quality, and the land is of inferior quality for agricultural purposes, though not barren. These timbered tracts answer the description in the statute, of lands, unfit for cultivation, and chiefly valuable for timber, and they are within the limits of the public surveys, made and being made as rapidly as appropriations can be obtained for the purpose. All of the state west of the mountains is a timbered region, though there are a few small prairies. The river bottoms and valley lands, having a rich alluvial soil, is considered good farming land, although in its natural state it is covered by a dense growth of alder, ash, cottonwood, and maple timber, which is useful and valuable for fuel and many other purposes. The stumps and roots of this timber soon

decay after the trees are cut down, and in two or three years' time they can be easily and cheaply removed and the land then yields bountiful crops of vegetables, grass, hops, grain and fruits. Fortunes have been made out of the produce of comparatively small farms of this quality of land by men who, without capital, took the land in the rough, and by their own hands improved and cultivated it. This class of land, although valuable for timber, is not chiefly so, and is not unfit for cultivation, because it can be profitably cleared, improved and cultivated. The most valuable timber, however, grows upon hilly and stony land. Fir and cedar stumps and roots will remain many years without decaying, and cannot be got rid of without much labor or great expense; and the soil of such timber lands is not so rich, and will not yield so abundantly, as that which I have previously described, yet will, when cultivated, produce the same kind of crops. After removal of the valuable timber, and while stumps remain, it is readily convertible into pastures, but is unfit for cultivation, because it cannot be at once made tillable without an expense greater than its value for agricultural purposes. Such land is chiefly valuable for its timber, and vast

areas of it are to be found within the limits of the surveys. It is the character of land contemplated by this statute, and is as much subject to sale under its provision, if situated in near proximity to navigable water, or a farming community, or to a city, or a railroad, as if it were in some remote, broken, rugged, and mountainous region. To a person acquainted with this country, this class of land is as readily distinguished from the alderbottom and valley lands, which are considered valuable for cultivation, as a forest is distinguished from a prairie.

"The evidence before me leaves no uncertainty or doubt as to which class the tract conveyed by the patent to Budd belongs. On the part of the government, eight witnesses have testified, proving that the land can be cultivated after the removal of the timber and stumps; that it is similar to other lands in the immediate vicinity, occupied by settlers, who each cultivate small tracts thereof; that in their opinion the land is valuable for agricultural purposes; and that the land is covered with a crust of leaf mould, which is an excellent fertilizer. And to confirm this testimony samples of the soil and specimens of the grain and grass

grown by the settlers have been introduced. These witnesses show by their evidence that the tract, except about 15 acres, is timbered, and show nothing as to the value of the timber, except that there has not been any market or demand for it. This evidence is insufficient to warrant the cancellation of a patent. But the defendants have not been content to accept a Scotch verdict. They have met the issue with evidence of the most conclusive character. Thirteen witnesses were called, who testified that the soil is stony and inferior for farming purposes; that it contains excellent fir and cedar timber, besides hemlock and an undergrowth of various shrubs and brush; that the trees are large, tall, and straight and sound, and will yield from 50,000 to 150,000 feet of the best quality of lumber per acre,—and this testimony and evidence is not controverted. The field notes made by the Government surveyor at the time of surveying the land, more than 25 years ago, describe the land as being stony and second rate, and the timber as fir, cedar, and hemlock, and the most convincing testimony of all is a series of 12 photographs, taken near the centers of each legal subdivision of the tract. These pictures exhibit, with unerring certainty

> and faithfulness, magnificent trees, standing so near together as to force each other to grow straight and tall. They satisfy the court that this tract is valuable and desirable for the timber upon it, and also that no man would be willing to subjugate this piece of forest for the mere sake of cultivating it."

This case was affirmed by the Supreme Court of the United States in United States v. Budd, 144 U. S. 154, 166, where Mr. Justice Brewer, speaking for the court, says:

> "With regard to the second question: The description in the act is of lands 'valuable chiefly for timber, but unfit for cultivation.' It is conceded that these lands were valuable chiefly for timber. It is claimed, however, that they were fit for cultivation and therefore not within the description of lands purchasable under this act. But obviously at the time of the purchase the land was unfit for cultivation. It was covered with a dense growth of timber; fir trees, many of them two hundred feet in height and five feet in diameter. In respect to the testimony the trial court makes this comment:
>
> " 'Thirteen witnesses were called who testified that the soil is stony and inferior

for farming purposes; that it contains excellent fir and cedar timber, besides hemlock and an undergrowth of various shrubs and brush; that the trees are large, tall and straight, and sound, and yield from 50,000 to 150,000 feet of the best quality of lumber per acre, and this testimony and estimate are not controverted. The field notes made by the government surveyor at the time of surveying the land, more than twenty-five years ago, describe the land as being stony and second rate, and the timber as fir, cedar and hemlock, and the most convincing testimony of all is a series of twelve photographs taken near the centres of each legal subdivision of the tract. These pictures exhibit, with unerring certainty and faithfulness, magnificent trees standing so near together as to force each other to grow straight and tall. They satisfy the court that this tract is valuable and desirable for the timber upon it, and also that no man would be willing to subjugate this piece of forest for the mere sake of cultivating it.'

"If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is, that the statute does not con-

template what may be but what is. Lands are not excluded by the scope of the act because in the future, by large expenditures of money and labor, they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming land; but surely no one before the commencement of these labors would have called them fit for cultivation. We do not mean that the mere existence of timber on land brings it within the scope of the act. The significant word in the statute is 'chiefly.' Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its

present state, substantially unfit for cultivation."

See also Whitney v. Spratt, 25 Washington 62, affirmed by the Supreme Court of the United States in Thayer v. Spratt, 189 U. S. 346.

The rules of the Land Department were not originally in harmony with the views thus expressed.

In Hughes v. Tipton, Second Land Decisions, 334, it was held that the Act of June 3, 1878, did not contemplate entries exclusively on land which is wholly unfit for cultivation after the timber has been removed but upon land which is unfit for ordinary agricultural purposes, following Spithill v. Gowen, 10 Land Owner 73, where it was held that the act contemplated the sale, as timber land, of such tracts only as had "soil unfit for ordinary agricultural purposes when cleared of timber."

In Rowland v. Clemmens, Second Land Decisions, 633, Secretary Teller, in a case on appeal from the local land office at Vancouver, Washington, held that notwithstanding there might be much valuable timber on a tract, the same was not subject to entry under the Act of June 3, 1878, if the soil was

susceptible of ordinary cultivation, except in minor portions where it was rocky or steep.

This rule was followed in Ellis v. Moore, 6 Land Decisions, 630, adhering to the rule of Hughes v. Tipton, 2 Land Decisions, 336, except that in the case last cited Secretary Vilas found upon the principle announced in the previous departmental decisions, that the land in question was chiefly valuable for timber and unfit for cultivation. The homestead entry in that case was cancelled, in so far as the same conflicted with the timber application under the Timber and Stone Act of June 3, 1878. These lands were situated in the Sacramento Land District, in the State of California.

In Wright v. Larson, 7 Land Decisions 555, Secretary Vilas says:

> "On the hearing, the appellant offered to prove, that the land in dispute was 'chiefly valuable for timber' and 'unfit for cultivation.' The local officers refused to allow this proof to be made, and this is one of the errors assigned on this appeal. This assignment of error must be sustained. In the case of Porter v. Throop (6 L. D. 691) I held, that 'while the act of June 3, 1878, in exempting from

its operation lands claimed by a 'bona fide settler,' ex vi termini, recognizes that there may be a bona fide settlement on the lands of the character described therein—that is, lands chiefly valuable for timber and 'unfit for ordinary agricultural purposes'—yet, for obvious reasons, such settlements should be closely scrutinized, and the fact, that the land is of such a character, might be a circumstance, taken in connection with the other facts of the case, shedding light upon the question of the bona fides of the settler.' The exception in the Act of June 3, 1878, is in favor of the bona fide settler,' and the issue involved in this case is the bona fides of the settlement of Larson. The evidence offered as to the character of the land being relevant to this issue, under the circumstances of this case hereinafter stated, should have been admitted.

"It is true, as stated in your office decision, that 'The question of Larson's compliance with the requirements of the pre-emption law will be inquired into when he offers to make proof,' and it was not necessary, as between him and the timber land applicant, that the compliance with those requirements should have been

shown on the hearing in this case. The bona fides of his settlement and not his conformity to the requirements of the law, was the subject of inquiry, and on this issue the burden was upon the timber land applicant. A settlement to be a bona fide must be made for the purpose of making the tract a home. (Porter v. Throop, supra.) This is the test, and a settlement for the purpose of securing the timber on the land or for any other purpose than establishing a home, is not a bona fide settlement within the meaning of the Act of June 3, 1878.

"It appears from the evidence, that the tract in dispute was six or seven miles from any other settlement in the dense forest of fir timber, and accessible only by a foot path, that it had been returned by the surveyor general as timber land, and had on it (according to the estimate of the witness) 4,000,000 feet of merchantable timber; and, while the local officers decided, as above stated, that evidence that the land was unfit for cultivation was not admissible, it appeared from the testimony incidentally, that the soil was poor, broken, and gravelly, and that it would require the expenditure of an amount wholly disproportionate to any

possible returns which could be expected from such land to clear and prepare it for cultivation. There seems to have been no inducement for a reasonable man of family to establish a home on such land, surrounded as it was by a forest, located so far from any other settlement and comparatively inaccessible. * * * * The character of Larson's improvements and of the land, its location and surroundings, and the large quantity of merchantable timber thereon (for utilizing which, together with that on other lands in the vicinity, a railroad had been projected and commenced about the time of Larson's filing), his maintenance of a home elsewhere after his alleged settlement on the land, and all the facts and circumstances of the case, convince me, that his was not a bona fide settlement for the purpose of establishing a home on the land, but that it was a pretended, or, at most, colorable, settlement, made with a view to securing the benefit of the timber thereon."

In re John A. McKay, 8 Land Decisions 526, Assistant Secretary Muldrow says:

"As this land is said to be densely covered with redwood and chiefly valu-

able therefor, all the facts and circumstances connected with Marsh's settlement and residence should be most carefully scrutinized so that it may be determined whether he was in fact a bona fide settler who made the land his home or whether his settlement was a pretended, or at most a colorable settlement made with the view of securing the timber thereon. Porter v. Throop (6 L. D. 691); Wright v. Larson (7 L. D. 555)."

In re Daniel R. McIntosh, 8 Land Decisions, 641, Assistant Secretary Chandler says:

"Land valuable for timber growing thereon may be acquired under the pre-emption law but the final proof should clearly show that it was taken in good faith for a home and not for the value of the timber alone."

This decision was announced June 21, 1889, before the repeal of the pre-emption law on the 3rd day of March, 1891.

In State of California v. Sevoy, 9 Land Decisions, 139, Secretary Noble says:

"The remaining question to be determined is whether the land is of the character subject to pre-emption, and whether

Sevoy has complied with the pre-emption laws as to inhabitancy, cultivation and improvement of the tract in controversy.

"The evidence shows that a greater part of the land is covered with heavy redwood timber, but it is also shown that part of the land is rich bottom land valuable for agricultural purposes, and that part of it has been cultivated by claimant. It is also shown that while the greater part of the land is chiefly valuable for its timber, yet it could be cleared so as to make the land valuable for pasturage. But although the land may be chiefly valuable for timber it will not defeat the right of a bona fide pre-emptor to take it under the settlement laws, if the bona fides of the pre-emptor are clearly shown. Porter v. Throop (6 L. D. 691); Wright v. Larson (7 L. D. 555)."

This was, of course, ruled when the pre-emption law was still in effect and before the modification of the homestead act, as we have shown.

In re George H. Hegeman, 11 Land Decisions 7, Assistant Secretary Chandler says:

"The record shows the tract involved to be chiefly valuable for timber. This

being so, the good faith of the claimant should be clearly shown before he can be allowed to acquire the same under the pre-emption law. Daniel R. McIntosh (8 L. D. 641); State of California v. Sevoy (9 L. D. 139).

"That the claimant's good faith is not clearly shown is, I think, manifest. His proof showing meager improvements was made within about the briefest permissible period following the initiation of his claim, and when considered with the surrounding circumstances, in the light of which his good faith must be determined, fails to satisfactorily show that he went on the land for the purpose of rendering a bona fide compliance with the pre-emption law."

In United States v. Montgomery et al., 12 Land Decisions 503, Acting Secretary Chandler, in ruling upon the claims afterwards considered in United States v. Budd, 43 Fed. 630, affirmed in 144 U. S. 154, says:

"The decision of the Department was that the lands in question were not subject to entry under the timber and stone act. Said act provides that lands 'valuable chiefly for timber, but unfit for cul-

tivation' may be entered, etc. As has been said 'all timbered lands are unfit for cultivation in their natural condition' being thus unfit for cultivation by reason of the timber thereon, the logical result of the contention by the defendants would be, that the Department could not inquire into the character of the land, whether it was actually fit for agricultural purposes and cultivation or not, provided there was a sufficient number of trees on the tract to prevent, or render it unfit for cultivation, at the date of entry. Such a construction of the act cannot be entertained, as it would be a plain violation of its intention and spirit, as well as of its words.

"Two conditions must combine to make timbered land subject to purchase under said act.

"1st. It must be valuable chiefly for its timber;

"2nd. And unfit for cultivation.

"The absence of either of these conditions, excepts the tract from purchase. Then it becomes the imperative duty of the Department, in each case, to ascertain whether the tract with the timber

removed, is 'unfit for cultivation.' If it is not, then the entry cannot stand.

"It was the evident intent, as gathered by this act, not to allow land fit for agricultural use to be purchased under this act. It is only such rough, stony or mountainous tracts as are unfit for cultivation on that account, that may be so purchased. The act does not read and cannot in reason be construed as meaning unfit for cultivation, on account of timber growing thereon. Some of the most fertile of the public lands are timbered, and when cleared are the most valuable for cultivation. The fact that Congress connected timber lands with stone, is a sufficient expression of the intent to allow only such lands as cannot be cultivated by ordinary methods of agriculture, to pass under this act."

In Ward v. Montgomery, 15 Land Decisions 280, the Department of the Interior modified its former ruling to conform to the ruling of the court in United States v. Budd, 43 Fed. 630, affirmed 144 U. S. 154. The Acting Secretary quotes at length from the opinion of Mr. Justice Brewer, and holds that the evidence was conflicting as to the character of the land, but tested by the

rule laid down by the court, found that there was no question but that the land was "unfit for cultivation" at the date of sale. To the same effect is Kelly v. Ogan, 15 Land Decisions 564. In the case last cited, Assistant Secretary Chandler says:

> "It is practically admitted that this land is rough and mountainous, badly cut up with canyons, and sparsely, at least, covered with a low grade of timber, also stone. While the testimony is very conflicting as to the value of this tract for its timber product, yet, it is clear to my mind that it is not very well adapted to agricultural purposes. The contestant offered testimony tending to show that twenty acres or upwards, of the tract might be, upon the removal of the timber and stone, used for the growing of oranges, vines, etc.; that the trees growing on the tract were of a scrubby character, of low order and fit only for firewood; that there were probably eighty to one hundred cords of wood which could be cut from trees growing along the ravines but would bring no profit if hauled to market. That it would cost $700 to $1,000 to construct a road to the tract. No evidence is offered for the purpose of showing what it would cost to reduce this land to a

condition fit for agriculture by removing the stone and timber, but all the testimony goes to show that without the removal of the trees and stone, the tract is unfit for cultivation.

"The entryman in support of his application, offers testimony for the purpose of showing that there are at least five hundred to one thousand cords of wood upon this tract; that it will cost $2.75 per cord to cut it, and from $3.50 to $6.00 a cord to haul it to market where he could realize therefor, $9.00 per cord; that on account of the stone and timber which are growing upon the tract and the canyons which cut it badly, it is unfit for cultivation, hence, the tract is chiefly valuable for its timber. The register and receiver adopted this view, as I think you did from a discussion of the case, independent of the question of where the burden of proof rested, and I am satisfied from the examination which I have given the case, that this tract is illy adapted for farming or agricultural purposes, and that, at the time this entry was made, the tract was chiefly valuable for its timber, and unfit for cultivation within the ruling of the supreme court

in the case of United States v. Budd, 144 U. S. 154."

In Merritt v. Philp, 16 Land Decisions 404, Assistant Secretary Chandler says:

"The first question to be considered relates to the character of this land. Is it, in the language of the Act of June 3, 1878, 'valuable chiefly for timber, but unfit for cultivation'? This provision has recently been construed by the supreme court in the case of United States v. Budd, (144 U. S. 154, 167), in which the rule is laid down that—'The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation.' Judged by this rule, the land must be considered 'valuable chiefly for timber, but unfit for cultivation,' within the meaning of those terms as used in said act.

"The land is situated at an altitude of over 5000 feet, is rocky and of granite formation. The soil is shallow and poor, and cannot be irrigated on account of its altitude. The attempts made to raise crops thereon have all failed. The season

for raising crops is short. In the winter the ground is covered with deep snow. The tract is heavily timbered with pine, fir, and cedar trees, and was variously estimated to be worth from $2,000 to $4,000 for its timber. There has lately grown up a greater demand for timber than formerly, and a lumber mill has been erected within a quarter or half a mile of said tract, and a greater amount of lumbering is carried on now than a few years ago."

In Robert v. Brownell, 18 Land Decisions 216, on review of the decision of the register and receiver of the Olympia Land District of Washington, Secretary Smith says:

"In the opinion appealed from, I find a lengthy statement as to the comparative value of the land for timber and for agricultural purposes, if cleared, but under the facts in this case, as shown by the record, such comparative values are not material. Under the record it appears that the value of said land for agriculture in its primitive state, was nominal.

"In the case of United States v. Budd (144 U. S. 154), it was held (syllabus) that:

"'Public lands * * * * valuable chiefly for timber, but unfit for cultivation, within the meaning of the timber and stone act of June 3, 1878, (20 Stat. 89, C. 151) include lands covered with timber, but which may be made fit for cultivation by removing the timber and working the lands.'

"This rule has been followed by the Department in analogous cases since the promulgation of the supreme court decision above cited. See Kelly v. Ogan (15 L. D. 564), and Gilmore v. Simpson, (16 L. D. 546), although prior to that time an opposite ruling obtained in departmental adjudications.

"It appearing from the evidence, therefore that the land in question at the date of the filing of appellee's timber land statement, was chiefly valuable for timber, it is held that the land was subject to entry under the act cited."

In Gibson v. Smith, 18 Land Decisions 249, Secretary Smith, after reviewing the facts, says:

"The act intended to cover those lands upon which the timber growing, at the time of the sale, was so dense and of such

> character as to make the timber valuable in the way of lumber and for commercial purposes. The facts in this case show that the trees growing upon the tract were valuable chiefly as wood to be used as fuel and not as beams or lumber, for the use of commerce."

See also Gosling v. Murphy, 18 Land Decisions 306, 308.

In United States v. Searles et al., 19 Land Decisions, 258, Secretary Smith ruled that it is immaterial that the land, if cleared of timber, would be fit for cultivation. If the land in its present state is chiefly valuable for timber, it does not matter that if the lands are cleared of the timber at heavy expense, they may be susceptible of cultivation or fit for cultivation. That circumstance does not bring the land within the class of lands adapted to entry under the settlement laws.

In Jones v. Aztec Land and Cattle Company, 34 Land Decisions, 115, 116, Acting Secretary Ryan, in a case where there was a contest on account of the selection made under the Act of June 4, 1897 (30 Stat. 36) says:

> "Prior to the act of 1878 any public lands not excepted by law because of their valuable mineral deposits, salt, etc.,

in general were not subject to disposal otherwise than under the pre-emption and homestead (or settlement) laws until after a public cash offering. The settlement laws imposed conditions of residence, improvement, and cultivation, compliance with which involved considerable expense and lapse of time before a title could be obtained. There were also many tracts that because of their rocky or heavily forested condition were left unentered under the settlement laws because unsuitable for the homes of an agricultural resident population. In view of such facts, the law of 1878 (20 Stat. 89) applicable only to certain mountain States, afterward, August 4, 1892, (27 Stat. 348), made applicable to all the public land States, provided that lands—

> valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold * * * at the minimum price of two dollars and fifty cents per acre, and lands chiefly valuable for stone may be sold on the same terms.

"This act merely opened unoffered lands of this general description to pri-

vate cash purchase in limited quantity, at an enhanced price, prior to its public offering. It was not the making of a new classification of lands that could be sold only under the act and only at the price fixed. Such lands, if not purchased under this act in advance of their public offering, upon being offered were subject to private cash entry or warrant location like any other public lands, not reserved from sale or entry. They became subject to settlement entry under the homestead law, the timbered or stony character and unfitness for cultivation being regarded merely as a circumstance to be considered in passing on the good faith of the settlement entryman. John A. McKay (8 L. D. 526); Porter v. Throop (6 L. D. 691); Wright v. Larson (7 L. D. 555); Keller v. Bulington (11 L. D. 140); Harper v. Eiene (26 L. D. 151).

"It is thus clear that the mere fact that the land is more valuable for the timber or the stone therein does not exclude it from appropriation under lieu selection or homestead entry, if not of mineral character."

While it is there stated that lands that are chiefly valuable for timber or stone are not

necessarily excluded from appropriation under the lieu selection or homestead entry, still the case is a distinct recognition of the changed policy of Congress evidenced by the Act of June 3, 1878, and the Act of August 4, 1892, amendatory thereof, and as we shall presently see, under the rules as to attempted entries under the Homestead Act, shows that these lands of the kind involved in suit, are not adapted to settlement and are therefore not subject to entry under the settlement laws. This fact was distinctly recognized in the case of Harper v. Eiene, 26 Land Decisions 151, where Secretary Bliss says:

> "It was alleged in this proof that he had established residence on the land in May, 1890; that he has since resided there except for short absences, but that his family, consisting of wife and one child, have never resided there owing to ill health and bad condition of the road and rough weather; that his improvements consist of a house fourteen by sixteen, a barn, three acres under cultivation, three acres slashed, an orchard, some fencing, and a road all valued at $750, and that he has raised crops two seasons on one and one half acres. This proof was approved and final certificate issued July 8, 1895.

"On November 6, 1895, Jennie E. Harper filed in the local office an affidavit of contest against said entry, alleging that the improvements upon which the final certificate was based consist of the remains of a small house twelve by fourteen feet and a small shed twelve by twelve feet, both burned, and an acre of ground underbrushed, with green timber standing thereon; that the value of said improvements would not exceed one hundred dollars; that both the residence and improvements of the homestead claimant are the merest pretense; that said tract is heavily covered with merchantable timber and is chiefly valuable therefor; and that the same is wholly unfit for agricultural purposes."

See also Rowley v. Hayes, 29 Land Decisions, 606.

Patton v. Quackenbush, 35 Land Decisions, 561.

In the last case cited Secretary Garfield says:

"At that time, as shown by the evidence, the permanent improvements were as follows:

"From about one-fourth of an acre, on which the cabin and shed stood, the trees had been felled and the logs and underbrush removed, but twenty-one stumps remained standing. This one-fourth acre was enclosed by a rail fence, outside of which on about one and one-half acres the trees had been felled and the brush partly burned out but the logs and stumps all remained. Outside of said enclosure no breaking of the soil had been attempted; within it there had been some stirring done in spots but it had never been plowed or harrowed. There was a habitable cabin, and also a shed built of round poles in which the entryman claims to have lived from September, 1901, until late in the fall of 1902, when the cabin was completed, though he had no stove. Some work had been done on the 'trail' by which access was had to the land. For water supply a hole had been dug about five feet deep, and partly curbed to hold surface water.

"As to the soil on this tract and its value for farming purposes, if cleared of the timber and brush, the testimony of the witnesses for contestant and claimant is irreconcilable. The former, experienced timber cruisers, state that there are eleven

million feet of timber worth at least one dollar per thousand feet; that the soil is clay and gravel, with a covering of decomposed vegetation or peat, peculiar to cedar swamps, which will burn when drained of water, and which is practically worthless for farming. The latter state that the soil is a fertile loam and that the land when cleared will in its raw state be worth twenty dollars per acre, and one of them estimates the timber at five million feet, but admits that he had not 'cruised' this tract.

"But all the witnesses, including the claimant, agree that it will cost two hundred dollars per acre to fell the trees and remove the logs and brush from the land, allowing the stumps to remain. And while, under the law cited, land 'unfit for cultivation,' and lands, the cost of reducing which to cultivation is practically prohibitive, may be taken under the homestead law, these questions have a decided bearing upon the probable good faith of the entry. It is also true that the homestead law does not require residence after final proof, yet where it is claimed that such land is claimed as and for a home the fact that the claimant does not return to it after final proof has a bearing on the good faith of such claim and entry.

> "Taking into consideration the value of the timber and quality of the soil as shown by preponderant competent testimony, the meagre residence and improvements, in view of his financial ability, the early final proof and termination of such residence, and the fact that claimant never had a domestic animal or fowl on this land, or otherwise indicated an intention of permanently residing thereon, the Department is unable to find in the record any facts on which to base a holding that the entry was made in good faith, for a home, and not for speculative purposes, to dispose of the timber on the land."

In further recognition of the non-settlement character of certain lands, Congress passed the Act of June 11, 1906, (34 Stat. 233) which authorized homestead entries within national forests. This act has been grossly abused, as shown by the statement of Mr. Henry S. Graves, Chief Forester, and it appears that even under the careful administration of this statute, lands have been entered which were chiefly valuable for timber.

In Davis v. Gibson, 38 Land Decisions 265, Assistant Secretary Pierce says:

"If such charge can be sustained, it would result in the cancellation of the entry, for the reason that no entry can be made in good faith of land that is not susceptible of cultivation where the entryman must have had knowledge of such condition. The law requires that an entryman must not only reside upon and improve his claim but must cultivate it. 'The purpose of the homestead law is to secure the establishment of actual agricultural homes upon the public lands. The improvement and cultivation of the land are necessary acts to that end.' (George Hathaway, 38 L. D. 33, 34).

"If this land cannot be adapted to any agricultural use, there can be no valid entry of it under that law, and if such condition was known to exist by the entryman at the date of his entry it was not made in good faith and should be cancelled."

In Finley v. Ness, 38 Land Decisions 394, 398, Assistant Secretary Pierce says:

"Land covered with valuable timber may nevertheless be entered under the homestead law where the character of the land is such that it would be suitable for agricultural use if the timber were re-

moved. See Jones v. Aztec Land and Cattle Company, 34 L. D. 115, Patton v. Quackenbush, 35 L. D. 561. But land not adaptable to any agricultural use is not subject to homestead entry. See Davis v. Gibson, 38 L. D. 265. The character of the land here involved, as shown by the record, is fairly stated in the opinion of the local officers above given.

"The unfitness of this land for agricultural use to any reasonable extent is established, and, considering the great amount of timber thereon and the rough and almost worthless character of the land for agricultural purposes if cleared, strong reasons for suspecting the good faith of Ness in making application therefor under the homestead law, are apparent."

In Winninghoff v. Ryan, 40 Land Decisions 342, decided January 2, 1912, an extended review of that case by Assistant Secretary Adams, typifies land of the general character of the lands involved in suit. It is there stated—

"The testimony is voluminous and conflicting. That of contestant's witnesses shows that the land embraced in this homestead is exceedingly mountainous,

precipitous, rough, broken with canyons, and impossible of cultivation. The land is very heavily timbered, carrying approximately fifteen million feet of merchantable timber of an estimated value of from one to two dollars per thousand. All of the contestant's witnesses agree that the soil is very poor, being composed of clay and gravel with numerous rocks intermixed, and would not raise agricultural crops even if the timber were cleared; further the steepness of the land is such that it would be impossible to cultivate it even if the soil were sufficient. Several of the witnesses are timber cruisers, and some of them were parties having contests against homestead entries in that vicinity. They visited the land at various times in the summer of 1908. The sole improvement found was a small log cabin, unchinked, with a door standing unhung. Across the small creek from this cabin was another built of shakes, with a log addition. They testified that both of these would be uninhabitable during the winter time and rainy season, as the snow would melt and the water would leak in. A small patch of from one-fourth to one-third of an acre had been slashed, i. e., the trees had been cut down, but the stumps were standing, and in this

patch there were nine or ten of these stumps and four or five large trees standing. They found no cultivation whatever, the only evidence of that nature being that on top of one of the large stumps the surface had been boxed in by shakes, some vegetable mold gathered and placed there, and a few strawberry plants planted, and also one onion planted, which was supported by being tied to a stick. The timber was so dense that sunlight could reach the ground for a period not to exceed one hour a day, which would make the growing of crops impossible; the dampness would occasion mold to settle upon the cabins and their contents, and render them unhealthy to live in. The sole means of access to the claim is a difficult and dangerous trail over the mountains from the nearest settlement, some fifteen miles away. The houses upon the land were such as farmers would use for hog pens or chicken houses, and would not be fit places of habitation for a man and his family. There were no domestic fowls on the place, and at the time of their visits, except once, there were no signs of habitation around the cabins, which appeared to be abandoned. There was no chimney to either of the cabins, but in the shake cabin there was

a square hole in the roof from which smoke, on one occasion, was pouring. Between this land and the nearest towns there is a large area of vacant public land, upon which the timber has been burned. They found no homesteads in this area, and did not see any homestead until they struck the green timber. They further testify that it would cost $300 an acre to clear this land of the timber, and that such expenditure would be useless, as the land would have no value for farming after the timber was removed. One of the witnesses testifies to a conversation with Ryan, in which Ryan told him that he was living in Aberdeen, Washington.

"Photographs of Ryan's, or his wife's, house in Aberdeen, and of the house in Kalama, to which they apparently moved later, were introduced in evidence.

"Notice of the contest was served upon Ryan in Aberdeen, Washington, and also another at Kalama, Washington, while he was there attending as a proof witness in another homestead entry. The directory of 1905, of Aberdeen, showed that Mrs. Ellen Ryan, milliner, and William L. Ryan, timber cruiser, were living at 306 Wishkah Street, and that of 1907

gave simply the address of Mrs. Ellen Ryan.

"This testimony further tends to show that it would be much easier to clear the land already burned over than the land embraced in this homestead, and that, from all the conditions surrounding the entry, the witnesses were of opinion that the entryman's sole purpose was to acquire the timber. It is also shown in their testimony that it would be a dangerous place for a man to live with his family, and that the snow in the winter time would be four or five feet deep. It also appears that the only method to get farming implements to the land would be to take them apart and strap the parts to the backs of pack animals, putting them together again upon the land. All produce raised would also have to be packed out, offering the same difficulty as with tools.

"Most of the witnesses on behalf of contestee are persons having heavily timbered homesteads in the near vicinity of Ryan's. Their testimony is directly in conflict with that of the contestant's witnesses as to the amount of clearing and the question of whether Ryan had a gar-

den or not. They contend that the photographs of the clearing taken by the contestant do not show all of the clearing, and are not fair. They do not dispute the heavily timbered character of the land. Some attempt is made to prove that the soil is good and could be farmed after the timber had been cut. The majority of them testify to having seen Ryan living on the land, at various times; some of them have eaten and slept with him in the shake cabin. The log cabin adjoining the shake cabin, it is testified was used by Ryan as a bath house for the purpose of relieving his rheumatism. The cabin seems to have been well equipped with homemade furniture, i. e., furniture hewn out of the timber which grows upon the land. He also appears to have kept it well supplied with provisions, and also brought in a mattress and springs. They testify that in the cleared space Ryan had a garden for several years, consisting of potatoes, strawberry plants, lettuce and beans, although their testimony is somewhat conflicting as to the exact location of the garden and its contents. They testify that this garden was in existence at the time contestant's witnesses examined the land, and that any person examining the clearing could not have failed

to observe it. During the course of the trial one witness went to the land and secured samples of potatoes, onions, strawberry plants and beans, which, it is alleged, came from the Ryan land. The strawberry patch on the stump, it was claimed, was planted there merely for the purpose of amusement or experiment. According to their testimony a county road had been surveyed out, which would lead within two hundred yards of the land, and would furnish an easier method of ingress and egress. Ryan's own testimony is that he first initiated his claim to this land in November, 1897, at which time the log cabin to the east of the small creek was already upon the land; that he constructed the shake cabin in about 1902; that his home has been on the land ever since 1902, at least; that his wife and family lived in Aberdeen, Washington, and removed to Kalama, Washington, after service of the contest notice. He admits that his wife and family never lived upon the land, but claims that his wife refused to do so, as she was desirous of keeping her children in town in order that they might attend school. He states that they had a serious disagreement upon this point, and that his wife has been self-supporting, the houses in Aberdeen

and Kalama being rented by her, she paying the rent out of money earned in conducting a small millinery store. It is admitted that no produce has ever been raised on or sold from this particular land, or any other homestead in that vicinity. The witnesses for contestee contend that it is easier to clear land of green timber than burnt timber. Ryan's testimony is corroborated by his wife, who testified that she visited the land but twice, in the summer of 1906 and the summer of 1907, merely as an outing. At one time she states that in August, 1907, she wrote her husband requesting him to come home, at Aberdeen, and then changes it to read her home in Aberdeen. The contestee's testimony is further to the effect that the snow does not lie upon the ground to exceed fourteen or sixteen inches in the winter time, and that Ryan's shake house was at all times water-tight, comfortable and inhabitable. Ryan's business appears to have been that of a timber cruiser and locator. The garden was apparently unfenced, and no domestic animals of any kind, except pack animals used in taking in supplies, were ever upon the land. That Ryan has spent considerable periods of time upon the land is established in his testimony

and that of his wife, the testimony of the remaining witnesses merely being to the effect that they saw him there at different times.

"In rebuttal, the contestant called attention to the fact that some of the bean plants introduced in evidence were in flower at that time (October); that the potatoes introduced in evidence could not have come from the potato plants, as there were very minute potatoes only beginning to form on the roots; that the sample onion introduced showed the old seed onion, no new onion having formed. The plants also showed the effect of frost, and also, from their appearance, indicated that they had been grown in the shade. The purport of the witnesses' testimony in rebuttal is to the effect that the samples so introduced could not have been raised upon land in question, as the soil was too poor to raise even the specimens introduced in sur-rebuttal. The contestee put in testimony to the effect that the soil was sufficient to raise such specimens.

"From the above the following conclusions are warranted: The land is exceedingly valuable for its timber, being worth

from fifteen to thirty thousand dollars. The register and receiver and the Commissioner found that the land was too rough, broken and heavily timbered, to be capable of cultivation, and the weight of the testimony substantiates their finding. Ryan appears to have spent a considerable portion of his time upon the land, and if his own mere physical presence thereon is sufficient, the Department's decision is correct. The register and receiver and the Commissioner apparently were not much impressed with the excuse offered by Ryan and his wife for the failure of his family to reside thereon. As their testimony is uncorroborated in that regard, and as they are the chief parties in interest, the Department concurs in the findings below as to that aspect of the case. A small garden patch may have been cultivated by Ryan, but it should be pointed out that the place so cultivated was along a small creek, where possibly some small amount of level ground might be found. The weight of the testimony shows that crops planted there could not mature, due to the lack of sunlight and the lateness of the season giving them no time to ripen.

"It has long been the rule of the Department that the mere fact that lands are heavily timbered does not exclude them from homestead entry. In the case of Davis v. Gibson (38 L. D. 265), it was held that land unadapted to any agricultural use is not subject to entry under the homestead law, the reason for the inadaptability in that case being the fact that the land was a shellmound overflowed by tide waters. Logically, there is no distinction between that case and the one here involved, as the heavy growth of timber, the rough character of the land, and the poorness of the soil prevent any adaptation of the land to agricultural purposes, even assuming that agricultural implements could be brought to the land and used when there. So, in the case of Finley v. Ness (38 L. D. 394) the Department held that land covered with valuable timber can be entered under the homestead law where it is of such character that it would be suitable for agricultural use if the timber be removed, but that land of a character not adaptable to any agricultural use is not subject to homestead entry. In the case of Johnson v. Bridal Veil Lumbering Company (24 Oreg. 182-33 Pac. 528), cited by counsel for the contestee, the Supreme Court of

Oregon held that the fact that the land is unfit for cultivation and valuable chiefly for timber, did not prevent homestead entry thereof. The court said:

"'It might be safely said that a homestead claimant who desired such a tract for a home and agricultural purposes had not exercised very good judgment in the selection, but if he could grow crops thereon he would be entitled, under the law, to make his final proof and receive his patent. His right to make final proof and obtain a patent rests upon his cultivation of the soil and not upon the exercise of his judgment in the selection of his homestead.'

"In the case of J. J. McCaskill Company v. United States (216 U. S. 504, 510), Justice McKenna states the requirement of the homestead law as follows:

"'It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that the 'application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person.' That applicant will honestly endeavor to comply with the requirements

of settlement and cultivation, and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefore, is to give a home, and to secure the gift the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two credible witnesses.'

"Under the above decisions the lands here involved must be held not subject to homestead entry, as it is impossible to escape the conclusion that the entryman has no purpose of establishing a home and using the land for cultivation, as required by law, but that his sole purpose is to obtain the valuable timber growing upon the land, which is so heavily timbered that the cost of clearing is prohibitive, and which even if cleared, would be impossible of cultivation, due to the poor quality of the soil and its rough and broken character. The Department concurs in the finding of the Commissioner and that of the register and receiver, that the contestee did not take this land for a home; that his actual place of residence at the date of entry, and at the date of contest, was with his family in Aberdeen, Washington, until

> he moved them to Kalama just prior to the hearing; that he failed to establish a bona fide residence on the land to the exclusion of his home in Aberdeen, and that his bad faith is clearly shown by the testimony."

This is the latest expression of the Land Department by its highest administrative head. It is distinctly applicable in its terms to the so-called actual settlers represented by Mr. A. W. Lafferty, who are cross complainants in this suit. The pretended settlement by these so-called actual settlers would be found under this ruling to have been made in bad faith and therefore the lands not subject to entry under the Homestead Act, and yet it is gravely asserted in this case that the company should sell these lands to actual settlers, or should have done so, while at the same time the United States under the Homestead Act, as now construed, and under the Timber and Stone Act has held and was bound to hold that upon the facts the lands were not subject to entry under the Homestead Act. It is strangely inconsistent with good faith upon the part of the United States to contend that the company should sell these lands to actual settlers, when, at the same time, there is no law under which the United States can permit the lands to be entered or appropriated

by actual settlers. Furthermore, it will be remembered that on March 3, 1879, (20 Stat. 472) Congress passed an act granting additional rights to homestead settlers on public lands within railroad limits, by which the former homestead applicant, as to the even sections within the limits of this grant of July 25, 1866, who had been limited to 80 acres, could enter an additional 80 acres adjoining the lands embraced in his original entry. This was a modification of the contract, in that it reduced the number of possible settlers on the even sections from eight to four.

We have thus somewhat laboriously discussed the settlement laws, their modification and repeal since the passage of the Act of April 10, 1869, and the Act of May 4, 1870, and the decisions of the courts construing the settlement laws and the Timber and Stone Act of June 3, 1878, so that the court, construing the Homestead Act as applicable to these lands involved in suit, must see that in the nature of things all, or nearly all, of such lands could not be entered in good faith under the Homestead Act, and such act cannot be deemed applicable, or if applicable, it would be impossible for the so-called settler to comply with the same in good faith or to obtain title from the United States based upon an attempted entry under the Homestead Act.

If this be so, how can it be contended that the company is bound or was bound to sell these lands to so-called actual settlers in order that it may thereby carry out some supposed policy of the United States as to the settlement of the public lands. It must be assumed that the company in some way, if obligated to sell to actual settlers in quantities not exceeding 160 acres, must ascertain who are qualified to purchase. That is to say,—the company must, at its peril, fix the status of the intending purchaser, and such purchaser must be an actual settler. If, by analogy, the Homestead Act applies, then such actual settler, under the law as it was in effect on April 10, 1869, and May 4, 1870, must reside upon and cultivate this land for a period of five years before he shall be entitled to complete the purchase, and yet, if the company should refuse to sell or accept the $2.50 an acre on the first day of the settlement, there is nothing in the statute which secures to the applicant the right to enforce an immediate transfer of the title or that obligates the company to convey the land until the company has carried out the assumed public policy in seeing that these lands are sold only to actual settlers, and presumably the company must administer the grant in the same way and in the same manner as the United States would administer the Homestead Act as to the even sections, with the dif-

ference that up to March 3, 1879, such homestead applicant could only enter 80 acres within the limits of the grant, but after that date, could enter 160 acres. It must be apparent to the court beyond any sort of doubt, that at least ninety per cent of these unsold lands in their present condition are unfit for cultivation, and that the expense of clearing the lands and fitting them for settlement or cultivation would be prohibitive, and that the chief value of at least ninety per cent of these lands is their timber character. The United States, under the rulings of the Land Department, in obedience to the decisions of the courts construing the Timber and Stone Act of June 3, 1878, would forbid entry or settlement of a large percentage of these unsold lands, either under the pre-emption act, if it was in effect, or under the homestead act now in effect, for the reason, as the decisions show, that the lands are chiefly valuable for timber, and that the good faith of the entryman could not be shown, but the circumstances would, without question, show that the entries were being made of lands not adapted to entry and settlement under the Homestead Act and were being made under cover of pretended settlement, but in fact to secure the lands for the timber thereon. The company has the right to be guided in its administration of this grant by like rules. Indeed, it would be obligated

by the terms of the act to see that the lands were sold only to actual settlers, and if it should sell to some person who was not an actual settler and who did not purchase for the purpose of actual settlement, and who did not reside thereon for the purpose of making the land a home, but who purchased the lands for speculation and because of their timber character, then, under such circumstances, the sale would be a fraud, not only upon the company but a breach of the condition imposed by the statute. For this breach, if the position of the Government is sound, the remaining lands could, at the election of the United States, be forfeited. Independently, therefore, of the said Timber and Stone Act of June 3, 1878, or the modification of the Homestead law, as we have shown, or the repeal of the pre-emption law impliedly waiving the provisions of the actual settler clause, it must be apparent to the court, under the testimony in this case and under the rulings of the Land Department and the decisions of the courts which we have cited, that this condition has long since become impossible of performance, and that, indeed, it never was capable of such performance as may have been contemplated by the statute.

It will not be doubted that if this statute created a condition subsequent, and perform-

ance, at the time it was enacted, or the estate vested, was impossible, or was rendered impossible by the law or by the grantor—in this case the United States—the condition is void, performance is dispensed with, and the estate vested absolutely.

6 Amer. & Eng. Enc. of Law, 2nd ed., 506.

Scovill v. McMahon, 62 Conn. 378; same case, 21 L. R. A. 58 and note.

In the note to the case last cited, it is said:

"The general rule of law with regard to conditions subsequent is that if the condition be impossible to be complied with, either by the Act of God or of the law or of the grantor, or if it be impossible at the time of making it, or against law, the estate of the grantee being once vested, is not thereby divested but becomes absolute."

See 4 Kent Comm. 130.

This principle was recognized in United States v. Arredondo, 6 Pet. 691, 745, where Mr. Justice Baldwin, speaking for the court, says:

"According to the rules and the law by which we are directed to decide this case, there can be no doubt, that they are subsequent, the grant is in full property, in fee, an interest vested on its execution, which could only be divested by the breach or non-performance of the conditions, which were, that the grantees should establish on the lands, two hundred Spanish families, together with the requisites pointed out, and which shall be pointed out by the superintendency, and begin the establishment within three years from the date of the grant. No time was fixed for the completion of the establishment, and no new requisites or conditions appear to have been imposed. From the evidence returned with the record, we are abundantly satisfied, that the establishment was commenced within the time required (which appears to have been extended for one year beyond that limited by the grant), and in a manner which, considering the situation of that country, as appears by the evidence, we must consider as a performance of that part of the condition. Great allowance must be made, not only from the distracted state and prevalent confusion in the province, at the time of the grant, but until the time of its occupation by the

United States. Though a court of law must decide according to the legal construction of the condition, and call on the party for a strict performance, yet a court of equity, acting on more liberal principles, will soften the rigor of law, and though the party cannot show a legal compliance with the condition, if he can do it cy pres, they will protect and save him from a forfeiture. 4 Dall. 203; 2 Fonb. 217-18, 220; 1 Vern. 224-5; 2 Ibid. 267 and note.

"The condition of settling two hundred families on the land has not been complied with in fact; the question is, has it been complied with in law, or has such matter been presented to the court as dispenses with the performance, and divests the grant of that condition. It is an acknowledged rule of law, that if a grant be made on a condition subsequent, and its performance become impossible by the act of the grantor, the grant becomes single. We are not prepared to say, that the condition of settling two hundred Spanish families in an American territory has been, or is, possible; the condition was not unreasonable or unjust, at the time it was imposed; its performance would probably have been

deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance, after its cession to the United States, would be demanding the 'summum jus' indeed, and enforcing a forfeiture, on principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves, at all events, justified, if not compelled, to declare, that the performance of this condition had become impossible, by the act of the grantors,—the transfer of the territory, the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life. The United States have not submitted this case to her highest court of equity, on such grounds as these, we are not either authorized or required by the law which has devolved upon us the final consideration of this case, to be guided by such rules, or governed by such principles, in deciding on the validity of the claimants' title. Though we should even doubt, if, sitting as a court of common law, and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The proceeding is in equity, ac-

cording to its established rules, our decree must be in conformity with the principles of justice, which would, in such case as this, not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant."

In Board of Commissioners v. Young, 59 Fed. 96, Lurton, Circuit Judge, speaking for the Circuit Court of Appeals, Sixth Circuit, says:

"The heirs of the grantor brought suit in ejectment, claiming the right of reentry for breach of the condition. The court held that, 'even if the condition was not performed, it appears to us that the nonperformance would in this case be excused, as being by act of law, and involuntary on the part of the lessees.' The court cited Bac. Abr. tit. 'Condition'; Com. Dig. tit. 'Condition'; and the case of Brewster v. Kitchell, 1 Salk. 198. The case of Lord Grantley v. Butcher, reported in 51 E. C. L. 115, is to the same effect.

"We are therefore led to the conclusion that if the title was a base or conditional one, yet the breach of condition

> relied upon as creating a right of re-entry is excused, because the breach was the act of the law."

In Jones et al. v. C. & O. R. R. Co., 14 West Virginia 514, 523, the court says:

> "But whether the condition be precedent or subsequent, if the act of the party who imposed the condition, makes its performance unnecessary or impossible, the condition is no longer binding, and the estate conveyed by the deed, in which it is contained, is discharged therefrom. Young v. Hunter, 2 Seld. 203."

In Vanderslice v. Hanks, 3 Cal. 28, 41, the court applies a strict rule for breach of condition subsequent, where no time for the performance of the condition is specified. The court in that case says:

> "Many cases have been decided by the Supreme Court of the United States involving the same question, arising in cases of grants made in Florida and Louisiana. There is, however, no case which I have seen where the grant has been rejected for the non-performance of the conditions, except when a time had been limited in the grant for the performance of the condition and it had

never been performed. This was the case in United States v. Mills' Heir, 12 Pet.; United States v. Kingley, 12 Pet.; United States v. Drummond, 13 Pet.; United States v. Burgevin, 13 Pet.; United States v. Wiggins, 14 Pet. While in the case of Arredondo, where no time was limited, it was confirmed, notwithstanding the nonperformance. The court says: 'We now consider the conditions upon which the grants were made; there can be no doubt that they are subsequent. The grant is in full property in fee, an interest vested on its execution which could only be divested by the breach or non-performance of the conditions.' 'No time was fixed for the completion of the establishment. It is an established rule of law that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single.'

"The very same language, with but little alteration, might be applied to this case. No time was limited for the performance of the conditions, and the day before the country was ceded to the United States, the right of Narvaez to fulfill the conditions was undisturbed and complete.

"It may be said that when no time for performance is fixed, the law will intend a reasonable time; but even if that be conceded, here was a method pointed out by which it should be determined; in the language of the grant 'it shall be denounced by another.'

"Then it follows that even if a reasonable time had elapsed, the denouncement by another, or some other action of the government to enforce a forfeiture, would be the only actual limitation as to time. There was no denouncement, and no complaint by the government. On the contrary, stipulating solemnly for his protection and enjoyment of his property, she cedes the country to another government, and thus, by her own act, puts it forever beyond his power to fulfill the conditions of his grant.

"Blackstone, speaking of conditional grants, says:

'These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God, or the act of the feoffer himself, or if they be contrary to law, or repugnant to the nature of the estate,

> are void. In any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant.' (2 Black. 157.)"

In Burnham and another v. Burnham and others, 79 Wis. 557, the court says:

> "The rule of law is well settled, and in fact elementary, that, 'if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, either by the act of God, or of the law, or of the grantor, or if it be impossible at the time of making it, or against law,—the estate of the grantee, being once vested, is not thereby divested, but becomes absolute.' 4 Kent's Comm. 130; Coke, Litt. 206 a.; 2 Bl. Comm. 156; 2 Jarm. Wills, 521; Davis v. Gray, 16 Wall. 230; Culin's Appeal, 20 Pac. St. 243; Merrill v. Emery, 10 Pick. 507; Parker v. Parker, 123 Mass. 584; Morse v. Hayden, 82 Me. 227; Merriam v. Wolcott, 61 How. Pr. 377; Jones v. Bramblet, 1 Scan. 276; Jordan v. Dunn, 13 Ont. 267."

We shall not discuss in detail the voluminous record containing the testimony as to

the character, situation, and location of these lands. There is scarcely a quarter section of any value but what is chiefly valuable for the timber thereon, and the testimony shows that the applications to purchase, evidenced by many thousands of applications represented by the interveners and cross complainants in this suit, were made primarily, and it may be safely asserted, solely because of the timber value of these lands. The proof also shows that these lands are so heavily timbered or so rough and broken that they are unfit for settlement, and that to remove the timber where the soil is at all adapted to cultivation, would cost more than the lands are worth.

We invite the attention of the court to the presentation of the evidence in this behalf at pages 338-428 of the Brief of Facts herein. This presentation includes reference to the exhibits showing panoramic views and blueprint plats, being Defendants' Exhibit 267, 268 and 269; together with 93 photographic views, being Defendants' Exhibit 270; 84 views, being Defendants' Exhibit 273; 6 views, being Defendants' Exhibit 274; and 4 views, being Defendants' Exhibit 317.

For the convenient and graphic presentation of this view of the case, we file with this

brief a map of the granted lands, which is a compilation and reflection of the proved physical facts of the case. This map is bound and filed separately. If now the court will open this separate map book and spread out the map, it will be assisted in the understanding of the map, we venture to hope, by the following explanation:

This map is a compilation, on a materially reduced scale, of the more important information shown by the maps introduced in the pending suit as Defendants' Exhibits Nos. 249 and 260, as described on pages 6698 and 6699 of Volume XIII of the Transcript of the Record, and as described on pages 1937 and 1941 of Volume IV of said Transcript.

So far as the map represents Defendants' Exhibit No. 259 (page 6698, Volume XIII of the Transcript), it shows in heavy black lines the 20 and 30-mile limits of the East Side grant, and the western and northern 20 and 25-mile limits of the West Side grant. The eastern and southern limits of the West Side grant are not marked, because they fell, by overlap, within the East Side grant.

The solid green coloring shows patented and unpatented unsold lands of both grants, not including unselected indemnity lands.

The green cross-hatching shows granted lands disposed of by the Company either by deed or by contract; the solid yellow shows lands (including unselected indemnity lands not in forest reservations) lost to both grants by adverse entries antedating the time when the grants became operative. The yellow cross-hatching indicates lands unavailable for indemnity selection because within forest or other reservations established by the United States subsequently to the date when the grant became operative—the Company's indemnity selections not having been made prior to the creation of the Government reserves.

So far as the map represents Defendants' Exhibit No. 260 (p. 1941, Vol. IV of the Transcript), it shows the topography of the country within the granted limits, the mountains being indicated by the black hatching, in the usual, conventional way, and the location of the streams being correctly shown.

Unsurveyed areas within the limits of the grant are indicated by dotted lines representing township and section lines. (See lower left-hand corner of map, in green.) Where Government surveys have not been made the topography is not known, and we have therefore not undertaken to indicate the same; as a matter of fact, the reason of such lands

being unsurveyed is that they were too rough and mountainous to survey when adjoining lands were surveyed.

As a graphic representation of the grant, the map shows, in solid yellow, that all of the valleys of any consequence, such as the Willamette Valley in the northern half of the grant, the valley area surrounding Roseburg in the southern part of the grant, and the Rogue River Valley in the vicinity of Grant's Pass and Medford—in a word, the yellow field of the map—were all lost to the grant by entries made by individuals prior to the date when the Company's right to the grant attached. Such entries were largely Oregon donation claims, pre-emption claims, and homestead entries.

The map shows further that, in so far as there were any lands left to be appropriated by the grantee railroad companies (being the green areas), they were confined to the mountainous portions of the territory within the limits of the grants.

It is to be further noted that even within these mountainous portions private entries under the public land laws had appropriated all of the really farmable areas. This will be observed from the scattered yellow seen here and there through the green.

The map brings out graphically, so far as it is possible to do so, the voluminous evidence in the record showing that the railroad companies secured only the mountainous lands because the valley and therefore arable lands had been taken up by settlers before the grant became effective. It has not been possible to show, on a map of this size and scale, the fact shown by the voluminous evidence in the case, and graphically shown on Defendants' Exhibit No. 260, that almost all of the granted area is covered by timber in heavy stands and of considerable value, and that such lands are not, never were, and, barring perhaps small areas, never will be suitable for settlement and cultivation.

It may be added that, while it is sometimes difficult, without a magnifying glass, to differentiate between the solid colorings and the hatched colorings, at the same time this difficulty will be found to be very much relieved by the circumstance that the hatched colorings are lighter in tint than the solid colorings; and where the hatchings occur in any considerable area this difference in tint is quite noticeable. For illustration, take the right-hand side of the map, where the light color of the hatched yellow will be seen, and compare it with the solid yellow in the Will-

amette Valley in the northern part of the map.

It is, as it seems to us, a palpable fraud, not only upon the company but upon the settlement laws of the United States, to assume that these lands are adapted to entry and settlement under the Homestead Act, or that the company could, even if it so desired, administer this grant in the spirit of the settlement laws and convey the title to actual settlers who may desire to settle upon the same for the purpose of making homes. The United States, in the passage of the so-called Innocent Purchasers Act of August 20, 1912, has recognized the non-settlement character of these lands. The report of Mr. Robinson, from the Committee on Public Lands, based upon which this statute was enacted, concedes the non-settlement character of the lands. The Congress of the United States, as early as June 3, 1878, recognized the non-settlement character of these lands by passing the Timber and Stone Act, and in the administration of this act, under the decisions of the Land Department and the construction of the act by the courts, has parted with a considerable proportion of the even sections within the limits of these grants as being chiefly valuable for timber and as not fit for entry or settlement under the settlement laws.

Congress has still further recognized that these lands were not subject to entry by actual settlers, and has, to that extent, changed its public land policy by a repeal of the preemption laws on March 3, 1891.

Under these circumstances, is it consistent to hold that the company must perform the alleged condition and must perform it under the penalty of forfeiture, when the United States, that is seeking to enforce the forfeiture, has declared that these lands are unfit for settlement, and that its own lands cannot be entered in good faith under the settlement laws. Not only is the condition impossible of performance, but it has been rendered practically impossible of performance by the enactment of the various statutes modifying the original contract between the United States and the companies, and by the changed policy of the United States, under which persons who desire to acquire title to lands of the character involved in suit, obtain such title under the Timber and Stone Act and under the lieu selection act, thereby depriving the company of opportunity to secure the sale of its lands of the same kind, and thereby withdrawing by statutory enactment, a large body of citizens who might otherwise have applied to purchase these lands as actual settlers.

VII.

If the terms of the "actual settler" clause be so indefinite and uncertain, as that the company could not, under its terms fairly construed, ascertain the legal measure of its duty, so as to perform the same, and if the law thus fairly construed is not enforcible as a covenant, or trust, or contract, for the benefit of "actual settlers," it is equally and for the same reasons not enforcible as a condition subsequent. There can be no condition subsequent, whether created by contract between private parties, or by grant by deed, or by legislative grant of public lands, to a private party assenting to and accepting such grant, which is not clear, definite and certain in its terms. No breach can arise or be assigned upon a contract, deed, or grant, or legislative grant, which is so indefinite or uncertain in its terms, as that it does not clearly and necessarily appear exactly what the grantee must, (not may) do; in what manner the thing required to be done shall (not may) be done; for whom or what person it shall (not may) be done; and when the things required shall be done. If the act to be performed is not required to be done in some definite and certain way, for a definite and certain class of persons, and for a definite and certain part of the lands granted, within a certain and definite time, under certain and definite rules and regulations

prescribed by law defining the "actual settler," the time and conditions of settlement, and the proof of same, there can be no assertion of any breach by the grantor, nor re-entry by legislative declaration of forfeiture, or otherwise. The grantor cannot forfeit the estate granted, for breach of a condition, the terms of which cannot be specifically and definitely found in the language of the condition.

As a covenant, trust, or contract, the "actual settler" clause is not enforcible, and the court has so held. (Opinion, Vol. II, pages 696-791-818) As a condition subsequent, it is likewise not enforcible. The grantee is not obligated to write into the statute, rules and regulations by which the Pre-emption or Homestead laws could be executed, as to these lands, nor does the statute adopt such rules or regulations as to procedure, or make the Pre-emption or Homestead Act a part of the "actual settler" clause.

It is respectfully submitted that these words, whether creating a covenant or condition, are so uncertain as that the proviso is void and not enforcible for the following reasons:

(a) There is no direction or requirement that the grantee beneficiary, or its successor or vendee, shall sell the lands at all. Unless

it was contemplated that the lands would all be sold pending construction so that the aid contempated by the statute could be furnished at that time, and that impliedly, at least, the Company would offer these lands to actual settlers who would be sure to apply during this period, there is nothing which would require the Company to attempt to offer the lands. The covenant or condition is a negative, there is no breach for non-action,—it is only when there has been affirmative action by the Company and a sale voluntarily made contrary to the limitations, that any breach can be asserted.

(b) The contract is void as a covenant or condition because there is no definitely ascertained person or class of persons named as beneficiary of the trust, or as entitled to enforce the covenant or condition. It cannot be determined from the actual settler clause whether it was contemplated that such actual settler should come under the provisions of the homestead act or under the provisions of the pre-emption act, the only two settlement laws in effect at the time the law was passed. It is at least doubtful which class of settlement was contemplated.

(c) The contract is void as a covenant or condition because it does not fix any time

within which the Company or its assigns shall sell any of this land to any present, future or prospective or possible actual settler.

(d) The contract is void as a covenant or condition because it does not fix any definite area of any of this land to be sold to any present, future, prospective or possible or any actual settler.

(e) The contract is void as a covenant or condition because it does not provide any tribunal for determination of status of any person applying to purchase who may claim to be an actual settler, or to determine priority of application between two or a multitude of applicants desiring to purchase any particular parcel of these lands, and it does not provide any rule or regulation by which the Company must be guided in determining who are actual settlers, a priority of settlement between contestants, or the length of time such person shall reside upon the lands, or any method by which proof shall be taken available to either party, showing that the applicant is a qualified person entitled to take, and has resided upon and cultivated the land as required by the settlement law. The Company could not exercise a discretion in this respect, for if it might exercise a discretion, then there was no contract, but its

enforcement, or the terms of its enforcement, or the methods by which it should be enforced, depended upon the discretion of the administrative agent, in this case the Company.

(f) The contract is void as a covenant or condition because the Company may refuse to sell its lands, and the proviso does not require any sale at any time, to any person, in any quantity, nor does it provide any remedy in case the Company does refuse to sell.

(g) The contract is void is being unreasonable in this: The grant was one in its entirety, and for a single breach of this condition, if valid and enforcible, the entire unsold portions of the grant would be forfeited and thereby the future actual settlers would be deprived of their rights to apply for and purchase these remaining unsold lands.

(h) The contract as a condition or covenant is void in this that it lacks mutuality. There is no obligation assumed by the United States that actual settlers will ever apply to purchase or will buy, and no obligations of any kind are assumed by the class known as actual settlers. There is no time fixed when any purchase or settlement, if at all, shall

ever be made. As a matter of fact from April 10, 1869 up to acceptance of final construction of road, November 8, 1889, no actual settler ever applied to purchase these lands so far as is disclosed by the record and failed to obtain title to the lands for which he applied.

It is stipulated (subdivision 6, item 8, paragraph e, page 15, stipulations as to the Facts) —that only 163,430.28 acres were sold by the Company prior to May 12, 1887, and nearly all of these lands were sold to actual settlers in small quantities, although in some instances such sales were made in quantities exceeding 160 acres to one person, and for prices in excess of $2.50 per acre. It is manifest that if the Company pending acceptance of completion of road on November 8, 1889, could not have sold to actual settlers in area substantially in excess of the amount sold up to May 12, 1887, this illustrates in a practical way that the grant had failed in its primary purposes, to aid in construction of road. If it must be held that the lands could only be sold to actual settlers in the quantities specified, for the prices limited, and if such lands must continue to be so sold indefinitely, it illustrates in a most forcible way the lack of mutuality in the alleged contract, and it is elementary that a contract lacking in mu-

tuality is not enforcible. We need not cite authority to the effect, if an agreement is so uncertain and ambiguous that the court is unable to collect from it what the parties intended, or if the court cannot for that reasor enforce it, that there is no obligation, and therefore no contract.

9 Cyc. 248.

It is also a fundamental rule that a contract relating to the sale of lands should describe or designate the terms to which it relates, that is to say, the contract of sale must be certain or it must be so certain as that it can be made certain. In the case under consideration the actual settler clause is affirmatively uncertain in respect to the quantity of land to be sold, and in view of the fact that no obligation rests upon the Company to sell any of its lands, even conceding there is an obligation to sell a part of a quarter section to an applying settler, it could satisfy the contract by a sale of a single forty to an intending actual settler. If it might do this at its election, it could satisfy the statute by tendering a deed to the applicant conveying eighty acres. There is no minimum area prescribed. There is, therefore, no contract which is enforcible.

29 Enc. of Law. (2d Ed.) 592.

The District Court in its printed opinion, in this case (Transcript Vol. II, pages 817 et seq.), has held that the language of the actual settler clause is not enforcible by the beneficiaries, or, for that matter, by the United States, either as a trust or covenant. In the course of the opinion the Court, speaking of the administration of the grant, says:

> "The land is to be disposed of to no specific person, but to actual settlers, in quantities not greater than 160 acres to each person—a great class of persons—and it was not intended that the bounty should be distributed among the entire class; no single third party can come forward and demand any specific tract of land from the company. This demonstrates the difficulty of selling to actual settlers without the adoption of some rule or regulation for determining who are actual settlers, and to test their good faith. In fact, in the administration of the sale of this grant, the grantee is given considerable discretion. It may require actual settlement upon the tract selected; it may require reasonable improvements; and it may require residence for a reasonable time to insure good faith. It might regulate the payments, requiring cash in hand, or deferred payments; it

might regulate the quantity of land to be sold to each person, not exceeding 160 acres to any one person; and it might regulate the price, not to exceed $2.50 per acre. Indeed, it has a reasonable discretion as to when it shall open up the lands to occupancy and settlement, so that the lands may be disposed of to its advantage, as well as to the advantage of the settlers. How can it be said, then, that Congress has made the offer of sale, to which the grantee has acceded, and therefore that any one, coming forward asserting himself as intending actual settlement, and tendering the price, concludes a bargain with the grantee for the purchase of 160 acres of land? Such was not the intendment or purpose of Congress, and such is not the effect of the grant. Nor is the person claiming to be a settler, who has gone upon the land and is in occupancy of the tract selected; in any better position. There can be no purchase, either by right of settlement or otherwise, until the grantee or its successor has offered the lands for settlement and sale."

It is respectfully submitted that a contract which gives to the vendor any discretion as to the terms upon which the sale shall be

made, the character of settlement upon the lands to be sold, the extent and character of the improvements, the duration of residence, the manner of payment, and all like questions, is not a contract within the meaning of the law, whether the instrument or writing is to be construed as a covenant or condition. The language of the actual settler clause creates a contract if it is sufficiently definite and certain to be binding upon any one. It must be construed like any other contract, excepting, as we have shown, it must be strictly construed, first, to ascertain whether the language creates a condition subsequent, and, second, whether, if it does create a condition subsequent, it is capable of enforcement, and in determining that question the rule of strict construction must obtain. If that be true, it follows as of course, that if there is any discretion as to material matters left to the vendor as one of the supposed contracting parties, either as to terms of purchase, amount of purchase, and conditions of purchase, it is then for all essential purposes unilateral and not enforcible. If it be not enforcible as a contract and void for the reasons we have shown, it cannot be valid as a condition subsequent, or be the basis of a forfeiture or a right of re-entry, or the foundation of a possibility of reverter for breach of the alleged condition. Before forfeiture,

whether by act of Congress or by judicial inquiry and decision, the only right which the United States had was a chose in action, a mere possibility of reverter. It was not an estate or a reversion, or any interest in these lands. It being a mere cause of action which it may bring, or omit to bring, at its pleasure, the United States must be able to point to the specific terms of the contract containing the conditions which have been violated and which gave rise to the cause of action to be asserted.

It is respectfully submitted that there is no distinction or difference in principle between a covenant or a trust on the one hand, and a condition on the other, as to whether or not the words construed created a valid and enforcible obligation.

VIII.

If the "actual settler" clause be a condition subsequent, certain and definite, so as to be otherwise enforcible, then it was repugnant to the grant, and could not have been enforced without destruction of the primary and dominant purpose of Congress to aid in construction of road. If the land thus subject to sale could not have been so sold in time to give the aid intended, the condition was destructive

of the fee intended to be granted, and the condition must give way, as repugnant to the grant.

In the opinion of Samuel L. Wilson of November 11, 1871, (Government's Exhibit 109) and submitted to the Secretary of the Interior, as we have shown, attention is called to the fact that if the actual settler clause in the act of 1869 is construed as a condition applicable for all time, until every parcel of the lands granted shall have been sold, the act of April 10, 1869 in effect would repeal by implication the grant made by the act of July 25, 1866; that the company could not mortgage its lands because such mortgage contemplated the possibility of foreclosure; that if none but such actual settlers could purchase under the limitations and restrictions named, such mortgage would be practically, and in fact, prohibited.

It was further argued by Mr. Wilson that repeals by implication were not favored, and that therefore Congress could not have intended to have made the grant ineffective and prevented that necessary aid in construction of road which the original grant contemplated.

Assuming, for the purposes of the argument, that Secretary Delano technically and

properly construed the words of the actual settler clause to mean that the sales could be made only to actual settlers under the limitations thereof, it may well be that the subsequent silence, acquiescence and assent of the land department from that date, and the acquiescence and assent shown upon the part of the United States, are accounted for upon the assumption, either that these words were considered as a good faith promise or covenant of the same character as that created between the United States and the State, when grants were made to the State for particular purposes, or it may be assumed that the United States, through its land department recognized that the actual settler clause provision was repugnant to the grant and was therefore void.

It is elementary that if an estate is granted or conveyed in fee simple, and in the instrument granting or conveying the same a provision occurs which, if construed literally, would destroy or impair the estate thus conveyed or granted, that such provision is deemed repugnant to the grant and therefore void.

In Varner v. Rice, 44 Ark. 236, 250, the court says:

> "It is certainly a well settled rule of law that where property is conveyed with conditions as to its devolution, use or enjoyment which are repugnant to the nature of the estate or interest granted, the grant prevails untrammelled by the conditions. It becomes absolute. Public policy, too, certainly requires that all property in the hands of its owners should be governed by uniform laws, as to the powers of the owners over it. Stukely v. Butler, 1 Hobart, 168; Bradley v. Peixoto, 3 Vesey Jr., 324; Greenleaf's Cruise, Vol. I, tit. 13, chap. 1, sec. 2, p. 466, 2d ed., and note."

We have already fully discussed the primary and dominant purpose of Congress, and, as we think, have shown that such purpose must be paramount in order that there should be the aid in construction of road intended by Congress. In the light of such purpose, if it must be held that the words of the actual settler clause created a valid and enforcible condition subsequent, it must necessarily follow that such enforcement would destroy this great purpose and deprive the company of the benefits intended and the aid which Congress offered. The Court must therefore apply the strict rules applicable to the construction of conditions subsequent, and in

order to avoid forfeiture and give effect to the intention of Congress, hold that the limitation or restriction is void as repugnant to the grant.

See also *Executors of McDonogh, et al., v. Murdoch et al.,* 15 How. 367, 412.

IX

The "actual settler" clause contemplated that the sales of land and construction of road should be concurrent. It was the intention of Congress that the lands granted should be "applied to the building" of the road, and this application could only be made by sales of the land when made pending construction. In that view, it must have been assumed that "actual settlers" would apply to purchase, and that the company would sell to such applicants all these lands before such construction should be completed. Only by sales in that way could the road be built. It follows, therefore as a necessary corollary to this primary purpose and intention of Congress, that if for any reason "actual settlers" did not apply to purchase these lands, and if they were not sold by or before the final completion of the road and the acceptance of such completion by the United States as in performance of the grant, then and thereafter the "actual settler" clause

would become inoperative, and whether the words of the "actual settler" clause created a covenant or condition, the estate of the company in the lands unsold would become absolute and unconditional. It is not alleged by the United States that in sales of the lands there was violation of this clause prior to the completion and acceptance of the road, and no breach on account of any such sale is assigned.

The fact that no provision is made for the payment of taxes which may be assessed upon these lands, as belonging to the grantee companies, shows that the "actual settler" was such person as may have been upon the land when the grant was made, or as may have entered upon the land as such prior to completion and acceptance of the road, and issuance of patent by direction of the President, for the lands opposite to and coterminous with the constructed portion of the road. It shows that the title to the lands thus occupied or applied for by the "actual settler" prior to issuance of patent, was regarded as public land, as to assessment and taxation, and that until such patent issued or the President had directed its issuance, the grant was held in trust for such "actual settler," and that jurisdiction existed over such "actual settler" who could establish his settlement, residence, and cultivation, and the fact that he was a

bona fide "actual settler." Under such circumstances the land thus applied for and occupied by such "actual settler" was quasi public land, and as such not subject to assessment and taxation, and hence the statute made no provision for payment of any sum other than the flat double minimum price of $2.50 per acre.

The taxes paid from April 1st, 1870, to April 30th, 1911, were $1,827,234.10, and from April 30th, 1911 to April 30th, 1914, $930,-859.97, a total of $2,758,094.07.

The views above indicated in substance were presented by the European & Oregon Land Company and the Oregon & California Railroad Company in a letter of transmittal from the European & Oregon Land Company of date January 27, 1872, addressed to Attorney General Williams (see Government's Exhibits 109, 109-a, 109-b, 109-c and 109-d, Transcript Vol. X, pages 5322-5370).

Therewith was submitted the original opinion of Samuel M. Wilson, of San Francisco, California, bearing date November 11, 1871. It must be borne in mind also that at that time the Supreme Court had not had occasion to construe the rights of actual settlers,—present or potential—under the reservations

contained in these acts, nor had the Land Department definitely ruled at what time the right of the company under these grants attached as against actual or potential settlers.

In Oregon Central Railway Company v. Jones, 14 Land Decisions, 283, 284, Secretary Noble discussing this subject, says:

> "Your decision (meaning the Commissioner of the General Land Office) states that:
>
> " 'Previous to 1886 it had been held that the right under the grant attached at the date of approval thereof, but by Commissioner's decision of February 6, of that year, in the case of Alfred F. Sears against the company, it was held that the grant was a float and attached to no particular tract until the definite location of the road, and that the tract involved having at that date been covered by a homestead entry, was excepted from the operation of the act.'
>
> "The contention on the part of the company is, in effect, that the right under this grant attached upon the passage of the act; that all lands then free from valid adverse right passed, and that thereafter no rights could be acquired, as

against the grant, by settlement upon and entry of the lands.

"It is true that the act recites that the road was in process of construction at the date of its passage, but, aside from the termini, there is nothing to give location to the road.

"The grant was therefore in the nature of a float, until location was made, for, until that act was performed, the lands passing under the grant were incapable of identification.

"It is clear that the act itself did not reserve any lands prior to the definite location of the road, for by the second section of the act it is provided that

> Whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands."

It will thus be seen that prior to 1886 the Land Department had ruled that the right

of the company under the grant attached at the date of the approval of the act. That is to say,—from July 25, 1866, as to the East Side grant, and from May 4, 1870, as to the West Side grant, but on February 6, 1886, in the case of Sears v. Company, it was held that the grant did not attach to any particular tract until the definite location of the road, and that a tract covered by homestead entry at that time was excepted from the operation of the act. Therefore, on April 10, 1869, and May 4, 1870, it must be understood that the rights of actual settlers, that is, settlers upon the land prior to the definite location or survey of the line of road and the filing of a map showing the same, or prior to construction of road and acceptance of same by the President, and direction to issue patents therefor, had not been settled or defined. There was no settled construction of the right of either the actual or potential settler. In this situation, Mr. Wilson in his letter, says:

> "The power of the Companies over the land is left entirely unrestricted, as it must have been to enable them to use the land for the practical purposes indicated. The Companies were put upon limited time, in the construction of their work. The first section of twenty miles was required to be finished in two years, and

at least twenty miles was required each succeeding year, and the whole by the 1st July, 1875. The best mode of obtaining aid, and funds out of the lands, with which to do the work, is left entirely to the good sense, sagacity and business judgment of the Companies. The entire *jus disponendi* was given to the Companies in the most unrestricted manner. In fact the disposition of these lands by the Companies was greatly facilitated by the Government, for a restraint of alienation is placed on the alternate sections remaining in the Government; the price being fixed at double the minimum price of public lands when sold; whilst the Companies might sell at any price, however low. The Government thus placed itself intentionally in a position where it could not compete with the Companies. The latter could get up great auction sales, could invite immigration by low prices, could mortgage, lease, or otherwise dispose of the land, as they might see fit. * * *

"We now come to the Act of April 10th, 1869, and must read it not only in view of the Act of 1866, but in the 'light of surrounding circumstances.' We must, therefore, remember that at the

time of the passage of the Act of 1866, there was no company in Oregon, selected by Congress, as the recipient of the powers and privileges conferred. *That* matter was referred to the sovereign State of Oregon. The Legislature of that State was left to designate a Company. No such designation was made until Oct. 20th, 1868. The Legislature could hardly be charged with neglect. On the contrary, the delay must be attributed to a due regard to the public interests. The Company designated, could be guilty of no neglect, because it could not act until designated. Congress might withdraw its bounty, or change its policy, doubtless, but unless it very clearly indicated that inteition a waiver as to mere points of time, would be assumed, where a Company had acted with all due celerity after its designation. The Federal Government, consistently with comity and public policy, could not treat a Sovereign State with disrespect, and therefore would not inflict a penalty on the Corporation, because of delay in the action of the State itself.

"The Act of 1869 gives the Company that had been designated by the Legislature of Oregon, the right to file its assent

within one year after the Act of 1869, and gives to that filing the same force and effect, to all intents and purposes, as if such assent had been filed within one year after the passage of said Act of 1866.

"There could have been no motive on the part of the Government, to put the Oregon Company, in a less favorable position than the California Company, for the latter, on reaching the State line, could have gone on, under the Act of 1866, with the consent of the Oregon Legislature, and completed the line of road to Portland. The same inducements on the part of the Government to give its aid in 1866, still exists in 1869. The Act of 1869, was, therefore, curative in its nature, and waived the literal performance of the acts called for by the Statute of 1866. * * *

"If it means that 'actual settlers' only' can become purchasers from the Company, and that all the lands, far and near, whether at stations, new towns, or important commercial points, are limited to two dollars and a half per acre, then it not only is directly contrary to the whole scope and bearing of the Act of 1866, but repeals by implication, a great part of

that Act. All this is done, if at all, not by the plain language of the body of the enactment, but by the obscure words of a second proviso. * * *

"The times within which each twenty miles of road and telegraph shall be built, are not changed by the Act of 1869, and the most that can be said would be, that those periods of time, by reasonable construction would run from the date of the Act of 1869. The Sections 2, 4, 6, 8, and 9 of the original Act, must be considered still in force. The object is still 'to aid in the construction of the Railroad, etc.' The mandate still remains that 'the land hereby granted shall be applied to the building of said road, etc.' The word 'assigns' is still annexed to the word 'Company.' The great benefit the Government is to have, as secured by Sections 2 and 5, still remains intact. But if the last proviso to the Act of 1869 is to be read literally, most of those provisions of the Act of 1866 woud be repealed by implication. The Company could no longer sell to the highest bidder, any of its vast acres, could have no auction sale, could not speedily realize, but must await the slow and tedious progress of immigration to an agricultural State.

At least a quarter of a century would pass away, yet short and positive is the time within which the road is to be completed and equipped.

"The Secretary of the Interior too, withdraws the Railroad lands from public sale and settlement, as provided in Section 2 of the Act of 1866, and thereafter no *bona fide* settlement could be made on these lands. The Company could not even Mortgage the lands, because a mortgage always contemplates the possibility of a foreclosure, or other enforced payment, in the ordinary way of judicial sentence, with the right of purchase by the creditors. Yet if none could purchase but settlers, and they only to the extent of 160 acres, each, and that too at two dollars and fifty cents per acre, a mortgage is practically and in fact, absolutely prohibited. Such absurd results could never have been contemplated by Congress; certainly not as the effect of a mere proviso to an amendatory or supplemental Act.

"Take the language of the *proviso* itself, and what can be said of it? Does it mean that no sale shall be made by the Companies, unless made to actual set-

tlers? Is it merely a *power* to sell to actual settlers; or is it, at once, mandatory and limited? *Must* the Company sell to actual settlers against its inclination, and can it sell to no one else? If yes, how long must the 'actual settler' have been such? Can he claim the preemption right the next day after he enters? If not, how long must he have occupied before he can claim it? What kind of occupation is required to make him an actual settler? Will the pitching of a tent do? Or must he have a house? Are enclosures necessary? Must he conform in his settlement to the Government survey, or not? Who is to determine his qualifications as an actual settler? Not the Registers, or any other Government officer, for these cease to be Government lands, and pass to the Company, and the restraint at best, is on the power of alienation, after the lands vest in the patentee. Is the question then to be tried between the 'actual settler' and the Company? Can the 'actual settler' tender his money and claim a deed, and procure a decree of a Court of Equity, enforcing his rights; or a mandamus? If so, the Government would no longer have any interest in the controversy, and the Courts of the land would give a complete

remedy to the settler. If the land were sold by the Company before the settler entered, could he have a right for all time, still to enter, until somebody should become a settler? Can it be that these lands are to remain forever out of market unless some one settles on them? In twenty years from now, will a title traced back through a series of persons to the patentee be conclusive; or must it appear, that the first person claiming from the patentee, was an 'actual settler'? * * *

"Grammatically considered, the word 'only' would be an adjective, qualifying the noun 'settlers', and the meaning would be, that sales shall be made to none others than 'actual settlers'; which would leave the company at liberty to keep its lands forever out of the market, use them itself, or lease them for such terms as it pleases.

"Besides, this reading, as above shown, is in conflict with the whole scope and object of the Act of 1866, and would repeal by implication, some of its most important and necessary parts.

"If the words be transposed, and the word 'only' be placed in proximity to the

words 'shall be sold,' it would be an adverb, and leave the Company at liberty to do as it pleases with the lands, unless in the case of an actual settler, with whom its transactions would be limited to *sales only*. This construction, of course, is not admissible.

"It would be equally absurd to suppose that no actual settler could, where the Company is willing, buy one quarter section 'only'; thus attaching the word 'only' to the quantity named in the proviso.

"All these constructions seem to be so unreasonable, that I have been led to seek for some other meaning to this proviso."

* * *

"Looking then, at the Act of April 10th, 1869, and we find that although the Company designated by the Legislature of Oregon, is given one year after April 10th, 1869, within which to file its assent in the Department of the Interior, yet that Act relates back, and has the same effect as if filed before the 25th July 1867. Being therefore retroactive, Congress was cautious to prevent a wrong being inflicted upon persons whose rights had intervened during this time. The first proviso distinctly reserves the interven-

ing rights of Railroad Companies under the Act of 1866, and provides (what was intended by the original Act) that only one Oregon Company should have a grant of lands under those Acts.

"The second proviso carries out the same principle. During the long lapse from July 25th, 1866, the date of the first Act, and April 10th, 1869, the passage of the last Act—settlers had gone in upon portions of these lands, and made their homes, though they had not yet purchased, or pre-empted, or complied with the homestead laws. They were, however, 'actual settlers,' and might have become, in the process of time (had not the Act of 1869 been passed), entitled to pre-emption or homestead rights. Up to April 10th 1869 no Oregon Company had acquired any right under the Act of 1866; consequently the Secretary of the Interior had not withdrawn, under the Act, the land from market, or settlement. The Act of 1869 operating then retrospectively, these 'actual settlers' were affected, and consequently were intended to be protected by the last proviso of the Act. Rejecting the single word 'only,' and the proviso becomes plain, viz: '*And provided further,* That the lands granted by the

Act aforesaid shall be sold to *actual settlers,* in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.' This would mean 'actual settlers,' at the date of the Act of 1869—or possibly up to the time of the location of the road, after the passage of the Act of 1869.

"The difficulty arises entirely from the use of the word 'only.' But the proviso may, by a slight transposition, give force even to that word; thus making it, that in the case of actual settlers, and in their cases 'only,' the Company would be compelled to let them have a quarter section each, at two dollars and a half per acre. This construction is rational and practical, retains all that is useful, in the original Act, aids the Railroad Company, and yet does justice to the 'actual settler' who was on the land when the Act of 1869 was passed. * * *

"In thus construing the Act of 1869, it is made to perform only a similar to that of the proviso in Section 2 of the Act of 1866. That Section after declaring that the 'land which shall remain in the United States, within the limits of

the aforesaid grant, shall not be sold for less than double the minimum price of public land, when sold,' goes on to protect by the proviso '*bona fide* and *actual settlers*' under the pre-emption laws of the United States, giving the right to purchase, at the price fixed at the date of their settlements, and also to protect settlers under the homestead laws, to the extent of eighty acres of the land reserved to the United States.

"The manifest intention of the last proviso, to the Act of 1869 is likewise to protect the 'actual settler' who is deemed to have a claim on the equity and conscience of the Government.

"I am satisfied from the whole scope of both Acts of Congress, and by applying the recognized rules of construction, that the meaning of the proviso, of the Act of 1869 is what I have given above, and that the power of the Company to sell is unlimited, as to persons and price, except that actual settlers on the lands on the 10th April 1869 and possibly up to the time of the location of the line of the Railroad, have the right to purchase one quarter section each at two dollars and fifty cents per acre."

It is true that the Secretary of the Interior disagreed with the company in this construction of these acts but no affirmative action was ever taken by the United States upon the matter, and the United States, with a copy of the trust deed of June 15, 1870, under which the construction funds for the first 198 miles were raised, and with a copy of the deed from the Oregon and California Railroad Company to the European & Oregon Land Company on file in connection with this correspondence, and having notice of the construction of the act by the companies, acquiesced therein from that date down to April 30, 1908, and permitted the company to mortgage these lands, raise money upon which to construct the road, and to sell the lands in harmony with the views expressed in this correspondence. This was contemporaneous and practical construction of the act, acquiesced in, atfer 36 years, by the United States; but independently of any question of estoppel or waiver, and where the rights of the parties have vested, as here, the rule is well settled that such construction will be followed by the courts.

11 Enc. of U. S. Sup. Ct. Rep., 136, 137, 138, 139, 140, and cases cited.
N. P. R. Co. v. U. S., 36 Fed. 282

Brown v. U. S., 113 U. S. 570

Opinion of Attorney-General Garland, 8 L. D. 13

U. S. v. Railway Co., 98 U. S. 341

U. S. v. Philbrick, 120 U. S. 58

U. S. v. Graham, 110 U. S. 219

Robertson v. Downing, 127 U. S. 607.

Pennoyer v. McConnaughy, 140 U. S. 1

It will be noted also that, as shown by the testimony of Mr. Loring, (volume 4, page 372) the company in the early days kept a book called a "railroad pre-emption book," the purpose of which was to record or not the cases where settlers had entered upon the lands supposing or believing they were public lands, or had entered upon the lands before the company's title had become final, whether because of going upon the lands before they were surveyed or in advance of construction of line or in advance of the filing of map of definite location or prior to the acceptance of the constructed line and the issuance of patents, does not appear.

The Act of July 25, 1866, contains in Section 2 thereof, an express provision that—

> "when any of the said alternate sections or parts of sections shall have been

> found to have been granted, sold, reserved or occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, * * * shall be selected by said companies in lieu thereof."

After providing that the even sections within the limits of the grant shall not be sold for less than double the minimum price of public lands, there is a further proviso, "that bona fide and *actual settlers* under the pre-emption laws of the United States may, after due proof of settlement, improvement and cultivation, as now provided by law, purchase the same at the price fixed for said lands, at the date of such settlement, improvement and cultivation." There was a further proviso that "settlers under the provisions of the Homestead Act, who comply with the terms and requirements of said Act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States; anything in this Act to the contrary notwithstanding."

The words "occupied by homestead settlers," the words "actual settlers under the pre-emption laws," and the words "settlers under the provisions of the Homestead Act," cannot mean the same class of persons in the

same situation. It would seem that the term "actual settlers" under the pre-emption laws of the United States contemplate that class of persons who were upon the even sections at the time the rights of the Railroad Company became definite and fixed under the Act, or who were actual settlers under the pre-emption laws of the United States at some time prior to the issuance of patents. The term apparently is limited to such settlers upon the even sections as were actually upon the lands, and to a class of settlers who were claiming under the pre-emption laws. Another class of settlers, to-wit, those taking under the provisions of the Homestead Act, and who were not defined by the term "actual settlers," who might diminish the quantity of lands going to the Railroad Company, were limited to eighty acres of land in the even sections. There were then three classes of settlers contemplated by Section 2—(1) Homestead settlers or pre-emption claimants occupying portions of the odd sections, which class evidently is limited to those who had entries in the local land offices prior to the time the rights of the Railroad Company attached, whenever that was; (2) Actual settlers under the pre-emption laws. That is, a class of persons who had entered upon the even sections desiring to take under the pre-emption laws but who had filed no declaration

of their intention to take under the pre-emption laws prior to July 25, 1866, or prior to the time when the rights of the company became officially known. These were actual settlers as contradistinguished to potential settlers and were limited to such as were there under the pre-emption laws or who might declare their intention to take under the pre-emption laws, based upon their actual settlement; (3) Settlers under the provisions of the Homestead Act, who were evidently potential or future settlers, who were limited to eighty acres and who might enter such area under the Homestead Act after the rights of the Railroad Company had become definitely fixed and ascertained.

In this situation Congress passed the Act of April 10, 1869, (16 Stat. 47) and used this language, "And provided further, that the lands granted by the Act aforesaid shall be sold to *actual settlers only* in quantities not greater than a quarter section to one purchaser, and for a price not exceeding $2.50 per acre."

On May 4, 1870, (16 Stat. 94) Congress passed the act making a grant of lands to the West Side Company. In Section 1 of that act the grant is made "to the amount of ten such alternate sections per mile on each side

thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act." That is to say,—if there was in the local land office a valid pre-emption or homestead right prior to May 4, 1870, although within an odd section within the limits of the grant, such right was protected, and the land covered thereby did not pass to the company. The date of the passage of the act and the record in the land office fixed the rights of the parties as to that class of settlement or entry.

It must be borne in mind that this railroad was in process of construction at the time the act was passed, but in order that the Land Department might know the extent of the lands affected by the grant, Section 2 required that the company should file with the Secretary of the Interior, maps of the survey and location of twenty or more miles of road, and whenever and as often as this was done, the Secretary was required to cause the granted lands adjacent and co-terminous therewith to be segregated from the public lands and "thereafter the remaining public lands subject to sale, within the limits of said grant, shall be disposed of only to actual settlers, at double the minimum price for such lands," but with the proviso that "settlers under the provisions of the Homestead Act who comply

with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres of said ungranted lands; anything in this act to the contrary notwithstanding." Reading these provisions of the act together, and giving all the words used, full meaning, it appears that there are at least three classes of settlers entitled to protection under the terms of the act; (1) Pre-emption or homestead claimants, whose entries are of record in the local land office, affecting lands within the odd sections, prior to May 4, 1870; (2) Lands within the even sections, after survey of definite location has been filed with the Secretary of the Interior, which must be disposed of only to actual settlers at double the minimum price of such lands, the actual settlers there contemplated evidently referring to those who have settled or who may have settled under the pre-emption law but have filed no declaration to that effect in the local land office prior to the filing of this map of definite location; (3) Homestead settlers who may desire to enter the even sections after the filing of this map of definite location and who are limited to eighty acres. In this situation Section 4 provides, "that the said alternate sections of land granted by this act, except only such as are necessary for the company to reserve for depots, stations, side

tracks, wood yards, standing ground and other needful uses in operating the road, shall be sold by the company only to actual settlers in quantities not exceeding 160 acres or a quarter section to any one settler, and at prices not exceeding $2.50 per acre." Here, for the second time in this act, the words "only to actual settlers" are used. These words must be given a definite and certain meaning, they presumably characterizing and defining the same class of persons named in Section 2 of the act, who were entitled to purchase as actual settlers, at double the minimum price for such lands, such of the even sections as they were then upon, under the pre-emption act, when the map of survey was filed. That is to say, Congress intended that the actual settlers protected by Section 2 might acquire the lands occupied by them under the pre-emption act, where, for any reason, such persons were upon the lands prior to the time the map of definite location was filed, but the remainder of the public lands within the even sections were to be taken under the Homestead Act and limited to eighty acres. There was no reason why the homestead claimant should be limited to eighty acres and permitted to commute his entry at $2.50 an acre within fourteen months after settlement, if, at the same time, 160 acres could be entered under the pre-emption law

at $2.50 an acre within twelve months after filing the declaration.

Bearing in mind, therefore, that these words "only to actual settlers" are limited to a particular class of persons in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, we proceed to a discussion of the meaning of the term "actual settlers."

Black's Law Dictionary, second edition, page 1080, defines the term "settler" as follows:

> "A person who, for the purpose of acquiring a pre-emption right, has gone upon the land in question and is actually resident there."

The author cites the following cases:

> Hume v. Gracy, 86 Tex. 671.
>
> Davis v. Young, 2 Dana (Ky.) 299.
>
> McIntyre v. Sherwood, 82 Cal. 139.

Black's Law Dictionary, second edition, page 28, defines the term "actual" as follows:

> "Real, substantial; existing presently in act, having a valid objective existence, as opposed to that which is merely theoretical or possible; something real, in

opposition to constructive or speculative; something existing in act."

and cites the following cases:

Astor v. Merritt, 111 U. S. 202.

Kelly v. Ben. As'n, 46 App. Div. 79.

State v. Wells, 31 Conn. 213.

Webster's New International Dictionary defines the term "actual" as follows:

"Involving or comprising action; pertaining to or consisting of acts or actions; active; existing in act or reality; really acted, or acting or being; in fact; real; opposed to potential, possible or nominal; non-action at the time of; now existing; present.

The Standard Dictionary defines the term "actual" as follows:

"Real in being or act; carried out or realized in practice; existing in fact, as opposed to merely possible, constructive, conceivable or ideal.

"(Law) Existing in fact; real as distinguished from conjectural or imputel by construction; as actual possession; actual notice; actual damages;

> "Being in existence or action now; existent; present; as the actual state of the country is cheering."

The Century Dictionary defines the term "actual" as follows:

> "Active; practical; in full existence; real; denoting that which not merely can be but is; opposed to potential, apparent, constructive and imaginary; now existing; present; opposed to past and future; as in the actual condition of affairs."

Bearing in mind these definitions and also bearing in mind that the term "actual settlers" is nowhere used in the pre-emption act or in the Homestead Act, it is proper and necessary that the term "actual settlers" shall have a definite and certain meaning and that each word should be given its true legal significance.

This distinction is recognized by Assistant Secretary Pierce in his opinion addressed to the Commissioner of the General Land Office, August 31, 1909, in the case of Adams v. Coates, 38 Land Decisions 179, 180. We quote—

> "On December 14, 1892 (Sen. Ex. Doc., 52d Cong. Vol. III, No. 39), Congress

was advised by the Secretary of the Interior that lands within the Siletz Reservation were 'mostly mountainous and densely timbered with good fir and cedar trees and well watered with rapid running streams which will furnish a good means of getting timber out."

"The Act of August 15, 1894 (28 Stat. 323, 326) opened lands in that reservation to homestead entry, and required—

> final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

"It is to be noted that, while the residence required by the act above quoted is reduced to three years, its character is particularly prescribed—it must be 'actual.' This term is new to Federal legislation concerning proceedings to acquire title to public lands, and it must be presumed that Congress used the same advisedly. The language of the statute being plain and unequivocal, leaving no room for construction, an apt and sensi-

> ble meaning must be given thereto, it being inadmissible to either import anything into it or eliminate anything therefrom in order to change or modify its plain intent."

The Act of August 15, 1894 (28 Stat. 323, supra), was a special statute intended to apply to lands within the limits of the Siletz Indian Reservation, and as a prerequisite to patent, a homestead entryman was required to show that he had maintained an actual residence upon the land for a period of three years. The term "actual" therefore became important. It was believed that when used in connection with the word "settlers" the law intended to give the word a different meaning from that which would be applied from the use of the word "settlers" alone.

In Johnson v. Squires, 55 Cal. 103, 104, the court had occasion to construe "An Act for the relief of purchasers of state lands," under Section 3 of Article XVII of the Constitution, which provided that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers." The court in that case says:

> "The application of plaintiff, we may assume, complied in form and substance

with the law in existence when it was made. Yet we cannot determine that he is entitled to purchase, in view of the prohibitory provision of the Constitution: 'Lands belonging to this State, which are suitable for cultivation, shall be granted only to actual settlers.' Art. XVII, Sec. 3.)

"This language is clear and explicit, and operates as well on applications made before as after the Constitution took effect. As the case shows, appellant has paid no portion of the purchase money, nor has his proposition to buy been accepted by the agent of the State. He has parted with nothing of value, and can neither assert that the State Constitution has 'impaired the obligation' of a contract, or deprived him of property 'without due process of law.' It is admitted by the stipulation—constituting part of the findings—'At the date of the application of Squires (defendant and respondent) neither plaintiff, nor any one under whom he claims, was in possession of said land or any part thereof.' It does not appear from the record, however, whether either party has been in possession since January 1st, 1880. This could not appear, since the judgment of the District

> Court was rendered prior to that date. Nevertheless, we must declare that the land can be granted only to actual settlers. Whether the land could be granted to an actual settler who had been wrongfully dispossessed, need not now be decided. We only say that under the present Constitution the facts as to the possession of the respective parties must be 'found' in all contested cases like the present."

That is to say, the party must have been an actual settler of the land before he was intending to purchase, but his application to purchase could be made before as well as after the Constitution took effect. That is to say, if an application was made by an actual settler to purchase this class of lands, such application, although made before the Constitution took effect, was protected. After the constitution took effect, applications to purchase could be made, but the party at the time of the application must be an actual settler. This shows that the Legislature intended by the use of the word "actual" an added meaning that would not obtain by the use of the word "settler." It clearly meant an actual settler or one who was a settler at the time, rather than a potential or prospective or possible settler.

In Urton v. Wilson, 65 Cal. 11, the court says:

> "For the purposes of the controversy between the plaintiff and defendant, it is necessary only to say that plaintiff has no right to purchase the land. Section 3, Article XVII, of the Constitution of this State, declare: 'Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law.' The plaintiff was not an actual settler. It is true, he made his application before the Constitution was adopted, but he thereby acquired no rights which the State could not annul; he had paid nothing. This question was directly considered and passed on in Johnson v. Squires, 55 Cal. 103. So long as the statute remained in force, the plaintiff's application might have been entitled to be considered, if defendant's application was void; but when the statute was modified by the Constitution, he was obliged to bring himself within the constitutional provision. We note, as referring, in principle, to the plaintiff's case, what is said by the court (by Saw-

yer, C. J.), in Hutton v. Frisbie, 37 Cal. on pp. 490-498, regarding pre-emption laws and the effect of their repeal."

In Dillon v. Saloude, 68 Cal 267, the Court says:

"It is not denied that appellant's application was in all respects proper and sufficient at the time it was made, but it is claimed that after the adoption of the new constitution in 1879, and the amendment of Section 3495 of the Political Code, on the 28th of April, 1880, the land could only be sold to an actual settler thereon, and that as appellant's answer failed to state that he was an actual settler on the land, it was wholly insufficient.

"In support of this view counsel for respondent cites Johnson v. Squires, 55 Cal. 103, and Urton v. Wilson, 65 Cal. 11.

"The constitution provides that 'lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers.' (Art. 17, Sec. 3.)

"This prohibited and made unlawful the sale of any land belonging to the state, which was suitable for cultivation, to one who was not an actual settler thereon, even though his application to purchase it

was made before the constitution was adopted, and when settlement was not required. But it did not prohibit the sale of land to one who was an actual settler thereon, though the fact of his settlement was not stated in the affidavit accompanying his application."

In Gavitt v. Mohr, 68 Cal. 506, the court says:

"Section 3 of Article 17 of the Constitution declares:

" 'Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law.' And section 3495 of the Political Code, after prescribing the conditions and terms for purchasing cultivable land from the state, provides that an applicant, to purchase, must make and file an affidavit in the office of the surveyor-general of the state, setting forth the qualifications of the applicant, the character and condition of the land which he wants to purchase, whether the land is or is not suitable for cultivation, and if it is, that the

applicant is an actual settler thereon. Under the law, therefore, a claimant, to purchase from the state a tract of its cultivable land, must be, at the time of filing his application, an actual settler.

"An actual settler upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it, to take possession for his exclusive occupancy and use, with a view to acquire title to it by purchase from the state. For that purpose, an actual entry upon land belonging to the state, followed by making improvements upon it, or building a house thereon in which to reside, and occupation of the land while doing such acts, are evidence of such a settlement as gives to the occupant, if he possesses the qualifications prescribed by law, an inchoate right to purchase the land, and operates as notice to all the world of the right."

In Bratton v. Cross, 22 Kan. 469, the court had occasion to construe a statute of the state concerning the sale of its school lands, where the words "actual settlers" were used. Mr. Justice Valentine, speaking for the court in that case, says:

"The only question which we think we are called upon to decide is whether, under the laws of Kansas, actual residence is required to enable a person to purchase, to the exclusion of others, a particular piece of the school lands of the state. The decision of this question depends entirely upon the construction that may be given to sections 4, 5, 6, and 20 of Article 14, c. 122, Laws 1876, (Comp. Laws 1879, pp. 854, 857, Sections 195-197, 211). Under said sections only persons who have 'settled upon and improved,' or who are 'actual settlers' upon, such lands, can so purchase them to the exclusion of others.

"Sections 4, 5, and 6 use the words 'settled upon and improved,' while section 20 uses the words 'actual settlers.' To 'settle' upon land, we think, means to fix one's place of residence thereon; and a 'settler' upon land is one who resides thereon. This is in accordance with all the definitions of the words 'settle,' 'settler,' and 'settlement,' when applied to settlements upon land. See any of the dictionaries, and also Smith v. Beck, 25 Pa. St. 106; Burleson v. Durham, 46 Tex. 152; Wilson v. McLernan, 20 Iowa 30, 33; Munday v. Muse, 15 La. Ann. 237; Gilday v. Watson, 5 Serg. & R. 267; Clem-

mins v. Gottshall, 4 Yeates 330; McLaughlin v. Maybury, Id. 534.

"A person who has done nothing more than to make improvements on the land cannot, under sections 4, 5, and 6, purchase the same. He must also have settled upon the land. In the language of these sections, he must have 'settled upon and improved' the land. Both are necessary. Probably a person might, by going upon school land, and making improvements thereon, with a bona fide intention of becoming a settler thereon, obtain rights thereto which would date from the very first moment of his occupany; but he evidently could not purchase the land as an exclusive purchaser until he had completed his settlement. If he did not go upon the land with the intention of becoming a settler, (and that seems to be this case) evidently he would not obtain any rights thereto or thereon. A person residing in New York, or anywhere else in the world, might take possession, and actual possession, of school lands of Kansas, and possession not only of one piece, but of many pieces, and might make improvements on all of such pieces; but we would not think that he would thereby become a settler upon all of such pieces,

or indeed upon any one of them, or that he would thereby get the exclusive right to purchase the same; nor would we think that he would obtain any exclusive rights in or to any of them. But according to the theory of the plaintiff in the court below, he would obtain the exclusive right to purchase every one of them. Where the plaintiff in the present case resides, the record does not show, and we are not informed.

"Section 20, above referred to, after providing for the purchase of school lands by 'actual settlers,' then contains a proviso 'that the person so residing upon said school lands' (evidently referring to 'actual settlers') 'shall have the privilege of purchasing said land, exclusive of the appraised value of the improvements.' Evidently the words 'actual settlers' as here used, mean actual residents."

In Baker v. Millman, 77 Tex. 46, the court says:

"It may be, as claimed by counsel for appellee, that it was not necessary that he should be the head of a family in order to acquire a right of pre-emption in the land claimed by him. The provision of the Constitution in question, in desig-

nating the persons to be protected, does not say heads of families; nor does it use any other words which evince an intention that the right should be restricted to that class; bue the language is, 'Actual settlers residing on said lands shall be protected in the prior right of purchasing that same to the extent,' etc. Cost., Art. 7, Sec. 6. While this language does not exclude single men, it includes only such persons as have actually settled upon the land and are residing upon it at the time the county determines to sell.

"An actual settler upon land is one who has actually established his residence upon it, and not one who has enclosed it and cultivated it, intending at some future time to live upon it. The use of the word 'actual' would seem to have been intended to prohibit the courts from extending the meaning of the word 'settlers' by construction, and to confine the benefits of the provisions to those only who come within the literal meaning of the term. The purpose was to secure to those who had made or should make homes upon the school lands an opportunity to make them permanent by purchase of the lands upon which their residences were established. It was not the

> object to confer any privilege upon those who should enclose and use the lands while they resided elsewhere. The defendant was not residing upon the lands at the time they were sold, and cannot be deemed an 'actual settler' within the meaning of the Constitution."

In Astor v. Merritt, 111 U. S. 202, 213, the Supreme Court of the United States had occasion to construe the words "wearing apparel not actually used," and Mr. Justice Blatchford, speaking for the court, says:

> "The word 'actual' in the lexicon, has as a meaning 'real,' as opposed to 'nominal,' as well as the meaning of 'present.' 'In use is defined to be 'in employment;' 'out of use,' to be 'not in employment;' 'to make use of, to put to use' to be 'to employ, to derive service from.' "

In Osborne v. San Diego Company, 178 U. S. 22, 38, Mr. Justice McKenna says:

> " 'Actual' of course, means existent, but it does not preclude change."

The language thus used was applied in construing the words of a charter of a Water Company, fixing the rates, the contention being that the rates were unalterable under a

clause which provided that "until such rates shall be so established" the actual rates established should be deemed and accepted as the legally established rates.

It is therefore important to determine what was meant by the use of the words "actual settlers only," and if we are to adopt the classification of entrymen, as we have suggested, and the reasoning of the courts, as well as the definitions of the lexicographers, it seems to us clear that by the term 'actual settlers only' is necessarily meant that class of preferred purchasers who entered upon these lands before they were surveyed or in advance of construction, and at some time before the finding of the Land Department that the company had earned the particular lands and was entitled to a patent therefor. That period was the date when the Secretary of the Interior, acting under the statute, submitted the reports of the Commissioners appointed to inspect and examine the completed portions of the road, to the President of the United States, who in turn approved these reports and directed the Secretary to issue patents to the company for the lands thus earned.

Unless it shall be held that the actual settlers contemplated by the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870,

are such persons as availed themselves of the pre-emption act while it was in force, no particular time or term of residence before purchase from the company is required. Construed, as suggested by us, the actual settler clauses of these acts did not contemplate any definite term of residence or any lapse of time before the settler could buy. It was expected that the company would deal with the actual settler as a pre-emption claimant and subject to the same rules and restrictions as to entry and settlement as applied to pre-emption settlers, or else that it would, at its own hazard, sell to a person representing himself to be an actual settler, and convey immediately upon tender of the $2.50 per acre. If the term "actual settler" be construed to mean one upon the land when the title of the company became absolute by construction of road and issuance of patent, there would be no question, after construction of road and its acceptance, but that the act could be held applicable to so-called actual settlers. A late comer, such as one of the class of cross complainants or interveners, nearly 25 years after the final completion of the road, could not relate himself to the actual settler clause because not contemplated by the act, and if such actual settler should be construed to be a potential or possible settler, then after the repeal of the pre-emption law, effected on March 3, 1891, (26

Stat. 1097) the company would, of course, be no longer obligated to sell, because no settler, within the meaning of the act, could apply or show his right to buy.

In McDonald v. Union Pacific R. Co., 70 Neb. 346, the court, construing the Act of July 1, 1862, (12 Stat. 489) which contains the proviso that "all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company," says:

> "It is our opinion that the above mentioned reservation in the proviso of section 3 of the act of 1862, had sole reference to the purchase of public lands by preemption and that it was therefore, as respects the privileges of the public and of citizens, wholly repealed by the act of March 3, 1891; but, for the purpose of restricting the discussion to as narrow limits as possible, we have preferred to treat it, as does the plaintiff, as including the privilege of settlement and acquisition under the homestead laws. As already said, it is quite clear that the de-

fendant has no duty to perform and no authority to exercise under these latter laws, the administration of which is committed solely to a governmental department created by congress. Hence, when the plaintiff tendered his money to the defendant and demanded from it a conveyance of the land in controversy, he required of the latter an act which it was not only under no obligation to perform but the doing of which, if the lands are open to entry under the laws of congress, would have conferred no title or right of possession upon the plaintiff. But upholding the plaintiff's claim the courts would, in practical effect, assume the administration of the public land laws, or, at least, the supervision of the administration of those laws by the department of the interior of the United States, a thing which even the federal courts are confessedly without jurisdiction to do."

There was no vested right in any actual settler designated in the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870, even if such settler could avail himself of the terms of the pre-emption act until he had tendered the purchase price and brought himself, by such tender and statutory qualifications as an actual settler, into relation with the particu-

lar tract of land. Prior to that time, even though the pre-emption law was in effect, the company could not in any view of the case, be obligated. Since its repeal such possibility of purchase and settlement is gone.

Hutton v. Frisbie, 37 Cal. 475, 481, 490, 491.

The company, assuming that the pre-emption act was in effect as to these lands, stood in the same position as the United States as to its lands.

Chief Justice Sawyer, in the case last cited, on this subject, says:

> "No proprietary interest in the land, as against the United States, is acquired till payment. The parties embraced within the purview of the general pre-emption laws are simply authorized to enter the lands in preference to others, when the proper time comes, and the lands are thrown open for sale, on paying the purchase money in the mode prescribed. It is a general law, designating the order of preference to be given to parties desiring to purchase, and a rule for the guidance of the officers of the Land Department in the disposition of the public lands which they are not authorized to disregard with-

out the authority of Congress. It is a mere privilege conferred, so far as the rights of the pre-emptioners are concerned, in case the lands should ever be offered for sale. But they may never be thrown upon the market. There is no right whatever given to have the lands ever open for sale. There is no contract between the pre-emptioner and the Government. There is no obligation on the part of the pre-emptioner to take the property, or of the Government to sell. The claimant may, at the last moment, abandon his pre-emption and locate another, or may decline to take any, and the Government cannot complain. There is no mutual obligation—none on either side. The Government is not bound to sell at all, until, in its discretion, it elects to do so. The statute simply designates the person who shall have the first privilege to enter while the statute remains in force, and when the land is thrown open to entry in the ordinary course of the sales of the public lands. The Government cannot be compelled to throw open the land for entry, or to permit an entry to be made, till in its own good time it sees fit to do so. The pre-emptioner has no contract obligation which he can in any way enforce. If all pre-emption laws

should be repealed and never re-enacted, a party who has merely entered as a pre-emptioner, without payment, would have no right which he could enforce against the Government. He would have no action for damages, and could not compel the issuing of a patent by mandamus. If a party goes upon the public land with a view to pre-emption, he does so knowing that it may never be sold. The Acts of Congress do not present the Government in the character of a party making executory contracts, but in the character of a Government which will, when it determines to sell its public lands, generally dispose of them in accordance with certain rules established by itself. We have no doubt that it is competent for Congress at any time before the payment of the purchase money, to withdraw the land from sale, reserve it for its own use, or repeal all pre-emption laws, and take away any right of entry thereunder. The power exists. It is only a question of good faith and expediency. The right of pre-emption is a mere privilege, given for the time being, and, whatever the case may be with reference to other claimants, while the law is in force, not a right of property as against the Government, and it can be withdrawn at any time before it

> has been perfected into an obligation which can be enforced against the Government itself, and that is before a sale and payment."

The actual settler was preferred to a subsequent purchaser, and in the administration of the pre-emption law, if it was found that a tract of land was actually settled upon at the time, he was given a preferred right of entry.

In Clements v. Warner, 24 How. 394, 397, the court says:

> "By the act of 1841, the pre-emption privilege in favor of actual settlers was extended over all the public lands of the United States that were fitted for agricultural purposes and prepared for market. Later statutes enlarged the privilege, so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers. No act of Congress has defined the meaning of the term reserve, as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. But all other public lands fitted for agricultural purposes, after they have been offered at public

sale, are affected by the privilege of the actual settler to have the preference of entry. No reason of public policy exists to exclude this class of public lands from the operation of the same law, under the same conditions. No violence is done to the language of the act by limiting the exception to the temporary withdrawal of the lands from the market, and the liberal policy of Congress in favor of the actual settler is better accomplished by a restrictive rather than extensive interpretation of the exceptional clause in the act."

This construction is in harmony with the view expressed by Mr. Justice Harlan, who delivered the opinion of the court in United States v. Oregon and California Railroad Company, 176 U. S. 28, 47, where he says:

"No exception is made of lands which, at the date of the passage of the act, were withdrawn from pre-emption, private entry and sale pursuant to the filing by the railroad company of its map of general route. And the court should not construe the act as excluding lands in that condition, unless it is prepared to hold that Congress had no power to confirm to the state lands which, at the time, were sim-

ply withdrawn from pre-emption, private entry or sale for railroad purposes. We cannot so adjudge. The withdrawal order of January 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that of 1866; first, because the act of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd numbered sections, or any of them, within certain limits on each side of the road, at any time prior to the definite location of the line of the railroad; second, Congress reserved the power to alter, amend or repeal each act; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands in aid of the construction of a railroad is, until its route is established, in the nature of a 'float' and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed. The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose

> of enumerated sections for other purposes than those originally contemplated."

That language, it is true, would apply particularly to the Act of July 2, 1864, (16 Stat. 378) and the Homestead Act of May 20, 1862, (12 Stat. 392). See also Leavenworth etc. Railroad Co. v. United States, 92 U. S. 733, 748.

In the case last cited the court takes notice of the original practice by which lands affected by a grant were withdrawn as soon as made, but that such practice was changed.

Mr. Justice Davis, speaking for the court, in reference to the Act of March 3, 1863, (12 Stat. 772) says:

> "The different parts harmonize with each other, and present in a clear light the scheme as an entirety. Kansas needed railroads to develop her resources, and Congress was willing to aid her to build them, by a grant of a part of the national domain, in condition at the time to be disposed of. It was accordingly made of alternate sections of land within ten miles on each side of the contemplated roads. Formerly, lands which would probably be affected by a grant were, as soon as it was made, if not in advance of it, with-

drawn from market. But experience proved that this practice retarded the settlement of the country, and at the date of this act the rule was not to withdraw them until the road should be actually located. In this way, the ordinary working of the land system was not disturbed. Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed; and if it then appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emptors, or reserved by the United States, an equivalent was provided. The companies were allowed to select, under the direction of the Secretary of the Interior, in lieu of the lands disposed of in either of these ways, an equal number of odd sections nearest to those granted, and within twenty miles of the line of the road. Having thus given lands in place and by way of indemnity, Congress expressly declared, what the act already implied, that lands otherwise appropriated when it was passed were not subject to it."

In Northern Pacfic Railway Co. v. Amacher, 175 U. S. 564, 567, Mr. Justice Brewer, speaking for the court, says:

> "The contest in this case is between one claimining under a homestead entry anu a company claiming under a grant in aid of a railroad. It was long ago said by this court that 'the policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person,' Clements v. Warner, 24 How. 394, 397; and in a later case, that 'the law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon.' Ard v. Brandon, 156 U. S. 537, 543."

This illustrates and enforces the reasoning underlying the construction contended for by us. Congress had in mind a class of actual settlers who had entered upon these lands, who might otherwise be deprived of their improvements and of their right to take the lands under the homestead of pre-emption law, unless a preferred right of purchase was given to the actual settler up to the time

when the rights of the company became fixed and definite by issuance of patent.

See also Holmes v. United States, 118 Fed. 995, 999, where Circuit Judge Gilbert, speaking for the Circuit Court of Appeals, Ninth Circuit, says:

> "By the last of these exceptions it was contemplated that there might be a valid settlement of the public lands, other than those which were embraced in legal entries or covered by lawful filings, as those terms were used in the public land laws. Does the settler upon unsurveyed land, who makes it his home with the intention, as soon as the land is surveyed, to take the necessary steps to secure and protect his entry as a homestead, and to acquire title under the homestead law, and who makes valuable and permanent improvements on the land, make a 'valid settlement pursuant to law?' In Clements v. Warner, 24 How. 394-397, 16 L. Ed. 695, it was said:
>
> " 'The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon.'
>
> "In Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, it was said:

"'A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase.'

"In Railroad Co. v. Osborne, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346, it was held that a settler upon public unsurveyed land, who had made improvements thereon with the intention of acquiring a title under the pre-emption laws as soon as the lands should be surveyed, had a 'possessory claim' such as was protected by the act of congress in granting to a railroad company a right of way over the public lands, and conferring upon a territorial legislature power to 'provide for the manner in which private lands and possessory claims on the lands of the United States may be condemned.' The court said:

"'It would not be easy to suppose that congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers.'"

In Southern Pacific Railroad Co. v. Bell, 183 U. S. 675, 679, the court says:

"The relative rights of railroads and settlers under these Congressional grants, all of which are couched in similar language, have been the subject of much litigation in this court, the main object of which has been to fix the time when the right of the roads to particular lands within both the place limits and the indemnity limits finally attaches as against both prior and subsequent settlers. Although at the last term of this court the question involved in the case under consideration was practically settled in Hewitt v. Schultz, 180 U. S. 139, the progressive steps by which the conclusion in that case was reached will show the difficulties which have attended the solution of these questions, and, as we think, indicate the logical necessity of affirming this case. Two objects have been kept steadily in view: First, securing to the railroad the benefit of the lands actually granted; second, protecting, as far as possible, the right of the public to lands not actually granted, or necessary to indemnify the roads for lands which have become unavailable to it within its granted limits, by reason of the fact that they have been otherwise disposed of prior to the designation of the line of the road."

In Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 638, Mr. Justice Miller, speaking for the court in a case which is or may be considered a land mark in land-grant law, says:

> "It will be observed that by the act of 1862, upon the filing of the company's map of designation of its general route, the Secretary was required to withdraw the lands within fifteen miles of said designated route from 'pre-emption, private entry, and sale.' In the terminology of the laws concerning the disposition of the public lands of the United States, each of these words has a distinct and well-known meaning in regard to the mode of acquiring rights in these lands. This is plainly to be seen in the statutes we are construing. In the third section of granting clause there are excepted from the grant all lands which at the time the definite location of the road is fixed had been sold, reserved, or otherwise disposed of, and to which a pre-emption or homestead claim had attached. Here sale, pre-emption, and homestead claims are mentioned as three different modes of acquiring an interest in the public lands, which is to be respected when the road becomes located, and the

> words are clearly used because they were thought to be necessary. But a sale for money in hand, by an entry made by the party buying, is throughout the whole body of laws for disposing of the public lands understood to mean a different thing from the establishment of a pre-emption or homestead right where the party sets up a claim to a definite piece of land, and is bound to build on it, make fences, cultivate and reside on it for a period of time prescribed by law."

This clearly recognizes the classes of entry and the classes of persons entitled to enter, and is in harmony with the views that we have suggested, that the words "actual settlers only" had reference to a distinct and well-understood class.

Judicial opinion as to the effect of the clause in the Act of July 1, 1862 (12 Stat. 489), granting lands to the Union Pacific Railroad Company, which provided that the lands thereby granted, which should not be sold or disposed of by the company within three years after the entire road shall have been completed, should be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 per acre, to be paid to the company, is interesting, in that the

courts attempt to harmonize and give effect to all of the provisions of the act.

It was ruled in Platt v. Union Pacific Ry. Co., 99 U. S. 48, as we have seen, that lands that were mortgaged to aid in construction of the road, were disposed of within the meaning of this provision, and that the primary purpose of Congress must control, and the privilege of settlement under the pre-emption law, and purchase from the company at $1.25 per acre, must give way to the dominant purpose of Congress, as evidenced by the grant, intending that the company should use the lands to aid in construction of road.

In Railway Co. v. Prescott, 16 Wall. 603, the Supreme Court of the United States held that this clause created a contingent right of pre-emption in these lands and constituted an exemption of the lands from state taxation. That case was afterwards overruled in Railway Co. v. McShane, 22 Wall. 444.

In the case of United States v. McShane, 3rd Dillon, 303, 310, Circuit Judge Dillon, speaking of this provision, says:

> "It is not my purpose to discuss at length the respective rights of the general government and of the railroad company in the lands, after the lapse of three

years from the completion of the road, nor whether a mortgage of the lands is such a 'disposition' of them as would defeat the right of settlement or pre-emption. The proofs show that the company has dealt with these lands, and is now dealing with them as if they were in all respects their absolute property. They are advertising and selling them at their own prices and upon their own terms, and they do not recognize the rights of the public to settle upon and pre-empt them, and to buy them at $1.25 per acre. On the other hand, neither congress nor the interior department has taken any steps to subject these lands to settlement and pre-emption, and the public are denied the right to the benefit of the privilege or reservâtion in their favor.

"I am inclined to consider the true meaning and effect of the provision in question to be this: While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or pre-emption; after three years have elapsed, the company may still sell or dispose of their lands

in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain —the price not exceeding $1.25 per acre, being payable to the company instead of the government.

"This view harmonizes and gives effect to all the different provisions of the act. The right of the company to the lands granted is a substantial one. The title passes to the company. Patents are required to be issued to the company conveying the 'right and title to the lands.' During the three years the right of the company to sell at its own price is clear, and has not been denied. After the three years the title does not change. The company still owns the lands, but 'subject' to the right of any person possessing the qualifications of a pre-emptor, to settle upon them and obtain them as a pre-emptor may obtain other public lands. But this right does not prevent the company from selling lands in good faith to persons who may not wish to pre-empt or occupy them. The rights intended to be given to the public are secured and the evils apprehended from

the company having a monopoly of such a vast amount of lands, are avoided by this construction—which recognizes the right of the actual settler to pre-empt the lands, and thus destroy the monopoly, and also the right of the company actually and in good faith, to sell any tract not at the time pre-empted, and which, if sold, likewise destroys to that extent the monopoly, since a sale of lands is usually the first step towards their settlement and cultivation.

"If this be a correct view of section three of the act of 1862, it results that the lands of the company so far as they are patented, are subject to taxation by the authority of the state, and this privilege reserved in favor of the actual settler, and of which he may never wish to avail himself, which is contingent in its nature and subject to be defeated by a sale of the lands by the company, is not inconsistent with and will not defeat the rightful authority of the state to tax the lands."

In Railway Co. v. McShane et al., 22 Wall. 444, the Supreme Court of the United States affirmed the decree of the court below and held that the lands were subject to taxation.

Mr. Justice Miller, speaking for the court, says:

> "The road was completed and accepted by the President in May, 1869, and these lands have been subject to such preemption since three years from that date, if this right can be exercised by the settler without further legislation by Congress, or action by the Interior Department. We do not now propose to decide whether any such legislation or other action is necessary, or whether any one, having the proper qualification, has the right to settle on these lands and, tendering to the company the dollar and a quarter per acre, enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an indefinite period of time. The company, meantime, obtains the title, sells the lands when a good offer is made, and exercises

all the other acts of full ownership over them, without the liability to pay taxes.

"We are of the opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not; and so far as the opinion in the case of Railway Company v. Prescott asserts a different doctrine, it is overruled."

The case last cited was decided by the Supreme Court at the October term, 1874, while the case of Platt v. U. P. Ry. Co., 99 U. S. 48, was not decided until the October term, 1878.

In Heath v. N. P. Ry. Co. 38 Land Decisions, 77, Assistant Secretary Pierce, construing the Joint Resolution of May 31, 1870, (16 Stat. 378) making a grant of lands between Portland and Puget Sound to the Northern Pacific Railway Company, which contained a proviso that all lands thereby granted, which shall not be sold or disposed of, or remain subject to the mortgage authorized by the act, at the expiration of five years after the completion of the road, should be subject to settlement and preemption like other lands, at the price, to be paid to the company, of not exceeding $2.50 per acre, says:

"Moreover, the main purpose of the grant made by the joint resolution was the construction of the road from Portland to some point on Puget Sound, and, if Congress also intended by the proviso under consideration that the land remaining unsold five years after the completion of the road should be subject to preemption to the end that the country might be rapidly developed, such latter intention was surely secondary to the main purpose of the grant and if not compatible therewith must yield to such main purpose, and, if necessary, fail entirely. See Platt v. Union Pacific Railroad Company. Congress evidently supposed that within five years after the completion of the road all of the lands granted would be surveyed and the entire matter finally settled, while in fact such has not been the case. The road was completed not later than June 10, 1888, and even at the present time the grant has not been finally adjusted and all of the lands have not been surveyed. It is too obvious for argument that the failure of the Government to survey the lands has seriously interfered with the company's ability to finally dispose of the same to advantage because, while it might have been entirely feasible to raise

money upon mortgaging the inchoate, indefinite claim to lands generally, it would be wholly impracticable to sell such lands and receive therefor anything like the actual market value of the lands themselves. * * *

"Moreover, the preemption law which was in existence at the date of the grant to this company was repealed by the Act of March 3, 1891, (26 Stat. 1097). Appellant claims that the term as used in the repealing statute applied only to the technical preemption act of 1841 and cites decisions of the Department where the term 'preemption' has been held to have a much broader meaning than that applied to it in connection with the act of 1841.

"In answer to this it is sufficient to state that by section 4 of the act of March 3, 1891, supra, not only was the preemption law of 1841 repealed but all other laws allowing preemptions of the public lands of the United States were repealed. See the decision of the Court of Appeals of the District of Columbia in the case of Menasha Woodenware Company, assignee of William Gribble (37 L. D. 564.)"

We need not, therefore, for the purposes of the contention we are now making, consider the question whether Congress by the Act of April 10, 1869, or by Section 4 of the Act of May 4, 1870, could compel the Railroad Company, after having granted the fee to these lands, to sell the same to so-called "actual settlers" not then in existence, and to a class of actual settlers not definitely in existence at some time prior to issuance of patents. This construction of the actual settler clause harmonizes with the main purposes of the grant and clearly indicates that the words "actual settlers only" had relation to a preferred class, and that Congress did not attempt, either by condition subsequent or by a covenant resting upon the good faith of the grantee, to control the title to this land after patent had issued.

It is familiar history that the pre-emption law, although the first act passed by Congress as early as 1830, which attempted to legislate in favor of the settler, was the instrument under which large areas of the public lands passed to persons other than bona fide settlers upon the public lands.

Donaldson's work entitled, "Public Domain," vol. 19, House Miscellaneous Documents, Second Session, 47th Congress, 1882-83, pages 214, 215, 678, 695, 1247.

Pressure to repeal the pre-emption laws became so great that the repeal was finally effected by the Act of March 3, 1891, (26 Stat. 1097) and with it, as we have seen, not only the policy of the United States, as to disposition of its public lands under the pre-emption law, requiring a short term settlement and a purchase in cash, was discontinued. The obligation of the company under these grants, even if the pre-emption law was at no time applicable to the land grants of the company, was waived, in harmony, it may be said, with the policy indicated by the Timber and Stone Act of June 3, 1878, (20 Stat. 89).

Furthermore, it will be remembered that on March 3, 1853, (10 Stat. 244) Congress passed an act providing "that the pre-emption laws of the United States, as they now exist, be and they are hereby extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States, wherever public lands have been or may be granted by Acts of Congress;

and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same in soldiers' bounty land warrants, estimated at a dollar and twenty-five cents per acre, or in gold and silver, or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction; Provided, That no person shall be entitled to the benefit of this act who has not settled and improved, or shall not settle and improve, such lands prior to the final allotment of the alternate sections to such railroads by the General Land Office; And provided further, That the price to be paid shall in all cases be two dollars and fifty cents per acre, or such other minimum price as is now fixed by law, or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres."

This statute was in effect, unrepealed, on April 10, 1869, and May 4, 1870. It was unrepealed on May 28, 1862, (12 Stat. 392) when the Homestead Act was passed. It gives precision and legal accuracy to the words "actual settlers only" used in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870. This act expressly provides, as we have seen, that no person should be entitled

to the benefit of it, who has not settled and improved, or who shall not settle and improve, such lands prior to the final allotment of the alternate sections to such railroads by the General Land Office. This must be construed to mean that, until the action of the Land Department in withdrawing the lands for the benefit of the grant made, an actual settler may, under the pre-emption laws, at the price of $2.50 per acre, acquire not to exceed 160 acres; but that after the final allotment—whatever those words may be construed to mean—the privilege in favor of the actual settler, is lost.

This construction of the Act of March 3, 1863, harmonizes the original act of July 25, 1866, as amended April 10, 1869, and also harmonizes all the provisions of the Act of May 4, 1870. It gives security to titles granted by these acts, and the patents issued have probative, final and conclusive effect. There would remain no secret, reserved, right of action in favor of the United States, based upon a possibility of reverter, resulting, as here, in an attempt by the United States to assert a breach of an alleged condition subsequent and to re-enter upon these lands forty-two years after the first patents were issued to the company, and after the company had conveyed these lands to other per-

sons, in some instances by warranty deeds, and after it had mortgaged these lands to secure construction funds, and after it had expended large sums of money to complete construction of road, and in various ways had relied upon and supposed it owned an absolute title in fee simple.

It is therefore respectfully submitted that the court should adopt this construction thus acted upon, and under which the rights of all the parties have been fixed. This is not only a just and reasonable construction but one which gives effect to all the words of the statute, and is in harmony with the public policy of the United States in respect to the disposition of lands of the class involved in this suit.

While we cannot consider the individual opinions of members of Congress, expressed in debate, on a measure which afterwards becomes a law, as to the meaning of such measure, it may be helpful to note that Mr. Sargent, in discussing the bill which became the Act of May 4, 1870, said:

> "One word in regard to the policy of land grants for railroads in the future. If they can be carefully guarded, as this bill is, *so that while they construct roads*

> the lands shall also go to the settlers in limited quantities, at small prices, then I am in favor of them."

This may well be a proper construction of the act, as passed. It was no doubt expected that with the announced construction of the road, settlers would apply for and purchase these lands. However that may be, it should be held to have been the intendment of the act and the intention of Congress that the lands would be applied for by actual settlers and purchased pending construction, so that the company might have the benefit of the purchase price and so that the primary purpose of Congress might be effected.

X.

(1) The lands involved in suit were mainly patented more than five years prior to the commencement of this suit, and these patents were all issued by the United States with full knowledge upon the part of the Government of continuous breaches of the so-called "Actual Settler" clause. The cause of suit, or action, to recover these lands, and to assert the breach, arose when each breach occurred, and the United States, as to all breaches occurring prior to issuance of patents, is necessarily barred after the expiration of five years following the date of

patents issued prior to March 2, 1896, and after six years following the date of patents issued after that date. The Act of March 3, 1891, (26 Stat. 1905), the Act of March 2, 1896, (29 Stat. 42), read in connection with the Act of September 29, 1890, (26 Stat. 496) as also Rev. Stat. Section 1047, is more than a mere statute of limitations. It is title in fee simple, without condition or possibility of reverter; and if the United States is to be deemed a formal party in aid of the interest of settlers, the general defences of laches and limitations are open.

(2) The Oregon and California Railroad Company, on March 29, 1870, by its deed of that date, became the purchaser, for value, of all the lands granted by the Act of July 25, 1866, to the East Side Company, and on October 6, 1880, by its deed of that date, for value, became purchaser of all the lands granted by the Act of May 4, 1870, to the West Side Company, and the Oregon and California Railroad Company has been ever since said dates respectively, the bona fide owner and in possession of the lands so granted, and as such, patents issued to it, and, as such, the Oregon and California Railroad Company is a bona fide purchaser, and has been recognized as such by the United States, continually since the dates of said deeds, respectively.

Independently of the effect of the issuance of patents from 1871 down to 1909, as shown by Exhibit 11 to the Answer, and as admitted by subdivision 19, item 3, page 40, "Stipulation as to the Facts," as constituting waiver and estoppel as against the United States, it seems to us beyond doubt, that the United States can not by this suit do indirectly what it could not do in the face of the act of March 3, 1891 (26 Stat. 1095), and the act of March 2, 1896 (29 Stat. 42), limiting the time in which suits to set aside patents may be brought to the period stated. As well said in *United States v. Arredondo,* 6 Pet. 691, 728:

> "A patent under the seal of the United States, or a state, is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. Patterson v. Winn, 5 Pet. 241. The grants of colonial governors, before the revolution, have always been, and yet are, taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation or denial by the king, and his consequent acquiescence and presumed ratification, are sufficient proof, in the absence of any to the contrary (subsequent to the grant), of the royal assent

> to the exercise of his prerogative by his local governors. This or no other court can require proof that there exists in every government a power to dispose of its property; in the absence of any elsewhere, we are bound to presume and consider, that it exists in the officers or tribunal who exercises it, by making grants, and that it is fully evidenced by occupation, enjoyment and transfers of property, had and made under them, without disturbance by any superior power, and respected by all co-ordinate and inferior officers and tribunals throughout the state, colony or province where it lies."

This suit is in effect a collateral attack upon these patents in this, that if the United States should prevail and these lands should be forfeited and the title of the United States quieted, there would be a decree directly in the face of the formal conveyance of this title by these many patents.

In *United States v. Winona & St. P. R. Co.*, 67 Fed. 948, 957, Sanborn, Circuit Judge, speaking for the Circuit Court of Appeals, Eighth Circuit, says:

> "In all these cases the land that was the subject-matter of the patents or cer-

tificates, and the rights of the claimants to it, were not subject to the jurisdiction of the land department. That department had no jurisdiction to hear and determine these claims, or upon such determination to dispose of the lands. On the other hand, in every case to which our attention has been called in which the power to hear and determine the claims of applicants for lands of the United States, and upon such determination to dispose of these lands, either under the pre-emption or homestead laws, under grants for railroads or other corporations, or by sale, or in any other recognized mode, has been vested in the land department, the supreme court has uniformly held that the patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack. Minter v. Crommelin, 18 How. 87, 89; U.S. v. Schurz, 102 U. S. 378, 401; French v. Fyan, 93 U. S. 169, 172; Quinby v. Conlin, 104 U. S. 420; Smelting Co. v. Kemp, 104 U. S. 636, 645-647; Steel v. Refining Co., 106 U. S. 447, 450, 452, 1 Sup. Ct. 389; Heath v. Wallace, 138 U. S. 573, 585, 11 Sup. Ct. 380; Knight v. Association, 142, U. S. 161, 212, 12 Sup. Ct. 258; Noble v. Railroad Co., 147 U. S. 174, 13 Sup. Ct. 271;

Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030."

These patents if erroneously issued should have been set aside under suits authorized by the act of March 3, 1887, and they were erroneously issued if they were issued at a time when the company had continually, to the knowledge of the United States, violated this alleged condition subsequent and subjected the title to forfeiture.

Since this suit was commenced the Secretary of the Interior has suspended further issuance of patents upon the express ground that it is claimed that there has been a breach of the condition subsequent and that the United States has declared a forfeiture and the matter is now in court.

It was the duty of the United States, acting by its land department, to see that the conditions of the grant were observed by the company, and this duty was a continuing one from the inception of the title to the date of issuance of patent, and even until the statute of limitations had fully run.

In *United States v. Winona,* etc., R. Co., 165 U. S. 463, 475, affirming 67 Fed. 948, Mr. Justice Brewer, speaking for the court says:

"Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the Government to insist upon the letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be *conclusive* against the Government, and this notwithstanding any *errors, irregularities* or *improper action* of its officers therein."

In *Smelting Co. v. Kemp,* 104 U. S. 636, 640, Mr. Justice Field, speaking for the court, says:

> "The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon

matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with."

In *Steel v. Smelting Co.*, 106 U. S. 447, 450, Mr. Justice Field, speaking for the court, says:

"That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the

qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

In *Maxwell Land-Grant Case,* 121 U. S. 325, 381, Mr. Justice Miller, speaking for the court, says:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of

title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

It was unnecessary to pass the joint resolution of April 30, 1908, in order to enable the United States to assert its rights in respect to these lands and determine by an appropriate proceeding whether or not there had been a breach of the alleged condition subsequent, whether the actual settler clause created a condition subsequent, and generally to fix the status of these lands. Such suit need not have been necessarily to set aside these patents as having been erroneously issued, but the general jurisdiction of a court of equity could have been asserted by the United States in this court to determine these questions.

In *United States v. Missouri &c., Railway Co.,* 141 U. S. 358, 381, the court says:

> In *United States v. San Jacinto Tin Co.,* 125 U. S. 273, 286, which was a suit by the United States to set aside a patent alleged to have been improperly issued, and in which the right of the Attorney General to bring such a suit was denied, this court held that such an action could be maintained where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own. In the recent case of

United States v. Beebe, 127 U. S. 338, 342, it was said: 'And it may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake, or obtained by fraud, where the Government has a direct interest, or is under an obligation respecting the relief invoked . . . Even if it had not been thus authoritatively settled, it would have been difficult, upon principle, to reach any other conclusion. The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and, under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. If a patent is wrongfully issued to one individual which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the

knowledge of the Government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the Government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the Government to institute judicial proceedings to vacate such patent. In the case before us, the bill avers that the patents, whose cancellation is asked for, were obtained by fraud and imposition on the part of the patentee, Beebe. It asserts that there exists, on the part of the United States, an obligation to issue patents to the rightful owners of the lands described in the bill; that they cannot perform this obligation until these fraudulent patents are annulled, and that they therefore bring this suit to annul these fraudulent instruments, whose existence renders the United States incapable of fulfilling their said prior obligation.' These principles equally apply where patents have been issued by mistake, and they are specially applicable where, as in the present case, a multiplicity of suits, each one depend-

> ing upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice."

It could have been determined in such a court of equity whether the words of the actual settler clause created a promissory or good faith covenant depending for its enforcement upon the good faith of the grantee, and whether any intending actual settler had any right to apply to purchase any of these lands. Such suit could not have been brought to enforce the clause as a trust or contract in favor of the alleged beneficiary, but the status of the land and the right of the public under a proper administration of the grant could have been thus determined, and it was the duty of the United States from the beginning to have asserted this public right in behalf of the class of its citizens contemplated by the act.

A remedy was found in the case of *Whiteside County v. Burchell,* 31 Ill. 68, 78, where it was held in a proceeding brought in chancery by the State's Attorney, that the grant there under consideration was made directly to the State without any limitation of its

power, and that the execution of the grant rests in the good faith of the State.

It could have been determined in any suit brought by the United States whether these words in the actual settler clause vested in the company title to these lands and left their disposition under the actual settler clause to the good faith of the grantee delegated in that behalf to perform a public duty.

See also *Dunklin County v. District County Court of Dunklin Co.,* 23 Mo. 449, 456.

See also *Cooper v. Roberts,* 18 How. 181; *Gaston v. Scott,* 5 Or. 48, 54.

The case of *Steel v. Smelting Co.,* 106 U. S. 447, and the rule there announced, was followed by the court in the case of Small v. Lutz, 41 Or. 570, 578.

If a private party had executed deeds to these lands covering a period of years from 1871 down to 1909, aggregating 2,894,566.98 acres, as patented here, and such grantor had so executed such deeds with knowledge of the alleged breaches, and if, from time to time, the grantor had dealt with his lands in the way we have shown the United States has dealt with its lands, and if this private grantor had prescribed certain rules by which

it should be determined whether the grantee had complied or was complying with the terms of the deeds, would not his cause of action be deemed to arise at the moment he discovered any breach of the condition under which the title was held, and would not such person be called upon to act with promptness and to observe in that respect the limitations of the statute of limitations? What reason is there to apply a different rule to the United States where it disposes of its lands in its proprietary capacity, and especially where, as here, it exercised that proprietary capacity primarily to secure the construction of a railroad, which it greatly desired, and also granted the land with a supposed limitation or condition that they should be so applied to aid in the construction of the road, and at the same time should be sold to actual settlers in small quantities, at this limited price, in the interest of its land policy and in the interest of its citizens of that class? Why should not the United States be barred of its right to assert or enforce this possibility of reverter which it is claimed was created by the condition?

Furthermore, the act of September 29, 1890 (26 Stat. 496), was a statute of repose, and was intended to be an exercise, once for all, of the right of forfeiture of lands granted

to railroads for their failure, or the failure of any one of them, to comply with any of the terms or conditions of the grant.

The attention of the Court is called to the history of this legislation on the subject matter.—

Senate Report No. 906, of date January 2, 1883, accompanying Bill S. 2301, providing for the forfeiture of railroad grants in certain cases (see Vol. X, Testimony, pp. 22-310) is a report from the Judiciary Committee of the Senate, of which Mr. Garland was chairman. The bill recommended for passage accompanies the report, and section 3 thereof reads as follows:

> "Section 3. That nothing in this act shall be construed to be a waiver of any condition or requirement imposed upon any corporation or in respect of any such grant by the act or acts granting land to or in aid of it, or amendatory thereof."

The debates in Congress at that time show that forfeiture of unearned railroad grants was an important and dominant matter, and this continued from 1883 up to September 29, 1890, when the general forfeiture act was passed. As we shall presently see, this section 3, expressly providing that the bill, if

passed, should not be construed to be a waiver of any condition or requirement imposed by the grants was eliminated in the same way that section 7 of the substitute bill reported by Judge Payson, as chairman of Committee on the Public Lands, was eliminated.

It will be remembered that on March 8, 1886, Mr. Henley, from the Committee on the Public Lands, made a report, known as Report No. 931, for the forfeiture of this particular grant, and that he submitted an elaborate argument justifying the report. The bill reported by Mr. Henley was intended to apply to the grant made to the California & Oregon Railroad Company in California.

On the same day Mr. Henley, from the Committee on the Public Lands, submitted Report No. 930, supporting a bill to forfeit this grant in so far as it applied to the Oregon & California Railroad Company.

On May 24th, 1884, Mr. Lewis, from the Committee on the Public Lands, submitted Report No. 1664 to accompany a bill or resolution prohibiting the confirmation, certification and patent of unearned land grants. Accompanying each of these reports was a strong minority report.

On May 29th, 1890, Mr. Payson, chairman of the Committee on the Public Lands, made

a report, No. 2215, to the House of Representatives, Fifty-first Congress, First Session, entitled "Lands granted to aid in the Construction of Railroads," and at the same time submitted a substitute bill. This report, with the bill, is introduced in Vol. 6 of the testimony, page 1896, and is copied in Vol. 6, pages 1898, 1905. Section 7 of the substitute bill reads:

> "Sec. 7. That nothing in this act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant."

Mr. Holman in his speech July 16, 1890, upon Senate Bill 2781, which became the Act of September 29, 1890, (26 Stat. 496) said:

> "The House in the 48th Congress on its first day adopted Mr. Holman's resolution:
>
> "RESOLVED that in the judgment of this House all the public lands heretofore granted to states and to corporations to aid in the construction of railroads so far as the same are now subject to forfeiture by reason of the nonfulfill-

> ment of the conditions on which the grants were made, ought to be declared forfeited to the United States and restored to the public domain, etc."

He quoted also from the reports of the Commissioner of Railroads for the years ending June 30, 1882, (page 42) and June 30, 1883, (page 49) showing the average price per acre obtained by the Northern Pacific Railroad Company for its granted lands, as reported to the Commissioner of Railroads. (See Volume 21 Congressional Record, Part XI, pages 574, 576 Appendix.)

On July 17, 1890, as disclosed by the Congressional Record, Volume 21, Part VIII, 51st Congress, First Session, page 7384, Mr. McRae said in discussing the General Forfeiture Act then pending:

> "Mr. Chairman, a word or two in reply. My friend says we ought to have a "bill of peace." That is exactly what we are trying to get. The gentleman speaks of a "bill of peace," and yet the seventh section of his bill provides: '*Section* 7. That nothing in this act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them as re-

> cited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant.' * * * There is a provision that is more liable to lead to litigation than anything else. It holds out the idea to the people that there is something else to be done. It puts in doubt the title of every acre of land on which people have settled, which lands were earned out of time, and we come in here with an amendment which will settle the matter forever by remitting it to the courts to quiet titles of the settlers' homes as well as the railroad titles, if gentlemen who represent the other side are correct in their belief that the Supreme Court will decide against us."

Evidently this language of Mr. McRae referred to the debate which took place on July 7, 1890, (See Volume 21 Congressional Record, Part VII, 51st Congress, First Session, page 7006.) where Mr. Payson, Chairman of the Committee on Public Lands, having in charge the bill, said:

> "Now I am going to inquire of my friend as to whether it will have the effect of confirming any title, or whether it shall prevent Congress from acting

> hereafter if it desired. That is covered by the seventh section, which I will read: 'That nothing in this Act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant.' That is reserving the right on the part of Congress to do anything it may choose hereafter in any other form it pleases with reference to this very character of land."

The bill reported by Judge Payson is set out at page 7004, Volume 21, Part VII, Congressional Record, 51st Congress, First Session, and it was reported as a substitute for the bill which had passed the Senate. This bill contains Section 7 quoted as above.

The history of the bill shows that thereafter the House passed the measure as reported by the House Committee on Public Lands, and the substitute thus passed was sent to the Senate, and a conference committee appointed from that body, which resulted in the passage of the Act of September 29, 1890, with Section 7 of the House substitute stricken therefrom. While we may not quote the individual opinions of the members of Congress

as expressed in the debates, to aid in the interpretation of the statute as passed, (See U. S. v. Trans-Missouri Freight Ass'n.; 166 U. S. 290; U. S. v. U. P. R. R. Co., 91 U. S. 72; Carter v. Hobbs, 92 U. S. 594; U. S. v. Oregon, etc. R. Co., 57 Fed. 427, still we may consider what occurred in the passage of the measure, the evil to be remedied, or the historical background.

Shallus v. United States, 162 Fed. 653.

Wadsworth v. Boysen, 148 Fed. 771.

Holy Trinity Church v. U. S. 143 U. S. 457.

U. S. v. Chicago etc. Co., 157 Fed. 616.

Mosle v. Bidwell, 130 Fed. 334.

Platt v. U. P. R. Co., 99 U. S. 48-67.

Smith v. Townsend, 148 U. S. 495.

Mobile etc. Co. v. Tennessee, 153 U. S. 502.

Johnston v. Morris, 72 Fed. 896.

Gold Hill Co. v. Caldonia S. M. Co., 5 Sawy. 577.

It must be remembered that the subject of forfeiture of unearned railroad grants had been a question of great importance both political and otherwise, from 1883 down to the

passage of the General Forfeiture Act of September 29, 1890. There had been a statute passed on March 3, 1887, under which railroad grants were required to be adjusted by the Secretary of the Interior, and under which authority was given to maintain suits on request of Secretary of Interior made to the Attorney General. The purpose indicated by these various statutes and the debates occurring in relation thereto, was to ascertain what rights the United States had in the lands granted to various railroad companies? What the railroad companies respectively had done to earn the title to the lands? In what respect, if any, these railroads had failed to comply with the conditions under which the lands were granted? While the dominant and main question was as to whether or not the railroad companies were entitled to any lands granted, where they had partially failed to construct their roads, or where as to certain portions of the grants opposite and coterminous with the unconstructed portions thereof they were entitled to any part of the lands granted, or were entitled to the lands opposite and coterminous with the portions of the constructed roads, apparently the object of Section 7 of the substitute and of Section 3 of the Act reported by Senator Garland accompanying Senate Report No. 906 was to leave open for further

legislation the right of the United States to forfeit the title to lands belonging to the railroad company which had been forfeited because of some other breach of condition than the particular condition and breach thereof covered by the express words of the statute. Clearly if this Section 7 had been permitted to stand and become a part of the Act of September 29, 1890, it would justify the conclusion that Congress might properly assert its right to forfeit for failure to perform any other condition subsequent, and in this case, for failure to comply with the "actual settler" clause, if it shall be held that such clause creates a condition subsequent. Congress by its action having refused to pass Section 7 when it was distinctly submitted to each body for its consideration, must have intended that the Act of September 29, 1890, was a statute of repose in the nature of a bill of peace, and that as to all such lands as were opposite and coterminous with the constructed portions of the road which were constructed at that time, the title should be absolute and unquestioned, and that no breach of any condition subsequent of any kind, for any cause, could be thereafter asserted.

Bearing in mind these facts, we insist that it was the manifest intention of Congress that the act of September 29, 1890, should

put at rest the title to all lands granted to railroad companies, excepting as to such lands as were opposite to and co-terminous with the unconstructed portions of the railroad contemplated by the act.

Section 2 of that act jealously protects and guards the rights of "actual settlers in good faith on any of the lands" thereby forfeited.

It would be very strange, indeed, that Congress should have before it knowledge of the many breaches of this so-called actual settler clause, that the attention of Congress should be called to these reports required by law, in the debates on this very measure, although not specifically referring to the reports made by the Oregon and California Railroad Company, and that having such actual knowledge immediately before them, and having in mind actual settlers who might be entitled to these lands as now claimed, should deliberately strike out from the substitute bill section 7 intended to leave the matter open for future consideration and action by Congress, if its action was not final.

Not only was the act of September 29, 1890, a statute of repose and intended so to be, but likewise the act of March 3, 1891 (26 Stat. 1095), and the act of March 2, 1896

(29 Stat. 46). Both read in connection with the act of September 29, 1890 (26 Stat. 496), must be construed to be more than a mere statute of limitation.

These patents, whether erroneously issued, or otherwise, after the period of time named had elapsed, were absolute and undoubted title.

In *United States v. Chandler-Dunbar Water Power Co.* 209 U. S. 447, 449, Mr. Justice Holmes, speaking for the court, says:

> "There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion that now the patent must be assumed to be good. The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act,' that is to say, from March 31, 1891. This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. United States v. Winona &

St. Peter R. R. Co., 165 U. S. 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599.

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black, 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457.

> This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 463, 476."

Patents constitute conclusive evidence that the grantee has complied with the conditions of the grant, and to that extent the grant was thereby relieved from the possibility of forfeiture for breach of its conditions.

In *Deseret Salt Co. v. Tarpey,* 142 U. S. 241, 250, Mr. Justice Field, speaking for the court, says:

> "It would therefore seem clear, that the title which passed under the act of Congress by the grant of the odd sections
>
> became by their identification so far complete as to authorize the grantee to take possession and make use of the lands; and in the exercise of that authority the grantee took possession from time to time as the lands became identified by the location of the line of the road, and made sales of parcels of the lands, and executed mortgages on other parcels with sections of the road con-

structed, for the purpose of raising money to meet expenses already incurred and which might thereafter be required for the completion of the road; and such mortgages were authorized by Congress.

"But it is contended that the natural import of the granting terms of the act is qualified and restricted by its fourth section, which, as amended by the act of 1864, provides that, upon the completion of not less than twenty consecutive miles of the road and telegraph line in the manner required, and their acceptance by the president, upon the report of commissioners appointed to examine the work, patents shall issue to the company conveying the right and title to said lands on each side of the road as far as the same is completed."

* * * * * *

"While not essential to transfer the legal right the patents would be evidence *that the grantee had complied with the conditions of the grant,* and to that extent that the grant was relieved *from the possibility of forfeiture for breach of its conditions.* They would serve to identify the lands as coterminous with the road completed; they would obviate the

necessity of any other evidence of the grantee's right to the lands, and they would be evidence that the *lands were subject to the disposal of the railroad company* with the consent of the government. They would thus be in the grantee's hands deeds of further assurance of his title, and therefore, a source of quiet and peace to him in its possession."

* * * * * *

" 'In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government.'

"Whilst a legal title to the sections designated, as distinguished from a merely equitable or inchoate interest, passed

to the railroad company by the act of Congress, upon the definite line of the road being once established, by which the sections could be ascertained and identified, the lands could not be disposed of by the company without the consent of Congress, *except as each twenty-mile section of the road was completed and accepted by the President,* so as to cut off the right of the United States to compel the application of the lands to the purposes for which they were granted, or to prevent their forfeiture in case of the company's failure to perform the conditions of the grant. The lands were granted to aid in the construction of the railroad and telegraph line, and it is manifest, from different provisions of the act, that Congress intended to secure this application of them. Whatever disposition might be made by the company of the lands after they became, by the definite location of the road, capable of identification, they were subject to the control of Congress, either to compel their application for the construction of the road contemplated, or to enforce their forfeiture if the road was not completed as required by the act. The application of the lands to the construction would not, of itself, operate to transfer

the title; it would only remove the restriction upon the use and disposition of the title already possessed."

* * * * * *

"We do not think the provision was designed to impair the force of the operative words of transfer in the grants of the United States, or invalidate the numerous conveyances by sale and mortgage of the lands made by the railroad company, *with the express or implied assent of the government.*"

In *United States v. Northern Pacific Ry. Co.*, 177 U. S. 435, 441, Mr. Justice Shiras, speaking for the court, says:

"This view of the case renders it unnecessary for us to consider whether the United States could be estopped by the acts of the executive department, in recognizing the rights of the railroad company as continuing in full force after the expiration of the time named in the statute; or to consider whether the ordinary doctrines of courts of equity, which relieve a contracting party from forfeiture by reason of a failure to complete the contract within a time fixed, when the work is subsequently completed and accepted, would apply to a case like the

present. Undoubtedly there would seem to be room for a fair presumption that Congress was aware of the action of the President and of the functionaries of the land department in the particulars before mentioned, and approved the same. It is not, as put by the counsel of the Government in his able brief, the case of a waiver presumed from mere non-action, but from non-action in the special circumstances disclosed."

It would seem, therefore, to be conclusive that the issuance of patent is the act by which, and the date when, the land department, charged with the duty of seeing that the conditions of the grant had been complied with, finally decides that all the conditions have been complied with, and that thereby a breach of any such condition is effectually and finally waived.

The United States, therefore, it is submitted, may not by this suit accomplish indirectly what it would not be permitted to do in the face of the Limitation Acts of March 3, 1891, and March 2, 1896—limitation acts which, as this court held in the Chandler-Dunbar Case (209 U. S. 447, 449), while as matter of form barring suits to annul the patent, yet must be taken "to affect the right,

even if in terms only, directed against the remedy," and must be taken "to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place." And if the formal contention is to be made that this suit is, as matter of form, a proceeding for a forfeiture, and not directly in form a proceeding to annul or cancel the patent, it is not maintainable —no such suit could be maintained—under Section 1047 of the Revised Statutes of the United States, reading as follows:

> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."

It was said of this statute in Wells vs. Graves, 41 Fed. 459, 467:

> "The doing of the prohibited act is cause for a forfeiture, which accrues under the provisions of the laws of the United States, and is therefore subject to the limitation of five years enacted by Section 1047."

In Leffingwell vs. Warren, 2 Black, 599, 605, cited by this court in the Chandler-Dunbar Case, *supra,* this court said:

> "The lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right and vests a perfect title in the adverse holder."

And finally, if this suit is to be treated as a proceeding to vindicate the Settlers Clause, and in aid of the rights of settlers, the United States must be taken to be a formal party only, against which, in that view, the defenses of laches and limitation will be sustained.

United States vs. Des Moines Navigation & Railway Co., 142 U. S. 510, 538, 539, 540.

XI.

(1) The United States may, as sovereign, impose restraints upon alienation of its lands, but it cannot delegate or impose upon a private party such as a citizen, or railroad company, the substantive administration of sales of its lands, or the administration of its settlement laws. If in granting the fee to the company, under these acts, the United States imposed a condition which, if enforcible, required the company, in making sales, to usurp the functions and duties of the Land Department

of the United States, and administer the settlement laws, and if the United States did not thereby reserve, in some way, the right to enforce or administer its land laws applicable thereto, the condition attempted to be created, is void, and the title is unaffected thereby. The estate vested, absolutely, unaffected by the attempted condition. The intended beneficiaries, if the condition was to be valid and effective, were entitled to require that the United States should retain jurisdiction of the grant, and administer the same. The beneficiaries were entitled to go before a tribunal having jurisdiction and authority, to hear and determine the facts, as to each settlement, which would bring each "actual settler" into a legal and effective relation to the parcel upon which he had settled. The railroad company could not be constituted, and is not by the settlers clause made such tribunal. Under the settlers clause neither the United States nor the assumed beneficiaries—the actual settlers, could compel the railroad company to act as such administrative tribunal, nor would its voluntary action bind any contesting claimant, nor could any court give any defeated contestant any relief, or afford him any remedy. The statute gives no remedy, provides no tribunal, and defines no procedure. It is therefore void.

(2) The title to these granted lands having passed from the United States to the Oregon and California Railroad Company by patents, the land having been earned by construction of roads, the estate vested in the company in fee simple. This is conceded by the United States. There is therefore no room for the application of the doctrine that a public grant will be strictly construed in favor of the grantor. Such rule of construction does not apply where the United States seeks to defeat the estate granted, whether by means of a condition subsequent, or other acts that would render the estate defeasible.

(3) The estate once having passed, the law of the State in which the property is situated, as determined by the Supreme Court of that State, will be followed, as a rule of property, in determining whether the language of the so-called "actual settler" clause is a condition subsequent, or a covenant.

In Wilcox v. McConnel, 13 Peters, 498, 517, the court says:

> "We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that

> question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

There is nothing in the actual settler clause defining how or by whom its provisions shall be administered, or in what tribunal the applicant may have his rights adjudged so as to bring himself in relation to a particular tract of land. If Congress had specifically provided that the company should be guided by the rules and regulations in effect in the administration of the Homestead Act, or by the Pre-emption Act, and if Congress had provided a tribunal where the actual settler might make his proof, tender his payment, and have his status defined, and definitely ascertained, a different question might arise. It is sufficient to say that Congress has not done so. Even if it had attempted to delegate governmental and administrative functions to the company, it would be an attempt to confer upon a private corporation governmental, administrative and quasi-judicial functions. As we have seen in Camp v.

Smith, 2 Minn. 131, 143, such limitation would be invalid. It was there said:

> "The state can never concede to Congress the right to prescribe to the actual settler and purchaser of public lands within their limits, the mode, manner or time in which he shall enjoy the land purchased. The federal government may regulate the terms on which it will give land to the citizen, fix the price for which it shall be sold, and give preference to certain purchasers, but when the terms of the gift are complied with, or the purchase money paid, the gift or purchase is complete; Congress has then exhausted the power over the public lands reserved by the constitution of the United States, and the sovereignty of the state immediately attaches."

If Congress may not prescribe to the actual settler and purchaser of lands within the limits of a state the method or time in which he shall enjoy the land purchased, how much more certain it is that Congress cannot vest in the person of a private corporation, the functions of a governmental administrative body, and, without prescribing any mandatory provisions by which the company shall be guided, claim that there is a rule of action

sufficient in law to control the administration of the grant and effectuate this "actual settlers" clause. It is in effect to say that Congress may lodge its power of the administration of its public lands in a private corporation, leaving to it unrestrained and unrestricted discretion as to the way and manner, and at what time the sales shall be made and leaving to it arbitrarily to determine as best it can the qualifications of the actual settler who may apply to purchase. It is respectfully submitted that Congress failed to prescribe any rules or regulations by which the administration of this "actual settler" clause could be enforced, and by which its terms could be brought into contract relation with the actual settler, and that therefore the attempted restriction or limitation must fail.

The court will not indulge the presumption that by the words of the proviso of April 10, 1869, or of Section 4 of the Act of May 4, 1870, known in this record as the "actual settler" clause, Congress intended by a mere subsidiary and secondary provision of legislation to entrust a railroad company about to construct a great national highway *with the administration of the public land laws as to the lands granted in aid of such construction.* It will not be presumed that Congress intended thereby to create such a

tribunal for the administration of this statute, the ascertainment of the character of lands that were subjected to its provisions, the determination of who are actual settlers, the length, duration, and character of such settlement and improvements,—specially and apart from the regular land department of the United States. It certainly was not in the contemplation of Congress that these railroad companies should assume the necessary administration of the public land laws in that regard, if this proviso shall be deemed to be valid and enforcible in its full scope, or, if it shall be deemed to be a condition for breach of which there might be resulting forfeiture of the grant.

Under the Act of Congress admitting the State of Oregon into the Union, approved February 14, 1859, and the Act of the Legislative Assembly of the State of Oregon approved June 3, 1859, assenting to the same, (Lord's Oregon Laws, pp. 25-29) it was expressly provided that certain propositions submitted by the Act of Congress to the people of Oregon were offered on condition that the people of Oregon should provide, by an ordinance irrevocable without the consent of the United States, "*That the said state shall never interfere with the primary disposal of the soil within the same by the United States,*

nor with any regulations Congress may find necessary for securing the title in said soil to the bona fide purchasers thereof." By the Act of June 3, 1859, the State of Oregon, by an act of its Legislative Assembly, expressly assented and agreed to this provision. The contract under which the state came into the Union was *not unilateral,* but was binding upon the United States as well as upon the state. Under this organic act it is fairly inferable that while the state may never interfere with the primary *disposal* of the soil within its boundaries, by the United States, nor with any regulations Congress may find necessary for securing the *title* in said soil *to the bona fide purchasers thereof,* that the United States may not, after that title has passed from the United States to a citizen or a corporation, for value received, under any reservation under which the title was granted, or under any condition that is repugnant to the grant or contrary to its purpose and spirit, *retain control of such lands granted, or be reinvested with its former estate. Such a proviso, or such a condition, may well be considered as in restraint of alienation, and not within the power of Congress.* Whether this be so or not, in its strict sense, it is certain that in construing doubtful words that are claimed to affect the title to lands thus granted, the courts will construe the words

used in harmony with the theory that title has vested absolutely, without possibility of reverter, rather than under conditions subsequent, for breach of which there could be forfeiture and re-entry.

In this connection it may be well to observe that where an amendatory act is passed, such as the Act of April 10, 1869, which contains no express words *of new and additional grant,* but which undertakes to provide *that lands granted by the Act of July* 25, 1866, shall be sold to actual settlers only, in quantities and for prices as stated, in the nature of things a condition affecting the estate previously granted, could not be imposed, and that a *condition subsequent cannot be created, excepting at the time, and in connection with, the granting of the estate.* As we have seen, the object of the Act of April 10, 1869, was not to vest an estate in either the East Side or West Side Company, but to enable the East Side Company, if it chose so to do, to file its assent to the Act of July 25, 1866, and thereby bring itself into a legal relation to the grant, so that a judicial determination might be had as to whether the East Side Company or the West Side Company was the legally designated beneficiary of the grant. *No new substantive rights were intended to be or attempted to be created,* and the most that could

be said would be that if the East Side Company, after the passage of the Act of April 10, 1869, and pursuant thereto, *for a sufficient consideration,* filed its assent to said Act, *it thereby contracted with the United States* that it would sell these lands as provided by the "actual settler" clause, *or at least such of these lands as could be so sold within a reasonable time, or such of these lands as could be sold prior to and pending construction of road, and before patents issued.* Under such circumstances the contract thereby created would be a personal covenant between the United States and the designated beneficiary, the East Side Company. It would not be a covenant that would run with the land, nor would it be a condition subsequent. *A sale of the grant to the Oregon and California Railroad Company, recognized by the United States, would cut off the efficacy of the covenant, and especially if the United States assented to the transfer, and did not insist upon the performance of the covenant by the grantee of the East Side Company.* In construing these words it must be borne in mind that the land department *had recognized,* and was dealing with the West Side Company, as the company entitled to the grant, and that it was not until December 25, 1869, when the West Side Company failed to construct its first twenty miles, *that it lost its claim to the*

grant. Secretary Browning had recognized the West Side Company; that company had filed its assent; was engaged in construction of road; was claiming the grant, and was using all possible effort to construct the first twenty miles. That Company opposed the passage of the Act of April 10, 1869. The East Side Company, it may be assumed, was willing that the Act of April 10, 1869, should be passed, in fact the record shows that on November 25, 1868, the East Side Company formally accepted the benefits of the Act of July 25, 1866, and commissioned John H. Mitchell to go to Washington D. C. and represent the East Side Company in all its matters before Congress. *Under such circumstances can it be said that the proviso of the Act of April* 10, 1869, *when accepted by the East Side Company, and when that company assented to its provisions, was anything more than a covenant upon its part, that it would undertake to sell these lands as the statute provides?* There is no controversy between the Government and the companies as to whether or not title passed under the Act of July 25, 1866, to the Oregon and California Railroad Company, as the grantee of the East Side Company, and there is no question but that that title was one in fee simple. There is therefore no room to indulge the principle that a public grant will be construed favor-

ably to the United States, and strictly against the grantee, and that nothing will be presumed to have been granted excepting what appears upon the face of the statute or granting act, *but such is not the rule, as applied to grants of the kind in question.*

In United States v. Denver etc. Ry. Co., 150 U. S. 1, Mr. Justice Jackson, speaking for the court says:

> "It is undoubtedly, as urged by the plaintiffs in error, the well settled rule of this court that public grants are construed strictly against the grantee, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In Winona and St. Peter R. R. v. Barney, 113 U. S. 618, 625, Mr. Justice Field, speaking for the ocurt, thus states the rule upon this subject: 'The acts making the grants * * * are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were

passed, as well as to the purposes declared on their face, and read all parts of them together.'

"Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the Act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare, by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works, of a quasi public character in or through an immense and undeveloped public domain, *such legislation stands upon a somewhat different footing, from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.* Bradley v. New York & New Haven R. R., 21 Conn. 294; Pierce on Railroads, 491.

"This is the rule, we think, properly applicable to the construction of the Act

of 1875, rather than the more strict rule of construction adopted in the case of purely private grants; and in view of this character of the act, we are of the opinion that the benefits intended for the construction of the railroad in permitting the use of the timber or other material, should be extended to and include the structures mentioned in the act, as a part of such railroad."

This rule has been well stated in another form by this court, in United States v. St. Anthony R. R. Co., 114 Fed. 722-724, where Morrow, Circuit Judge, speaking for the court says:

"It is well settled that, while public grants are to be contsrued strictly against the grantee, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. And to ascertain that intent it is often necessary to look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together. Railroad Co. v. Barney, 113 U. S. 618, 625; 5 Sup. Ct. 606, 28 L. Ed. 1109. In U. S. v. Denver & R.

G. R. Co., 150 U. S. 1-15, 14 Sup. Ct. 11, 37 L. Ed. 975, this rule of construction was held to be properly applicable to the Act of 1875, in controversy in the present action. In that case the timber was cut from lands adjacent to the line of railway of the defendant, but was used in the construction of its road at points distant from the place from which it was taken. Under the rule of construction above stated, it was held to be the purpose of Congress to aid railroad companies entitled to the benefits of the act, by conferring the right to take timber necessary for road construction from adjacent public lands, and use it upon distant portions of their lines. Applying, then, this liberal construction of the act to the facts before us, we are entitled to consider that the road under construction passed through a barren, frontier country; that, according to the admitted facts, there was no suitable timber upon either side of the said road nearer than the lands in question, and and that said lands from which the timber was cut were near enough and so located with reference to said road as to be directly and materially benefited thereby; that said timber could be hauled by wagon to said railroad with reasonable profit. These conditions are

> important in considering whether the privilege conferred by Congress has been properly exercised, and whether the mutual benefits contemplated by the act are likely to be realized."

While this case was reversed by the Supreme Court of the United States in United States v. St. Anthony R. R. Co., 192 U. S. 524, the rule of construction thus announced was reaffirmed. Mr. Justice Peckham, speaking for the court, quotes at length with approval, from the opinion of Mr. Justice Jackson, in United States v. Denver etc. Ry. Co., 150 U. S. 1 and as quoted by us above.

A liberal construction in favor of the general spirit and purpose of the Act of July 25, 1866, was given to that act by the Supreme Court in Bybee v. Oregon & California R. R. Co., 139 U. S. 663-679, where the court, speaking by Mr. Justice Brown, says:

> "The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been considered by this court *as taking effect in praesenti,* although the particular lands to which the grant is

applicable remain to be selected and identified when the road is located, and the map is filed with the Secretary of the Interior. The Act then operates as a grant of all odd numbered sections within the limits, except so far as they may have been in the meantime "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of." And in all the cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings or by an act of Congress, resuming title to the lands."

In the course of the opinion Mr. Justice Brown further says:

"A condition that would put it beyond the power of the company to build the last mile of its road by the aid of the granted land, is manifestly so harsh and unjust, that *the breach of such condition ought not be treated as a forfeiture, unless the language of the act be so clear and unambiguous as to admit of no other reasonable construction.*"

This language was used with reference to the proviso of Section 8, that in case the company should not complete the road as provided in Section 6, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, *shall revert to the United States.*"

How apposite is this language of the Supreme Court as applied to the contention of the United States now made in the case at bar! The Government contends that because the company has sold *timber lands unfit for actual settlement,* to persons other than actual settlers, in quantities in excess of 160 acres, and at prices in excess of $2.50 per acre, *that it has forfeited the title to all of the unsold lands of every kind, the effect of which is not only to deprive the railroad company of the consideration for building the road,* but to place it within the power of the railroad company by its administration of a public grant, to thwart and destroy the so-called public land policy of the United States, when it enacted this proviso, and in the destruction of this estate, not only deprive the road of the grant, but destroy all rights of the so-called actual settlers, then or at any time thereafter. The courts will not give any such construction to the actual settler clause.

The case of United States v. Denver etc. Ry. Co., 150 U. S. 1, supra, has been adhered to in the following cases:

Wisconsin Central Ry. Co. v. Forsythe, 159 U. S. 46-55.

United States ex rel v. C. O. & G. R. R. Co., 3 Okla. Rep. 404-502.

United States Trust Co. of New York v. Territory, 8 New Mex. 673-689.

Moon v. Salt Lake County, 27 Utah, 435-444.

It is therefore unnecessary as it seems to us, to *interpolate words of forfeiture* into the Act of April 10, 1869, or of May 4, 1870, *or to assume that any public land policy secondary in its purpose and character* should control, and induce the court to adopt a construction which will destroy the estate granted, rather than sustain that estate. Nor are we left without controlling authority upon this subject. In Stuart v. Easton, 170 U. S. 383, Mr. Justice White, strongly adhering to *the rule of property as found in the decisions of the Supreme Court of Pennsylvania,* and quoting at length from these common law cases adopting the common law rule, says:

"If the grant be viewed as one merely to trustees to hold 'for the uses and pur-

poses mentioned in the act of the assembly,' it is clear that the fee was not upon a condition subsequent nor one upon limitation. There are no apt, technical words (such as *so that; provided; if it shall happen;* etc. 4 Kent Com. note b, p. 132; 2 Washburn on Real Property, p. 3) contained in the grant, nor is the declaration of the use coupled *with any clause of re-entry or a provision that the estate conveyed should cease or be void on any contingency.* (Ib.) So, also, we fail to find in the patent the usual and apt words to create a limitation (such as *while; so long as; until; during,* etc., 4 Kent, Ib.), or words of similar import. And, for reasons already stated, if we disregard the absence of technical terms or provisions importing a condition or limitation, and examine the deed with a view of eliciting *the clear intention of the parties, we are driven to the conclusion that it was the intention of the grantors to convey their entire estate in the land.*"

In Wright v. Morgan, 191 U. S. 55-58, Mr. Justice Holmes, speaking for the court, construing an Act of Congress granting to the City of Denver certain property rights, says:

> "If the legal title was in the city it was an absolute title. *In view of the extreme unwillingness of courts to admit the existence of a common law condition, even when the word condition is used,* it needs no argument to show that there was no condition or limitation here. Stuart v. Easton, 170 U. S. 383."

The court also had occasion to speak of the question as to whether or not Congress could declare land within the limits of a state, after title has passed from the United States, inalienable at common law, and, by analogy, whether Congress can impose a condition upon an estate, in restraint of alienation, or which might, for breach of such condition, cause the title to revert to the United States, and thereby deprive the state of its jurisdiction and control over these lands. Upon this subject Mr. Justice Holmes, speaking for the court, says:

> "Little more needs to be said to show that the act of Congress did not make the land inalienable at common law. We need not consider whether the act could have that effect upon land within a state, when the conveyance was absolute and was made to a citizen or instrumentality of the state; we express no opinion upon

> the point. It is enough that it did not purport so to restrict the ordinary incidents of title. We should require *the clearest expression of such an unusual restriction before we should admit that it was imposed,* especially in an ordinary sale for cash."

And so in the case at bar, the court should not strive to construe these words as creating conditions subsequent, for breach of which this title would be liable to forfeiture, with all resulting injury to the beneficiary that had complied with the Act of Congress in its important and controlling purpose, and with all of its damage and loss to the state in which the lands are situated, in the deprivation of taxes upon these lands, and other incidents of its sovereignty, and at the same time result in placing these lands as they are now sought to be placed by the Innocent Purchasers Act of August 20, 1912, in a state of reservation, after confirming the title to the timber investors who bought from the company, after having exacted from these timber investors the nominal price of $2.50 per acre for these lands, justified by a report of the Public Lands Committee that these lands were unfit

for settlement, chiefly valuable for timber, and therefore they might as well be patented to these so-called Innocent Purchasers, although the sale made by the company to these same so-called Innocent Purchasers is the gist of the bill of complaint, as to breach of the "actual settler" clause.

See also Palatine Ins. Co. v. Ewing et al., 92 U. S. 111, 114. This court, in harmony with the view expressed by the Supreme Court, as we have seen, will rather follow the rule of law adopted by the Supreme Court of Oregon in Raley v. Umatilla County, 15 Or. 172-179, and in Coffin v. City of Portland, 16 Or. 77-80, holding that "a condition subsequent in a deed, that will under any circumstances defeat the title conveyed, must provide that the conveyance is upon the condition, and that the failure to perform it shall operate as a forfeiture of the estate granted." In other words, this court will, as the Supreme Court did in Stuart v. Easton, supra, follow the rule of property found in the decisions of the Supreme Court of the state in which the lands are situated, and this court will follow the rule of law announced by the Supreme Court of the United States, as in

harmony with the Supreme Court of Oregon, in the cases cited, *as to what words are necessary to constitute a condition subsequent, and will adopt that view which will leave the estate vested, rather than destroy the estate, and will at the same time give purpose and effect, if possible, to the intention of Congress.*

CONCLUSION

From the voluminous record which we have undertaken to review and briefly summarize, we contend that the following controlling ultimate facts have been established:

I.

That on July 25, 1866, Congress passed an act entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad in California to Portland, in Oregon," by which a grant of lands in quantity was made to the California and Oregon Railroad Company organized under the laws of the State of California, and to such company organized under the laws of Oregon as the Legislature of that State might thereafter designate, and that these companies thereby obtained a grant in praesenti to the lands involved in suit other than those inuring to the company under the act of May 4, 1870.

II.

That on November 21, 1866, the Oregon Central Railroad Company of Portland, known in this record as the "West Side" company, filed its articles of incorporation in the

office of the Secretary of State at Salem, Oregon, and that it claimed to have been incorporated and its articles to have been filed on or before October 10, 1866.

III.

That on October 10, 1866, the Legislature of Oregon attempted to designate the said "West Side" company as the beneficiary of the act of July 25, 1866, and as the Oregon company entitled to earn the grant.

IV.

That on May 25, 1867, the "West Side" company adopted a resolution assenting to and accepting the benefits of the act of July 25, 1866, and that thereafter a certified copy of such resolution was duly filed with and accepted by the Secretary of the Interior, and within the time required by the act of July 25, 1866.

V.

That on April 22, 1867, the Oregon Central Railroad Company of Salem, hereinafter known in this record as the "East Side" company, duly incorporated under the laws of the State of Oregon, and on said day filed its

articles of incorporation in the office of the Secretary of State, and thereby and thereafter *claimed to be the company entitled* to construct the railroad and earn the grant as provided in the act of July 25, 1866.

VI.

That on April 15, 1868, the "West Side" company, and on April 16, 1868, the "East Side" company, commenced actual construction of road, claiming under the grant of July 25, 1866, and that each company industriously continued such construction; but that the "West Side" company failed to construct the first twenty miles by or before December 25, 1869, but that the "East Side" company did construct the first section of twenty miles by or before December 25, 1869, and was continuously engaged in the construction of its line from April 16, 1868, up to and after October 20, 1868, and thereafter until it conveyed its railroad and property, including its land grant, on March 29, 1870, to the Oregon and California Railroad Company.

VII.

That on October 20, 1868, the Legislature of the State of Oregon rescinded the Joint Resolution of October 10, 1866, and desig-

nated the "East Side" company as the company entitled to the benefits of the grant of July 25, 1866, and *as the company in contemplation of Congress under the act of June* 25, 1868.

VIII.

That on June 25, 1868, the Congress of United States, then knowing that both the "East Side" and "West Side" companies were engaged in the actual construction of road, and then knowing that both companies claimed or would claim the benefits of the act of Congress of July 25, 1866, and of the land grant made therein, and knowing that the "West Side" company had filed its assent, and that the "East Side" company had not filed its assent and had not been designated by the Legislature of the State of Oregon, *passed an act by which the filing of assent was dispensed with,* and by which the time for construction of the first twenty miles was extended to December 25, 1869, and the completion of road was extended to July 1, 1880.

IX.

That on April 29, 1868, the "East Side" company adopted a resolution accepting the grant of July 25, 1866, and empowered A. M.

Loryea to present a duly certified copy thereof to the proper authorities to be filed as certified by S. A. Clark, Secretary of the "East Side" company, under date of April 30, 1868 (Volume XIV, pages 7454-5, Transcript of Record), and in connection therewith adopted a resolution appointing A. M. Loryea, agent and representative of that company April 15, 1868 (Volume XIV, pages 4934-8, Transcript of Record), and that A. M. Loryea on July 16, 1868, wrote a letter to Secretary Browning (Volume XIV, page 7454), receipt of which was acknowledged by Secretary Browning in his letter of July 17, 1868 (Volume XIV, page 7440), *declining to regard the resolution as an assent filed within the time, although the filing of assent had been dispensed with by the act of June* 25, 1868.

X.

That thereafter, on November 25, 1868, after the Legislative Assembly had passed the Joint Resolution of October 20, 1868, designating the "East Side" company as the beneficiary of the act of July 25, 1866, the "East Side" company again adopted a formal resolution assenting to the Act of Congress of July 25, 1866 (Volume X, page 5026), and employed J. H. Mitchell to represent that company at Washington, D. C., and presumably

to present this resolution to the Secretary of the Interior and to the Congress of the United States, and to secure such legislation, if any, as might be deemed advisable to enable the "East Side" company *to be recognized as the beneficiary of the grant instead of the "West Side" company, which up to that time had been so recognized.*

XI.

That the "West Side" company, by its representatives and agents, opposed any further legislation and claimed to be the legally designated beneficiary of the grant; that the "East Side" company, by its attorneys and agents, claimed to be the legally designated beneficiary of the grant, and that the "West Side" company was not a corporation and had not been legally designated by the Legislative Assembly, and insisted that some further legislation might be necessary to give the "East Side" company a status in relation to this grant so that the question of whether it had been legally designated by the Legislative Assembly of the State of Oregon might be judicially determined, and so that meantime the grant might not lapse for any possible reason.

XII.

That thereafer on April 10, 1869, Congress passed an act amendatory of the act of July 25, 1866, the purpose and effect of which was *to permit* the "East Side" company to file assent, and so that, when filed, it should have *the same legal effect as if filed within the time provided by the act of July* 25, 1866, and so that in case the "East Side" company should file such assent, it might have a relation to the Land Department of the United States and a status by which it could be judicially determined whether it was the legally designated beneficiary of the grant, and by which it was provided that *the lands granted by the act of July* 25, 1866, should be sold to actual settlers at quantities not exceeding 160 acres, and in price not exceeding $2.50 per acre.

XIII.

That on June 9, 1869, the "East Side" company filed its assent to the act of July 25, 1866, and acts amendatory thereof, including the act of April 10, 1869, and that thereupon and thereafter the Land Department received said filing *and dealt with that company as one of the companies that might ultimately be adjudged to be entitled to the grant.*

XIV.

That on March 29, 1870, the "East Side" company, for a large and valuable consideration, sold and conveyed to the Oregon and California Railroad Company its railroad, including its land grant, all rights acquired by the "East Side" company under the act of July 25, 1866, and amendments thereto, which was evidenced by a deed of conveyance thereafter duly recorded and thereafter brought to the attention of the United States by filing the same with the Secretary of the Interior; and that from that date up to the present time the Oregon and California Railroad Company has been recognized as the beneficiary of the grant, and as the successor in interest of the "East Side" company, and that all patents which have been issued from 1871 down to the last patent issued, have been issued to the Oregon and California Railroad Company *without any limitation or restriction of any kind,* and that these patents were issued from time to time pursuant to the approval of the reports of Commissioners appointed to examine the constructed road and report upon the same, and pursuant to the recommendations of the Secretary of the Interior, and pursuant to the approval of the President of the United States endorsed upon each of said several reports, directing that

patents issue to the lands opposite to and coterminous with the constructed portions of the road, the same being evidence of compliance with the terms of the grant, and that these patents were begun as early as 1871, and that since that time the Oregon and California Railroad Company has paid taxes lawfully assessed upon these lands in the sum of $2,758,094.07, from April 1, 1870, to April 30, 1913.

XV.

That the United States had full notice and knowledge during all this time of the way and manner in which the Oregon and California Railroad Company administered the grant, and had full notice and knowledge of the claim made by the European and Oregon Land Company for and in the name of the Oregon and California Railroad Company as to the way and manner in which the "actual settler" clause should be observed.

XVI.

Expenditure of more than $9,000,000.00 in construction of roads from 1870 to 1873—197 miles to Roseburg and 47½ miles to McMinnville. (Subdivision V, Stipulation as to the Facts.)

XVII.

Surrender of all the first mortgage bonds and securities and cancellation of same on account of principal and interest due, in May, 1881, by the bondholders, and their acceptance of $12,000,000.00 preferred and $7,000,000.00 common stock in lieu of foreclosure, *thereby making the then purchasers of this stock now owned by the Southern Pacific Company, purchasers in good faith of both land grants as well as both of the constructed lines.* (Subdivision VI, Stipulation as to the Facts.)

XVIII.

Expenditure of about $5,000,000.00 additional construction funds secured under the mortgages of June 1, 1881, and May 26, 1883, from June 1, 1881, to January, 1884, in constructing about 145 miles of railroad from Roseburg to a point 1¼ miles south of Ashland. (Subdivision VI, Stipulation as to Facts.)

XIX.

Expenditure of about $2,500,000.00 between March 28, 1887, and January 3, 1888, in construction of 24.135 miles from a point 1½

miles south of Ashland to the Oregon and California state line, and purchase by Pacific Improvement Company, assignor of Southern Pacific Company, of the stock of Oregon and California Railroad Company, and the guaranty of Southern Pacific Company of the principal and interest of the bonds issued under the mortgage of July 1, 1887, and in accordance with Exhibit No. 9 to the Stipulation as to the Facts, Exhibit No. 1 to the Joint and Several Answer of the defendants herein, Exhibit "E" to the Bill of Complaint, Subdivision VII, item 20, Stipulation as to the Facts; said Exhibit No. 9 being the agreement of date July 31, 1885, of Oregon and California Railroad Company and Central Pacific Railroad Company, and said Exhibit No. 1 being the agreement of October 11, 1886, of Central Pacific Railroad Company, Pacific Improvement Company and Southern Pacific Company and said Exhibit "E" being the agreement of date March 28, 1887, signed by the stockholders' Reconstruction Committee of the Oregon and California Railroad Company, the London Bondholders' Committee, and the Frankfort Bondholders' Committee, the Southern Pacific Company and the Union Trust Company.

XX.

Expenditure of $34,784.85 in advertising these lands; $142,651.40 in examining, cruising and grading these lands; $145,977.26 in payment of surveying fees to the United States, and in payment of $1,827,234.10 in taxes on these lands from April 1, 1870, *to April* 30, 1911. (Answer; defendants' exhibit 289; and testimony of Robert Adams; testimony of J. B. Eddy; and defendants' Exhibits 319, 320, 321, 331, 359; and testimony of P. A. Worthington.)

XXI.

Expenditure of $315,828.34 (defendants' Exhibit 288) between 1906 and 1910, and estimated like amount prior to 1906, on so much of this road as lies between Portland and Oregon-California state line (see testimony of C. P. Lincoln, and J. N. Sherburne) all said sums being amount of free movement of traffic for the United States, as required by the Act of July 25, 1866, section 5 (14 Stat. 239); and for the entire line between Roseville Junction and Portland, the amount is *more than* $1,250,000.00.

XXII.

Issuance of patents conveying title in fee simple, from 1871 down to 1909, and particu-

larly since the Act of September 29, 1890 (26 Stat. 496). (See Exhibit 11 to answer, Subdivision XIX, item 3, Stipulation as to the Facts.)

XXIII.

Modification of the contract contained in the Act of July 25, 1866, (14 Stat. 239) and the Act of May 4, 1870, (16 Stat. 94) made as to quantity to be entered by homestead settlers under these acts, which modification was made by the Act of March 3, 1879, (20 Stat. 472) by which such homestead settlers could enter 160 acres.

XXIV.

The Timber and Stone Act of June 3, 1878, (20 Stat. 89) is *an implied waiver of the actual settler clause in the* Acts of April 10, 1869, and May 4, 1870. The General forfeiture act of September 29, 1890 (26 Stat. 496) is an implied waiver of the actual settler clause, in the acts of April 10, 1869, and May 4, 1870. The act of March 3, 1891 (26 Stat. 1097) repealing the pre-emption law is an implied waiver of the actual settler clause of the acts of April 10, 1869, and May 4, 1870, and section 24 thereof (26 Stat. 1193) which authorized the President to set apart as re-

serve in any state or territory having public lands having forests in any part of the public lands, *wholly or in part* covered with timber or *undergrowth* likewise is evidence of such implied waiver. The act of March 3, 1887 (24 Stat. 56) for the adjustment of land grants is an implied waiver of the actual settler clause of the acts of April 10, 1869 and May 4, 1870. The act of June 4, 1897 (30 Stat. 11-36) contained this proviso: "That in cases in which a tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of a public forest reservation the settler or owner thereof, may if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent. Under this statute the Land Department accepted title to 10,376.01 acres sold by the company for $49,769.56, and by direction of the Attorney General in 1907, after the Department of Justice had begun to investigate these land grants, the Secretary of the Interior suspended selections so pending for 23,012.77 acres sold by the company for $67,594.69. (See Exhibit 9 to the answer; Exhibit No. 17 to Stipulation as to the Facts.) The sections of the act quoted gave to the grantees of the company the absolute right to relinquish these tracts to the United States

and select in lieu thereof any vacant public land. Both the statute and the action of the land Department waived the actual settler clause in the Act of April 10, 1869, and the Act of May 4, 1870. These lands were all within the Cascade Forest Reserve, and this was likewise a waiver of this clause, even if the company had retained the title to these lands.

XXV.

The Act of February 10, 1909, (25 Stat. 609), the Act of June 17, 1910, (36 Stat. 531), the Act of June 6, 1912, (37 Stat. 123) all amending the Homestead Act of May 20, 1862, (12 Stat. 392) and the due administration thereof applied to the character and class of lands involved in this suit, chiefly valuable for timber and unfit for settlement, applied to these unsold lands now owned by the company, would prevent the company from further compliance with the provisions of the Act of April 10, 1869, or Section 4 of the Act of May 4, 1870.

XXVI.

The Act of August 20, 1912, entitled, "Public No. 278, H. R. 22002," commonly known as the Innocent Purchasers Act, is a substan-

tial waiver of the alleged breaches of the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, and is a recognition of the non-settlement character of the lands involved in suit, and that such lands, at the time they were sold to the so-called innocent purchasers described in forty-five suits brought by the United States against said purchasers and these defendants, are unfit for settlement and were so unfit for settlement and could not be sold to actual settlers at the time they were so sold by the company to such purchasers.

XXVII.

Notice of the construction of the companies placed upon the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, and of the purposes of the mortgage of April 15, 1870, and of the intention of the company to mortgage said lands to secure construction funds, as shown by the correspondence, (Government's Exhibits 109, 109-A, 109-B, 109-C,) and which correspondence was brought to the attention of the United States and particularly of the Department of Justice, the Commissioner of the General Land Office and the Secretary of the Interior, and the non-action of the company in respect to the same, and mortgaging

these lands to secure construction funds, from May 20, 1872, to April 30, 1908.

XXVIII.

Notice to the United States and acquiescence in the alleged breaches thereby shown, as contained in the reports made by the Oregon and California Railroad Company, required by law, to the Commissioner of Railroads, transmitted to the Secretary of the Interior and by him to Congress and published in the official documents, showing knowledge of and acquiescence in the alleged breaches in the sale of these lands, in violation of the actual settler clause in the Act of April 10, 1869, and Section 4 of the Act of May 4, 1870, from December 31, 1879, down to and including the year ending June 30, 1903. (Subdivision XXI, Stipulation as to the Facts.)

XXIX.

Notice of the assignment and conveyance of these grants by the deed from the Oregon and California Railroad Company to the European and Oregon Land Company; the Oregon Central Railroad Company, East Side, to the Oregon and California Railroad Company by deed of date March 29, 1870;

conveyance of the Oregon Central Railroad Company, West Side, to the Oregon and California Railroad Company by deed of date October 6, 1880, and the various mortgages from the beginning down to and including the mortgage of July 1, 1887, all of which were of record in the office of the County Clerk or County Recorder of Conveyances in the various counties in Oregon in which the lands or any part thereof were situated, and all of which were filed with the Secretary of the Interior at or about the time they were executed, or were brought to the attention of the Department of the Interior by requests for re-conveyances and joinder therein by the various trustees under said mortgages, as shown by the evidence and exhibits in the case. This evidence also shows the acquiescence of the United States in the execution of all such instruments.

XXX.

Exhibit No. 257 which shows conveyances made by the Oregon and California Railroad Company to various purchasers, from 1873 to January 16, 1907, and consideration therefor, showing that the company sold these lands, claiming to hold title in fee simple without particular regard to the provisions of the Act of April 10, 1869, or Section 4 of

the Act of May 4, 1870, unless the same shall be construed to apply to actual settlers on these lands prior to issuance of patents and prior to the acceptance of the completed sections of the road.

XXXI.

That on March 17, 1870, the Oregon and California Railroad Company was duly incorporated under the laws of the State of Oregon and that by its articles of incorporation it had power and authority to take over and acquire the railroad of the East Side Company and the grant of lands made to it by Act of Congress of July 25, 1866 and the acts amendatory thereof, and that thereafter on March 29, 1870 for a large and valuable consideration it purchased and acquired from the East Side Company its railroad and the grant of land *in solido* and has ever since been the owner in fee simple and in possession of that railroad and land grant, excepting such portions of the grant as it from time to time sold, and that as such it completed the construction of the road from the end of the first section of twenty miles to connection with the California & Oregon railroad on the boundary line between Oregon and California, and that it so completed said road after the Pacific Improvement Company had acquired

the stock of the Oregon and California Railroad Company and after the Southern Pacific Company had undertaken to finance the construction of said road from a point one and a half miles south of Ashland to the Oregon and California state line.

XXXII.

That on May 4, 1870 Congress passed an act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon, intending and directly referring to the "West Side Company," and that the "West Side Company" thereafter constructed its road from Portland by way of Forest Grove to a point on the Yamhill River at or near McMinnville, a distance of forty-seven and a half miles.

XXXIII.

That on October 6, 1880 the West Side Company for a large and valuable consideration sold and conveyed its railroad and land grant to the Oregon and California Railroad Company, and that the Oregon and California Railroad Company has ever since said date been the owner and in possession of the said railroad and the said land grant, excepting

such portions of said grant as it from time to time sold, and that the United States since October 6, 1880 has continuously recognized the Oregon and California Railroad Company as the owner of said land grant and as the successor in interest of the "West Side Company," and that all patents issued for lands in said grant have been issued to the Oregon and California Railroad Company, and that the same facts and circumstances in relation to that grant as related to the East Side grant, so far as notice and knowledge of the United States and administration of the grant is concerned, exist and have existed from that date.

XXXIV.

That on January 31, 1885, the Congress of the United States forfeited for failure to construct the road, that portion of the grant of May 4, 1870 between Forest Grove and Astoria, and the United States thereby resumed possession of the said lands so granted and not earned.

XXXV.

That pursuant to the Act of Congress approved June 19, 1878 (20 Stat. 169) the grantee companies duly reported as required by

said act, the sales of land made by said companies commencing with the half year ending December 31, 1879 and ending with the year June 30, 1903, a period of twenty three years, and in each year reported average price per acre for all sales to date, average price per acre during half year, average price per acre for all purchases to date, maximum price per acre for sales, maximum price per acre then asked, showing continuous and regular excess sales of land in excess of $2.50 per acre, and that these reports were brought to the attention of the President of the United States and Congress of the United States and the Secretary of the Interior as by law provided and that Congress took no action attempting to forfeit either grant on account of any alleged breach of the actual settler clause of the Act of April 10, 1869 or section 4 of the Act of May 4, 1870, but, on the contrary, Congress, without any reference to or action upon Sec. 1047 of the Revised Statutes, imposing a limitation upon the time within which suits might be maintained for a forfeiture, on September 29, 1890 passed a general forfeiture act by which all causes of forfeiture as to all the land grants were waived excepting the one cause of forfeiture, *failure to construct,* and forfeited only for this cause lands opposite to and coterminous

with the unconstructed portions of said road so unconstructed.

XXXVI.

That thereafter Congress passed the Act of March 3, 1891, and the Act of March 2, 1896 for the adjustment of land grants, and from time to time thereafter continuously by its legislation indicated that Congress did not construe the so-called "actual settler" clause as binding or effective upon the lands involved in suit, or any of the lands granted by the Act of July 25, 1866, or May 4, 1870, or that the so-called "actual settler" clause was a condition subsequent, or that the grants were not being or had not been administered in accordance with the full intent and purpose of Congress.

XXXVII.

That up to about the year 1887 there was no demand for any of these granted lands excepting in small quantities and for such uses as might be made of them by farmers, settlers or other persons desiring to use these lands for *agricultural purposes,* and that the Company sold such lands in small quantities to such persons, departing, it is true, in various instances, from the limitations of the Set-

tlers' Clause, but conforming largely and in the majority of instances, to the requirements thereof. (Subdivision E, Item 8, subdivision 6, Stipulation as to the Facts, Vol. 4, Transcript of Record, pp. 1565-1566).

XXXVIII.

That for many years and until about 1887, all the remaining lands unsold and involved in this suit were not marketable, were wild, rough, and mountainous and had no value for any purpose, and that about said time a demand for timber arose and that thereafter and rapidly these lands became valuable for timber, and that during *all said time they were unfit for settlement, have never been and are not now fit for actual settlement and cannot be used for agricultural* purposes, that their chief value is for the timber and that they could not be used for agricultural purposes excepting after the timber is removed, and such timber could only be removed at very great expense, and that the United States by its Land Department and its legislation has recognized these lands as of the class of timber lands and as not settlement lands, and that during all these times it was impossible for the company to sell these lands to "actual settlers," and that the actual settler clause as to the bulk of the unsold lands is impossible

of performance and has been made so by the physical conditions and characteristics of the land *and by the legislation of Congress in that behalf.*

We submit that deducible from these facts the following conclusions of law inevitably follow:

I.

That the United States is and of right ought to be estopped to maintain this suit or to contend that the actual settler clause is either a condition subsequent or a covenant, or to contend that the title to the lands involved in suit is or should be forfeited to the United States for any reason.

II.

That the so-called "actual settler" clause is not a condition subsequent or a covenant or promise in the first instance by the immediate grantees, the East Side Company and the West Side Company.

III.

That this covenant or promise was personal to that grantee and did not run with the land and was not binding upon the Oregon and

California Railroad Company, the purchaser from the immediate grantees.

IV.

That the covenant or promise was enforcible by the United States while the Land Department of the United States retained its jurisdiction over the grants *up to issuance of patents for lands opposite to and coterminous with the constructed portions of road and that from that date the United States lost its control and jurisdiction over the lands and could not therefore enforce this covenant or proviso.*

V.

That these lands remained *quasi* public lands within the jurisdiction of the Land Department and not subject to taxation up to issuance of patent, and that the United States could require the grantee company and its successor in interest *up to issuance of patent to protect the actual settler that might desire to purchase settlement lands within the limits of the grant, and could by its own land department machinery ascertain who was such actual settler and apply the settlement laws to each quarter section that might be settled upon or sought to be purchased.*

VI.

That when the grantee companies and the Oregon and California Railroad Company, their successor in interest, borrowed money upon bonds secured by mortgages upon these grants, the lands became thereby pledged to furnish construction funds or redeem bonds issued therefor, and that the entire grant in each case may be sold *in solido* to reimburse the bondholders for the construction funds advanced, and that thereby the so-called "actual settler" clause would yield to the prior and paramount purpose of Congress in making the grants in aid of construction of the road.

VII.

That by reason of the character of the unsold land, the title thereto cannot be forfeited for alleged breach of condition subsequent for the reason that such condition has become impossible of performance and the condition has been thereby discharged, not only as to major portion of said grant because of its timber character and because the lands are *not settlement lands,* but every portion of the grant treated as a unit is thereby saved and the title in fee simple remains in the company, discharged of any condition, if these

words may be construed as creating a condition subsequent.

VIII.

Congress has by its legislation, as before indicated, construed the actual settler clause as applicable only to *settlement lands* and not as applicable to lands of the character involved in suit, and has adopted the construction put upon the Act by the Oregon and California Railroad Company from 1870 down to date, and has by its effective legislation waived any and all causes of forfeiture or all causes of suit for attempted enforcement of the so-called actual settler clause.

IX.

That the defendants-appellants are entitled to a decree of this court reversing the decree of the court below, dismissing the bill of complaint, dismissing the cross-complaint of cross-complainants and the bill of intervention of the interveners, and adjudging and decreeing that the Oregon and California Railroad Company is the owner in fee simple, in possession and entitled to possession of all of the lands involved in suit, and of all of the lands inuring to the company under the Act of July 25, 1866 and of May 4, 1870,

subject to the lien in favor of the Union Trust Company under its Mortgage of July 1, 1887, and subject to such rights as exist under the Deed of Trust of June 2, 1881 in favor of Stephen T. Gage.

We respectfully submit that in view of the foregoing, if *a private party were to stand in this court in the shoes of the United States,* and were to seek forfeiture of lands granted to another private party, which latter party had expended large sums of money for a public purpose, as has been expended here, but had expended them for the benefit of this private party so in court, and had fully performed all of the conditions of the contract other than that the grantee had not sold a portion of the lands conveyed under an actual settler clause such as here, and if that private party had stood by for a period of thirty-seven years and had permitted his grantee to expend large sums of money in taxes, to construct the road, to invest his money that he otherwise would not have invested, to perform continuing obligations upon his part exacted from him by the grantor; if, in other words, this private party had done as the United States has done, if

this private party had stood by and had been silent as the United States has done, and been, if this private party had done certain affirmative acts tending to assure the grantee that *his construction of the contract was correct and one that* ought to be observed, would any court of chancery, at any time or place, in any country, allow such party to receive the benefits and consideration of his sale and then take by the stroke of a pen the substantial consideration that he had received from his grantee, deprive him of his estate, continue to require him to perform his contract and do so under the pretense that he was seeking to perform an act for the benefit of a third person, and at the same time have no intention or purpose to bestow upon such third person the benefit of the forfeiture, applying the case of such private party to the United States in the case at bar? And what greater right, what greater equity as between the Government of the United States and the defendant companies, has the United States than such private suitor under the circumstances stated? Is it necessary that the Government of the United States should be justified in a wrong of this kind? Is it

necessary that the Oregon and California Railroad Company should be punished for its construction of this road,—punished for the fact that it kept the contract it made with the United States? Must it be punished by depletion of its estate, after it has paid in taxes vast sums of money which it can never recover, after it has constructed its road, after it has operated it without profit for nearly forty years, maintained it as a public highway, kept its contract to the letter in every particular—merely because, thirty-seven years afterwards the Congress of the United States, in the supposed performance of a public duty, seeks to forfeit this land grant, not *because actual settlers want it, not because actual settlers could use it, not because the United States intends that actual settlers shall have it, but for some other reason—because timber investors desire it, because it desires to penalize the railroad company, or for any reason,* good or bad? It is respectfully submitted that a court of justice should, and that it will not look with favor *upon a suitor that comes into court under such circumstances for such purposes and with such ends in view.* It is therefore

respectfully submitted that the decree of the court below must and should be reversed.

WM. F. HERRIN
P. F. DUNNE
WM. D. FENTON

Solicitors for Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, Individually and as Trustee.

Defendants and Appellants.

F. C. CLEARY,
Of Counsel.

APPENDIX.

The following are copies of the Acts of Congress to be considered:

Act of July 25th, 1866, 14 Stat., p. 239, the same being—

> "An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon."
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the "California and Oregon Railroad Company," organized under an act of the State of California, to protect certain parties in and to a railroad survey, "to connect Portland, in Oregon, with Marysville, in California," approved April sixth, eighteen hundred and sixty-three, and such company organized under the laws of Oregon as the legislature of said State shall hereafter designate, be, and they are hereby, authorized and empowered to lay out, locate, construct, finish and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Rail-

road, in California, in the manner following, to wit: The said California and Oregon Railroad Company to construct that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said company) on the Central Pacific Railroad in the Sacramento Valley, in the State of California, and running thence northerly, through the Sacramento and Shasta valleys, to the northern boundary of the State of California; and the said Oregon company to construct that part of the said railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon, where the same shall connect with the part aforesaid to be made by the first-named company: Provided, That the company completing its respective part of the said railroad and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right, and the said company is hereby authorized, to continue in constructing the same beyond

the line aforesaid, with the consent of the State in which the unfinished part may lie, upon the terms mentioned in this act, until the said parts shall meet and connect, and the whole line of said railroad and telegraph shall be completed.

Sec. 2. And be it further enacted, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten

miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of section of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: Provided, That bona fide and actual settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: And provided also, That, settlers under the provisions of the homestead act, who comply with the terms

and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

Sec. 3. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said companies for the construction of said railroad and telegraph line; and the right, power, and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine-shops, turn-tables, switches, side-tracks, turn-tables, water stations, or any other structures required in the construction and operating of said road.

Sec. 4. And be it further enacted, That whenever the said companies, or either of

them, shall have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, the President of the United States shall appoint three commissioners, whose compensation shall be paid by said company, to examine the same, and if it shall appear that twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act, the said commissioners shall so report under oath to the President of the United States, and thereupon patents shall issue to said companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of said railroad and telegraph line as aforesaid; and from time to time, whenever twenty or more consecutive miles of said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued.

Sec. 5. And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

Sec. 6. And be it further enacted, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage

hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the "Central Pacific Railroad" of California, and be connected therewith.

Sec. 7. And be it further enacted, That the said companies named in this act are hereby required to operate and use the portions of parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and communication, so far as the government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damages sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any state, of competent jurisdiction.

Sec. 8. And be it further enacted, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and *all the lands not conveyed by patent to said company or companies,* as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

Sec. 9. And be it further enacted, That the said "California and Oregon Railroad Company" and the said "Oregon Company" shall be governed by the provisions of the general railroad and telegraph

laws of their respective States, as to the construction and management of the said railroad and telegraph line hereinbefore authorized, in all matters not provided for in this act. Wherever the word "company" or "companies" is used in this act it shall be construed to embrace the words "their associates, successors, and assigns," the same as if the words had been inserted, or thereto annexed.

Sec. 10. And be it further enacted, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber so much of the timber thereon as shall be required to construct said road over such mineral land is hereby granted to said companies: Provided, That the term "mineral lands" shall not include lands containing coal and iron.

Sec. 11. And be it further enacted, That the said companies named in this act shall obtain the consent of the legislatures of their respective States, and be governed by the statutory regulations thereof in all matters pertaining to the right of way, wherever the said road and telegraph line shall not pass over or through the public lands of the United States.

Sec. 12. And be it further enacted, That Congress may at any time, having due regard for the rights of said California and Oregon railroad companies, add to, alter, amend, or repeal this act.

APPROVED, July 25, 1866."

Act of June 25th, 1868, 15 Stat., p. 80, the same being—

"An Act to amend an Act entitled "An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon," approved July twenty-fifth, eighteen hundred and sixty-six, be so amended as to provide that instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph shall be completed within eighteen months from the passage of this act, and

at least twenty miles in each two years thereafter, and the whole on or before the first day of July, anno Domini eighteen hundred and eighty.

APPROVED, June 25, 1868."

Act of April 10th, 1869, 16 Stat., p. 47, the same being—

"An act to amend an Act entitled "An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July twenty-five, eighteen hundred and sixty-six."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the legislature of the State of Oregon, in accordance with the first section of said

act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act: Provided, That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land: And provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.

"APPROVED, April 10, 1869."

Act of May 4th, 1870, 16 Stat., p. 94, the same being—

"An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And

in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

"Sec. 2. And be it further enacted, That the commissioner of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: And provided also, That settlers under the provisions of the homestead act who comply with the terms and require-

ments of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

Sec. 3. And be it further enacted, That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said complected (completed) sections.

Sec. 4. And be it further enacted, That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by

the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

Sec. 5. And be it further enacted, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the (rate) of seven per centum per annum; and not part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth

the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the State courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

Sec. 6. And be it further enacted, That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that the said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date.

APPROVED, May 4, 1870."

Act of May 3rd, 1875, (18 Stat. 519), the same being:

"An Act for the relief of settlers on lands within railroad limits."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where any actual settler who

shall have paid for any lands situate within the limits of any grant of lands by Congress to aid in the construction of any railroad, the price of such lands being fixed by law at double minimum rates, and such railroad lands having been forfeited to the United States and restored to the public domain for failure to build such railroad, such person or persons shall have the right to locate, on any unoccupied lands, an amount equal to their original entry, without further cost, except such fees as are now provided by law in pre-emption cases; Provided, That when such location is upon double minimum lands, one-half the amount only shall be taken.

APPROVED, March 3, 1875."

Act of June 3rd, 1878, (20 Stat. 89), the same being:

"An Act for the sale of timber lands in the states of California, Oregon, Nevada and in Washington Territory."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of Cali-

fornia, Oregon and Nevada and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intentions to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands, Provided, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona-fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: And provided further, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled 'An act granting the right of way

to ditch and canal owners over the public lands, and for other purposes,' shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not ap-

ply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land-office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, shall be null and void.

Sec. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office, shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office,

for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall

issue thereon; Provided, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of the claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land-office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

Sec. 4. That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred

nor more than one thousand dollars; Provided, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

Sec. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: Provided, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to

purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act; And further provided, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

Sec. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

APPROVED, June 3, 1878."

On May 3rd, 1879, (20 Stat. 472), the same being:

"An act to grant additional rights to homestead settlers on public lands within railroad limits."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any State in aid of any

railroad or military road, shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler, and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land-grant, and who, by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry, if such additional land be subject to entry; or if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made. And any person so making additional entry of eighty acres, or new entry after the surrender and cancellation of his original entry, shall be permitted so to do without payment of fees and commissions; and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted

from the five years' residence and cultivation required by law; Provided, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year.

APPROVED, March 3, 1879.

On January 31st, 1885, (23 Stat. 296), the same being:

"An act to declare forfeiture to certain lands granted to aid in the construction of a railroad in Oregon."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the lands granted by an act of Congress entitled 'An act granting land to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May fourth, eighteen hundred and seventy, as are adjacent to and coterminus with the uncompleted portions of said road, and not embraced within the limits of said

grant for the completed portions of said road, be, and the same are hereby, declared to be forfeited to the United States and restored to the public domain, and made subject to disposal under the general land laws of the United States as though said grant had never been made.

Sec. 2. That all persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited, and who are otherwise qualified, on making due claim to such lands under the homestead, pre-emption, or other laws, within six months after the same shall have been declared forfeited, shall be entitled to a preference right to enter the same in accordance with the provisions of this act and of the homestead pre-emption, or other laws, as the same may be, and shall be regarded as having legally settled upon and occupied said lands under said pre-emption, homestead, or other laws, as the case may be, from the date of such actual settlement or occupation; and in case any such settler may not be entitled to thus enter or acquire such land under existing laws, he shall be permitted, within one year after the passage of this act, to purchase not to exceed one hundred and sixty acres of

the same, at the price of one dollar and twenty-five cents per acre; and the Secretary of the Interior is hereby authorized and directed to make such rules and regulations as will secure to said actual settlers the benefits of these rights: Provided, That the price of the even-numbered sections within the limits of said grant and adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, is hereby reduced to one dollar and twenty-five cents per acre.

Sec. 3. That the act of March third, eighteen hundred and seventy-five, entitled 'An act for the relief of settlers within railroad limits,' is hereby repealed.

APPROVED, January 31st. 1885."

General Forfeiture Act of September 29th, 1890.

"Act of September 29th, 1890. (26 Stat. 496), the same being:

"An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and for other purposes."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain; Provided, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.

Sec. 2. That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim to said lands under the homestead law

Bill S 2301 reported by Mr. Garland from the Committee on the Judiciary on the Senate, January 2nd, 1883, 47th Congress No. 906 (Vol. XIV, pp. 7457-7463, being Defendants' Exhibit 377), the same being:

"A Bill providing for the forfeiture of railroad grants in certain cases."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where grants of lands of Congress have been made to aid in internal improvements, and said lands have not been patented by the United States to the grantee, where the grantee was a corporation, or where the lands were granted to the State, and said lands have been disposed of by the State, and said grants have become subject to forfeiture or resumption by the United States for any cause whatever, it shall be the duty of the Attorney-General to cause suit or suits to be brought in the name of the United States in the proper courts having jurisdiction, to obtain judgments declaring the forfeiture or right of resumption

within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act. The Secretary of the Interior shall make such rules as will secure to such actual settlers these rights.

"Sec. 3. That in all cases where persons being citizens of the United States, or who have declared their intentions to become such in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, or where persons may have settled said lands with bona fide intent to secure title thereto by by the United States of such lands, as the case may be, which suit or suits shall be subject to trial or hearing like other suits, with right or writ of error or appeal by either party, as in other cases. This section shall not be construed so as to prevent the executive authority of the United States from taking possession and disposing of any such lands without judicial proceedings in any case in which it could lawfully do so if this act had not been passed.

"Sec. 2. That the provisions of the first section of this act shall not apply to the case of any railroad (except as mentioned in section three of this act) in which, within one year preceding the passage of this act, any substantial progress in building the same has been accomplished in good faith, and shall be continued in the manner hereinafter mentioned, or in which, before the 1st day of December, eighteen hundred and eighty-two, there shall have been made any substantial progress in the building thereof, and which progress shall be continued in good faith, as hereinafter mentioned. The fore-

purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor, and where any such person in actual possession of any such lands and having improved the same prior to the first day of January, eighteen hundred and ninety, under deed, written contract, or license as aforesaid, or his assignor, has made partial or full payments to said railroad company prior to said date, on account of the purchase price of said lands from it, on proof of the amount of such payments he shall be entitled to have the same, to the extent and amount of one dollar and twenty-five cents per acre, if so much has been paid, and not more, credited to him on account of and as part of the purchase price herein provided to be paid the United States for said lands, or such persons may elect to abandon their purchases and make claim on said lands under the homegoing provisions of this section, limiting the application of section one of this act, shall cease, determine, and be of no effect in the case of every railroad affected thereby the building of which shall not be in good faith or continued after said first day of December, eighteen hundred and eighty-two, to the number of miles in each year required by the act or acts granting such lands, or act or acts amendatory thereof, and in the manner so required, until such railroad shall be entirely completed.

"Sec. 3. *That nothing in this act shall be construed to be a waiver of any condition or requirement imposed upon any corporation or in respect of any such grant by the act or acts granting lands to or in aid or amendatory thereof.*

"Sec. 4. That in every case in which any corporation, or its lawful successor, being lawfully entitled so to do, shall not do the acts mentioned in section two of this act, it shall be the imperative duty of the Attorney-General of the United States to proceed against it as provided in section one of this act."

stead law and as provided in the preceding section of this act; Provided, That in all cases where parties, persons, or corporations, with the permission of such State or corporation, or its assignees, are in the possession of and have made improvements upon any of the lands hereby resumed and restored, and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations shall have six months in which to remove any growing crop, and within which time they shall also be entitled to remove all buildings and other movable improvements from said lands: Provided further, That the provisions of this section shall not apply to any lands situate in the State of Iowa on which any person in good faith has made or asserted the right to make a pre-emption or homestead settlement: And provided further, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March third, eighteen hundred and eighty-seven, or as repealing, altering, or amending

Report No. 2215 of the Committee of the Public Lands, to whom was referred S. No. 2781, "An Act to Forfeit certain Lands heretofore granted for the purpose of aiding in the construction of Railroads and for other Purposes," shows that on April 1, 1890, the Committee reported a Bill on the subject (H. R. No. 8919) which had not yet been considered by the House and that in some respects, the two Bills were in substance the same. The Committee recommended the amendment of Senate Bill No. 2781 by striking out all after the enacting clause, and inserting various provisions of the House Bill in the section represented, and as thus amended, the Committee recommended that the Senate Bill pass, which amended bill so recommended was as follows: (Vol. IV, Defendants' Exhibit 366; Vol. IV, pp. 2019-2027) and is as follows:

"AMENDED BILL.

"AN ACT to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes.

said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

Sec. 4. That section five of an act entitled 'An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State,' approved May seventeenth, eighteen hundred and sixty-four and section seven of an act entitled 'An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes,' approved March third, eighteen hundred and sixty-five, and also section five of an act entitled 'An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State,' approved July fourth, eighteen hundred and sixty-six, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby repealed; and so much of the provisions of section four of an act approved June second, eighteen hundred and sixty-four, and entitled 'An act to amend an act entitled 'An act making a grant of lands to the

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and co-terminous with the portion of any such railroad not now completed, for the construction or benefit of which lands have heretofore been granted; and all such lands are declared to be a part of the public domain: PROVIDED, that this act shall not be construed as forfeiting the right of way or depot grounds of any railroad company heretofore granted, or lands included in any city, town or village site.

Sec. 2. That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homstead

State of Iowa in alternate sections to aid in the construction of certain railroads in said State,'' approved May fifteenth, eighteen hundred and fifty-six, be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or six miles granted limits of the roads mentioned in said act of June second, eighteen hundred and sixty-four, or the act of which the same is amendatory.

Sec. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the 'Harrison line,' being a line drawn from Wallula, Washington easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven, in township seven north, of range thirty-seven east, of the Willamette meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July first eighteen hundred and eighty-five, or who at said date were in possion of any portion of said lands or had improved the same, claim-law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or preemption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act. The Secretary of the Interior will make such rules as will secure to such actual settlers these rights.

Sec. 3. That in all cases where persons are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and

ing the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the land so acquired, possessed, or improved, from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of two dollars and fifty cents per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: Provided, That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New Cork, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the legislative assembly of the twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor; PROVIDED, That in all cases where parties, persons, or corporations, with the permission of such State or corporation, or its assignees, are in the possession of and have made improvements upon any of the lands hereby resumed and restored, and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations shall have six months in which to remove any growing crop, and within which time they shall also be entitled to remove all buildings and other movable improvements from said lands: PROVIDED FURTHER, That the provisions of this section shall not apply to any lands (situate in the State of Iowa) on which any person in good faith has made or asserted the right to make a pre-emption or homestead settlement: AND PROVIDED FURTHER, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by 'An act to provide for the adjustment of land grants made by Congress to aid in the

State of Oregon approved November twenty-fifth eighteen hundred and eighty-five, providing for the means to supply the city of Portland with an abundance of good, pure, and wholesome water over and across the following described tracts of land: Sections nineteen and thirty-one in township one south, of range six east; sections twenty-five, thirty-one, thirty-three, and thirty-five, in township one south, of range five east; sections three and five in township two south, of range five east; section one in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five in township one south, of range four east of the Willamette meridian, in the State of Oregon, forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the above described sections for the purpose of constructing, maintaining, and repairing a water-pipe line aforesaid.

Sec. 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March third, eighteen hundred and eighty-seven, or as repealing altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

Sec. 4. That section five of an act entitled 'An act for a grant of lands to the State of Iowa in alternate sections to aid in the construction of a railroad in said State,' approved May seventeenth, eighteen hundred and sixty-four, and section seven of an act entitled 'An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa and for other purposes, approved March third, eighteen hundred and sixty-five, and also section five of an act entitled, 'An act making an additional grant of lands to the State of Minnesota in alternate sections to aid in the construction of railroads in said State,' approved July fourth, eighteen hundred and sixty-four, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby, repealed; and so much of the provisions of sec-

granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line.

Sec. 7. That in all cases where lands included in a grant of land to the State of Mississippi, for the purpose of aiding in the construction of a railroad from Brandon to the Gulf of Mexico, commonly known as the Gulf and Ship Island Railroad, have heretofore been sold by the officers of the United States for cash, or with the allowance or approval of such officers have been entered in good faith under the pre-emption or homestead laws, or upon which there were bona fide pre-emption or homestead claims on the first day of January, eighteen hundred and tion four of an act approved June second, eighteen hundred and sixty-four, and entitled 'An act to amend an act entitled 'An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in this State,' approved May fifteenth, eighteen hundred and fifty-six, be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or six miles granted limit of the roads mentioned in said act of June second, eighteen hundred and sixty-four, or the act to which the same is amendatory.

Sec. 5. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the 'Harrison line,' being a line drawn from Wallula, Washington, easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section twenty-seven, in township seven north, of range thirty-seven east, of the Willamette meridian, all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said

ninety, arising or asserted by actual occupation of the land under color of the laws of the United States, the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed and persons claiming the right to enter as aforesaid may perfect their entry under the law. And on condition that the Gulf and Ship Island Railroad Company within ninety days from the passage of this act shall, by resolution of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title, and claim in and to all such lands as have been sold, entered, or claimed as aforesaid, then the forfeiture declared in the first section of this act shall not apply to or in anywise affect so much and such parts of said grant of lands to the State of Misissippi as lie south of a line drawn east and west through the point where the Gulf and Ship Island Railroad may cross the New Orleans and Northeastern Railroad in said State, until one year after the passage of this act. And there may be selected and certified to or in behalf of said company lands in lieu of those hereinbefore required to be lands prior to July first, eighteen hundred and eighty-five, or who at said date were in possession of any portion of said lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquiesced, possessed, or improved from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of two dollars and fifty cents ($2.50) per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: PROVIDED, That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August eighth, eighteen hundred and eighty-six, and which are described as follows: A strip of land fifty feet in width, being twenty-five feet on each side of the center line of a

surrounded to be taken within the indemnity limits of the original grant nearest to and apposite such part of the line as may be constructed at the date of selection.

Sec. 8. That the Mobile and Girard Railroad Company, of Alabama, shall be entitled to the quantity of land earned by the construction of its road from Girard to Troy, a distance of eighty-four miles. And the Secretary of the Interior in making settlement and certifying to or for the benefit of the said company the lands earned thereby shall include therein all the lands sold, conveyed, or otherwise disposed of by said company not to exceed the total amount earned by said company as aforesaid. And the title of the purchasers to all such lands are hereby confirmed so far as the United States are concerned. But such settlement and certification shall not include any lands upon which there were bona fide pre-emptors or homestead claims on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States.

The right hereby given to the said railroad company is on condition that it shall within ninety days from the passage of this act, water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the legislative assembly of the State of Oregon approved November twenty-fifth, eighteen hundred and eighty-five, providing for the means to supply the City of Portland with an abundance of good, pure, and wholesome water over and across the following described tracts of land: Sections nineteen and thirty-one, in township one south, of range six east; sections twenty-five, thirty-one, thirty-three and thirty-five, in township one south, of range five east; sections three and five, in township two south, of range five east; section one, in township two south, of range four east; sections twenty-three, twenty-five, and thirty-five, in township one south, of range four east, of the Willamette meridian, in the State of Oregon, forfeited by this act, are hereby confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the above described sections for the purpose of constructing, maintaining, and repairing a waterpipe line as aforesaid.

by resolution of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title and claim in and to all such lands within the limits of its grant, as have heretofore been sold by the officers of the United States for cash, where the Government still retains the purchase money, or with the allowance, or approval of such officers have been entered in good faith under the pre-emption or homestead laws, or as are claimed under the homestead or pre-emption laws as aforesaid, and the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed, and all such claims under the pre-emption or homestead laws may be perfected as provided by law. Said company to have the right to select other lands, as near as practicable to constructed road, and within indemnity limits in lieu of the lands so relinquished. And the title of the United States is hereby relinquished in favor of all persons holding under any sales by the local land officers, of

Sec. 6. That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure, by virtue of the forfeiture hereby declared, to the benefit of the completed line; and the price of all lands affected hereby and hereby restored when in any way sold is hereby reduced to one dollar and twenty-five cents per acre.

Sec. 7. *That nothing in this*

the lands in the granted limits of the Alabama and Florida Railroad grant, where the United States still retains the purchase money but without liability on the part of the United States.

APPROVED, September 29, 1890.

act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant.''

Act of March 3, 1887, 24 Stat. 556, the same being:

"An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

Sec. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the

Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

Sec. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: Provided, That he has not located another claim or made an entry in lieu of the one so erroneously cancelled; And provided also, That he did not voluntarily abandon said original en-

try: And provided further, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

Sec. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intentions to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact that such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or

patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney General shall cause suit or suits to be brought against such company for the said amount: Provided, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: And provided, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, such lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: Pro-

vided further, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

Sec. 6. That where any such lands have been sold and conveyed, as the property of any railroad company, for the State and county taxes thereon, and the grant to such company has been thereafter forfeited, the purchaser thereof shall have the prior right, which shall continue for one year from the approval of this act, and no longer, to purchase such lands from the United States at the Government price, and patents for such lands shall thereupon issue. Provided, That said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of any actual settler.

Sec. 7. That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein

mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State corporation or individual would be rightfully entitled.

APPROVED, March 3, 1887."

ORIGINAL HOMESTEAD ACT.

Act of May 20th, 1862, (12 Stat. 392), the same being:

"An act to secure Homesteads to actual Settlers on the Public Domain. . . .

Sec. 2. And be it further enacted, That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that he or she is the head of a family, or is twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that

said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: Provided, however, That no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in

other cases provided by law: And provided, further, That in case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall inure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicile, sell said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified. . . .

Sec. 5. And be it further enacted, That if, at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid, it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at

any time, then and in that event the land so entered shall revert to the government. . . .

Sec. 8. And be it further enacted, That nothing in this act shall be so construed as to prevent any person who has availed him or herself of the benefits of the first section of this act, from paying the minimum price, or the price to which the same may have graduated, for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases provided by law, on making proof of settlement and cultivation as provided by existing laws granting pre-emption rights.

APPROVED, May 20, 1862."

STATUTE OF LIMITATIONS.

Act of March 3, 1891, (26 Stat. 1093), the same being:

"An act to amend section eight of an act approved March 3rd, 1891, entitled 'An act to repeal timber culture laws and for other purposes."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled 'An act to repeal timber culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows; etc.

Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a tresspass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agri-

cultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

APPROVED, March 3, 1891."

Act of March 2nd, 1896, (29 Stat. 42), the same being:

"An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

Sec. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof; and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant, shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons

for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the Acts of the second session of the Forty-ninth Congress.

Sec. 3. That if at any time prior to the institution of suit by the Attorney General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit

or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

APPROVED, March 2, 1896."

"An Act to repeal Timber culture laws, and for other purposes," (26 Stat. 1095-1099,) the material part of which is as follows:

"Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be

brought within six years after the date of the issuance of such patents. . . . "

Sec. 17. That reservoir sites located or selected under the provisions of 'An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes,' and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provision of 'An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes,' which reads as follows, viz.: 'No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws,' shall be construed to include in the maximum amount of lands the title to which is permitted

to be acquired by one person *only agricultural lands* and not to include lands entered or sought to be entered under mineral land laws. . . . . "

Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

APPROVED, March 3, 1891."

FOREST RESERVE LIEU LAND SELECTIONS.

Act of June 4th, 1897, (30 Stat. 11-35-36-37) the same being:

"An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, (26 Stat. 1095) the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions: . . . . . The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals. . . .

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries. . . .

That is cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government,

and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; Provided, further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. . . .

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, ... any public lands embraced within the limits of any forest reservation, which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. . . .

For surveys and resurveys of public lands, three hundred and twenty-five thousand dollars, at rates not exceeding nine dollars per linear mile for standard

and meander lines, seven dollars for township, and five dollars for section lines: Provided, That in expending this appropriation preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers and of lands granted to the States by the Act approved February twenty-second, eighteen hundred and eighty-nine, and the Acts approved July third and July tenth, eighteen hundred and ninety, and other surveys shall be confined to lands adapted to agriculture, and lines of reservations, except that the Commissioner of the General Land Office may allow, for the survey and resurvey of lands heavily timbered, mountainous, or covered with dense undergrowth rates not exceeding thirteen dollars per linear mile, etc., . . . Provided, That in the States of California, Colorado, Idaho, Montana, Oregon, Utah, Washington, Wyoming, and the Territory of Arizona there may be allowed, in the discretion of the Secretary of the Interior, for the survey and resurvey of lands heavily timbered, mountainous, or covered with dense undergrowth rates not exceeding twenty-five dollars per linear mile, etc."

PRE-EMPTION LAWS REPEALED.

Act of March 3rd, 1891, (26 Stat. 1095), the same being:

> "An act to repeal timber culture laws, and for other purposes," and Section 4 thereof, being as follows:
>
> "Sec. 4. That chapter four of title thirty-two, excepting sections twenty-two hundred and seventy-five, twenty-two hundred and seventy-six, twenty-two hundred and eighty-six, of the Revised Statutes of the United States, and all other laws allowing pre-emption of the public lands of the United States, are hereby repealed, but all bona fide claims lawfully initiated before the passage of this act under any of said provisions of law so repealed, may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if this act had not been passed."

AMENDED HOMESTEAD LAW.

Act of March 3rd, 1891, entitled, "An act to repeal timber culture laws, and for other

purposes," (26 Stat. 1095) and Section 5 thereof is as follows:

> "That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident of the State or Territory in which the land sought to be entered is located."

Reference is made to an Act entitled "An Act to provide for an enlarged homestead" (35 Stat. 639), approved February 9th, 1910, but it is not set out herein. A like reference is made to "An Act to provide for an enlarged homestead" (36 Stat. 531-532) approved June 17th, 1910, but the same is not set out.

The joint resolution under which this suit is prosecuted, approved April 30th, 1908, (35 Stat. 571), is as follows:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Attorney General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and

all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following described Acts of Congress, to wit: 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon,' approved July twenty-fifth, eighten hundred and sixty-six, as amended by the Acts approved June twenty-fifth, eighteen hundred and sixty-eight, and April tenth, eighteen hundred and sixty-nine; also 'An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said State,' approved March third, eighteen hundred and sixty-nine; also 'An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May fourth, eighteen hundred and seventy, including all rights and remdeies in any manner relating to the lands, or any part

thereof, granted by either or any of said Aacts; and in and by any and all such suits, actions, or proceedings the Attorney General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions, and procedings, including the claim on behalf of the United States that the lands granted by each of said Acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said Acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which suits actions or proceedings may be instituted or pending to entertain, consider, and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found to enforce

the same: Resolved, further, That the authority and direction hereinbefore given shall extend to any and all suits, actions, or proceedings, which may be instituted or pending under the authority of the Attorney General at the time of the adoption and approval hereof.

APPROVED, April 30, 1908.

The so-called innocent purchasers' act, (37 Stat. 320) entitled "An Act Supplementing the joint resolution of Congress approved April thirtieth, nineteen hundred and eight, entitled 'Joint resolution instructing the Attorney General to institute certain suits,' and so forth," is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of forfeiture heretofore or hereafter asserted by the Attorney General on behalf of the United States in or by any and all suits in equity, actions at law, or other judicial proceedings instituted pursuant to the joint resolution of Congress approved April thirtieth, nineteen hundred and eight, entitled 'Joint resolution instructing the Attorney General to institute certain suits,' and so

forth, be, and the same are hereby, ratified and confirmed and are hereby declared to be of the same force and effect as declarations of forfeiture by the Congress of the United States.

Sec. 2. That none of the lands reverting to the United States by virtue of any right of forfeiture thereto as aforesaid shall be or become subject to entry under any of the public-land laws of the United States, or to the initiation of any right whatever under any of the public-land laws of the United States.

Sec. 3. That no suits in equity, actions at law, or other judicial proceedings shall be instituted pursuant to said joint resolution approved April thirtieth, nineteen hundred and eight, that shall involve any lands sold by the Oregon and California Railroad Company prior to April thirtieth, nineteen hundred and eight, unless the same shall be instituted within one year from the date of the approval of this Act: Provided, That this this section shall not be construed to apply to any suits in equity heretofore instituted, nor to any parties thereto, nor to any of the lands involved therein, nor to the institution of any further suits in

equity, actions at law, or other judicial proceedings, relating to the lands that are involved in said pending suits.

Sec. 4. That the Attorney General is hereby authorized to compromise in the manner hereinafter provided any suit heretofore or hereafter instituted pursuant to the provision of said joint resolution approved April thirtieth, nineteen hundred and eight, involving lands purchased from the said Oregon and California Railroad Company prior to September fourth, nineteen hundred and eight. In any such suit the Attorney General may, in his discretion, stipulate with the defendant or defendants who purchased said lands, or are the successors or assigns of such purchaser or purchasers, that decree shall be entered adjudging that the lands involved therein have been and are forfeited to the United States. Such decree shall recite that the same was entered pursuant to such stipulation. If said purchaser defendant or defendants, or their successors or assigns, shall within six months from the entry of said decree file with the Secretary of the Interior a certified copy of said decree, together with an application to purchase all of the lands adjudged by said decree

to have been forfeited by the United States as aforesaid, and shall pay to the Treasurer of the United States the sum of two dollars and fifty cents per acre for all of the lands so applied for, the Secretary of the Interior shall cause patents to be issued conveying to said purchaser defendant or defendants, and their successors and assigns, all of the right, title and interest of the United States in and to all of said lands; and such purchase shall operate as a compromise of any and all claims of the United States for waste or trespass upon any of said lands committed by such purchaser defendant or defendants or their successors or assigns, respectively: Provided, That the benefits of this section shall not be exercised or enjoyed except in cases where decree shall have been entered pursuant to stipulation entered into as aforesaid: And provided further, That the provisions of this section shall not apply to any lands that have not been patented to said Oregon and California Railroad Company: And provided further, That the aforesaid privilege of purchasing said forfeited lands shall not be exercised or enjoyed as to less than all of the lands involved in said suits, respectively, the

purpose hereof being to prevent the elimination from any purchase of any lands from which timber has been removed or upon which any other waste or trespass has been committed, or the elimination of any part whatever of any land from such purchase.

Sec. 5. That the provisions of section four of this Act shall not be construed to apply to the suit involving approximately two million three hundred and sixty thousand acres, now pending in the District Court of the United States for the District of Oregon, wherein the United States of America is complainant and the Oregon and California Railroad Company, the Southern Pacific Company, Stephen T. Gage, the Union Trust Company, and others are defendants, being designated in the records and files of said court as suit numbered thirty-three hundred and forty; nor shall the provisions of said section four of this Act be construed to apply to any of the lands involved in said last described suit; nor to create any rights or privileges whatever in favor of any of the defendants therein.

Sec. 6. That nothing in this Act contained, nor action taken pursuant to the provisions of this Act, shall be construed as a condonation of any of the breaches of any of the conditions or provisions annexed to any of the grants designated in said joint resolution approved April thirtieth, nineteen hundred and eight, nor as a waiver of any of said conditions or provisions, nor as a waiver of any right of forfeiture in favor of the United States on account of any breach or breaches of any of said conditions, nor as a waiver of any cause of action or remedy of the United States on account of any breach or breaches of any of said conditions or provisions, nor as a waiver of any other rights or remedies existing in favor of the United States.

APPROVED, August 20, 1912."

Code of 1862, in effect when the East Side Company and the West Side Company were each incorporated, is now Section 6678, will now be found in Chapter 1, Section 6679 et seq., Lord's Oregon Laws, and so much of the same as is material is as follows:

"Sec. 6679.

Whenever three or more persons shall desire to incorporate themselves, for the

purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act. (L. 1862, D. p. 658, Sec. 1; H. Sec. 3217; B. & C. Sec. 5052.)

"Sec. 6680. Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgment of a deed, and shall file one of such articles in the office of the secretary of state, and cause the same to be recorded by him in a book to be kept in his office for that purpose, and shall file another with the clerk of the county where the enterprise, business, pursuit, or occupation is proposed to be carried on, or the principal office or place of business is proposed to be located, and cause the same to be recorded by him in a book to be kept in his office for that purpose, and shall retain the third in the possession of the corporation. (L. 1862; D. p: 658, Sec. 2; L. 1891, p. 110, Sec. 1; H. Sec. 3218; B. & C. Sec. 5053.)

"Sec. 6682. All corporations heretofore incorporated and organized under the laws of this state which have main-

tained their corporate existence, and are now de facto corporations and engaged in the pursuits for which said corporations were organized, and which have caused their articles of incorporation to be filed and recorded in the office of the secretary of state or in the office of the county clerk of the county where said company was organized, but which have failed to cause said articles of incorporation to be filed and recorded in both the said places; or, where said articles of incorporation have been filed and recorded, as by law provided, but which said articles were not properly acknowledged, are hereby declared to be legal corporations and are to have the same force and effect as if the same had complied with all the requirements of the law. (L. 1903, p. 176.)

"Sec. 6683. The articles of incorporation shall specify:

1. The name assumed by the corporation and by which it shall be known, and the duration of the corporation, if limited;

2. The enterprise, business, pursuit or occupation in which the corporation proposes to engage;

3. The place where the corporation proposes to have its principal office or place of business;

4. The amount of the capital stock of the corporation;

5. The amount of each share of such capital stock;

6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal, or bridge, the termini of such navigation, road, canal, or the site of such bridge. (L. 1862; D. p. 659, Sec. 4; H. Sec. 3220; B. & C. Sec. 5055.)

"Sec. 6686. Upon making and filing the articles of incorporation, as herein provided, the persons subscribing the same are incorporators, and authorized to carry into effect the objects specified in the articles, in the manner provided in this chapter; and they and their successors, associates, and assigns, by the name assumed in said articles, shall thereafter be deemed a body corporate, with power,—

1. To sue and be sued;

2. To contract and be contracted with;

3. To have and use a corporate seal, and the same to alter at pleasure;

4. To purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation, and to take, hold and possess, and dispose of all real and personal property donated to such corporation by the United States, or by any state, territory, county, city, or other municipal corporation, or by any person, firm, association, or private corporation, for the purpose of aiding in the objects of such corporation;

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation;

6. To make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution; provided, that no such sale

shall be made without thirty days' notice of time and place of sale in some newspaper in circulation in the neighborhood of such company for the transfer of its stock for the management of its property, and for the general regulations of its affairs;

7. In case the object or purpose for which any such corporation is incorporated is in whole or in part to construct, or construct and operate a railroad, to lease any part or all its road to any other company incorporated for the purpose of maintaining and operating a railroad, and to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company upon such terms and conditions as may be agreed upon between said companies respectively. Any two or more railroad companies whose lines are connected may perfect any arrangement for their common benefit to assist and promote the object for which they were created; provided, that nothing in this act shall be construed to authorize the leasing of any railroad line to any company or corporation owning a road which forms a competing or parallel line to its

railroad. (L. 1864; D. p. 659, Sec. 5; L. 1878, p. 90; Sec. 1; L. 1887, p. 14, Sec. 1; H. Sec. 3221; B. & C. Sec. 5056.)"

Office Supreme Court, U. S.
FILED
MAR 29 1915
JAMES D. MAHER

No. 679.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, a corporation, et al.,
Defendants and Appellants,

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Map of Land Grants Referred to at Pages 618-623 of Brief of the Law, on Behalf of Oregon and California Railroad Company, et al., Appellants.

MAP

TOO

LARGE

FOR

FILMING

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible].

No. [illegible].

OREGON & CALIFORNIA RAILROAD COMPANY,
a Corporation,

UNION TRUST COMPANY OF NEW YORK,
Individually and as Trustee, et al.,
Defendants and Appellants,

JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, *et al.*,
Intervenors and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

[illegible] FOR THE [illegible] COMPANY OF NEW YORK,
[illegible] Appellant.

[illegible] MALLORY, SIMON & GRAHAM,
[illegible], KING, LANE & TRAFFORD,
Attorneys for Union Trust Company of New York.

JOHN C. SPOONER,
JOHN M. GRAHAM,
Counsel.

[illegible], INC., NEW YORK.

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2) The greater part of the granted lands were heavily timbered. These lands were incapable of settlement and cultivation while the timber was upon them. At the time the grant was made, and for many years thereafter, the timber was without value. The expense of cutting the timber and clearing the land was prohibitive of its use for actual settlement even though the land itself, after being cleared, should be found to be susceptible of settlement and cultivation..... 73

3) A large proportion of the granted lands in their natural state, and a large proportion of the timber lands when cleared, were mountainous, broken and sterile, and for that reason incapable of settlement and cultivation..... 73

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(4) Of the granted lands, 163,431.28 acres were sold by the Oregon and California Railroad Company prior to May 12th, 1887. Nearly all of the said sold lands were sold to actual settlers in small quantities, although in a few instances such sales were made in quantities exceeding 160 acres to one person, and at prices slightly in excess of $2.50 an acre. These lands were capable of settlement and cultivation, but when they had been disposed of, the remaining lands were incapable of settlement and cultivation, or were chiefly valuable for timber..... 74

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(7) From about 1894 to 1903 the Oregon and California Railroad Company sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person, and at prices exceeding $2.50 per acre, and in several instances between the said dates the said Company sold lands of the said grant in quantities from 1,000 to 20,000 acres to one purchaser, at prices ranging from $5 to $20 per acre, and in one instance at $35 per acre, and in one instance at $40 per acre, and in one instance 45,000 acres at $7 per acre were sold by said Company to a single purchaser, but each of said

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(8) The defendant, Oregon and California Railroad Company, has heretofore made approximately 5,360 sales of its land grant lands, aggregating 820,000 acres; approximately 4,930 of which sales were for quantities not exceeding 160 acres to one purchaser, aggregating about 269,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres; but the said 376 sales were of lands which were chiefly valuable for timber and were not capable of settlement and cultivation 78

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(10) The timbered lands of the reserved even sections and Government timber lands generally in the vicinity of the grant have not been disposed of, exclusively or generally, to actual settlers, but have been sold under the Timber and Stone Act, which does not require settlement or cultivation, and under the Commutation Clause of the Homestead Act, to persons other than bona fide settlers, who entered merely for the timber and sold the land on acquiring title thereto to timber speculators 79

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(11) No evidence was submitted that the lands sold in greater quantities than 160 acres to one purchaser, and at greater prices than $2.50 per acre, were lands susceptible of settlement and cultivation 79

(12) Shortly before the commencement of this action a considerable number of persons applied to the Railroad Company to purchase various sections of said granted lands. In each instance the lands they sought to purchase were timbered and were chiefly valuable for timber, and were of a value largely in excess of $2.50 per acre. The Railroad Company had no reason to believe, nor was it a fact, that these applicants were actual settlers upon the said lands, or that they intended to purchase the said lands for actual settlement.. 80

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 679.

OREGON AND CALIFORNIA RAILROAD COMPANY,
a Corporation,
UNION TRUST COMPANY OF NEW YORK,
Individually and as Trustee, *et al.*,
Defendants and Appellants,

JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, *et al.*,
Interveners and Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNION TRUST COMPANY OF NEW YORK, Defendant and Appellant.

This case comes here under Section 239 of the Judicial Code.

A decree was entered July 1st, 1913, by the District Court of the United States for the District of Oregon, forfeiting to the complainant, the United States of America, the land of the Oregon and California Railroad Company, which passed to that Company by Act of Congress passed July 25, 1866 (14 Stat. 239), as amended by the

Act of April 10, 1869 (16 Stat. 47) and the Act of May 4, 1870 (16 Stat. 94), which had been patented under said Acts of Congress respectively to the said Railroad Company, and which, at the date of the institution of this suit, were unsold, which said lands had been mortgaged by that Company to this appellant as trustee to secure the payment of certain bonds of the Railroad Company.

From the decree so entered an appeal was taken by this defendant to the Circuit Court of Appeals for the Ninth Circuit, where the appeal having come on to be heard that court certified certain questions or propositions of law concerning which it desired the instructions of this court for the proper decision of said appeal (Vol. XIX). Thereupon this court made an order requiring that the whole record and cause be sent up to it for its consideration.

The whole matter in controversy, therefore, comes before this court for consideration and decision in the same manner as if it had been brought here for review by appeal (Judicial Code, Section 239).

The bill of complaint was filed September 4, 1908. Certain of the defendants, not including the Union Trust Company, demurred thereto for insufficiency. The demurrer was overruled by the District Court and an opinion written by Judge WOLVERTON, will be found reported in 186 Fed. 861 (Vol. II, p. 696).

Cross complaints were filed by certain cross-complainants, a typical one of which is the cross-complaint of John L. Snyder, *et al.*, which is set out in Volume II, pp. 640-676, inclusive, of the record.

B. W. Nunnally, *et al.*, were allowed to file their petition in intervention, which is set out in Volume II, pp. 541-638, inclusive, of the record, and which petition in intervention is typical of the petitions in intervention of all other interveners.

The defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage,

individually and as trustees, filed their joint and several demurrer to the complaint herein, which is set out in Volume II, pp. 677-681, inclusive, of the record.

The same defendants filed their joint and several demurrer to the cross-complaint of John L. Snyder, *et al.*, which said demurrer is set out in Volume II, pp. 688-691, inclusive, of the record.

The defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustees, filed their joint and several demurrer to the petition in intervention of B. W. Nunnally, *et al.*, which said demurrer is set out in Volume II, pp. 685-687, inclusive, of the record.

This defendant, the Union Trust Company, filed its demurrer to the cross-complaint of John L. Snyder *et al.*, which demurrer is set out in Volume II, pp. 682-684, inclusive, of the record.

These several demurrers were argued and submitted to the court, and on April 24, 1911, the court made an order overruling the demurrer of the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustees, to the bill of complaint, and sustained the demurrer of the said railroad companies and Stephen T. Gage to the cross-complaint of John L. Snyder, *et al.*, and to all other cross-complaints, and sustained the demurrer of said companies and Stephen T. Gage, individually and as trustees, to the petition of intervention of B. W. Nunally, *et al.*, and to each of the petitions of all other interveners, and sustained the demurrer of the Union Trust Company to the cross bill of John L. Snyder, *et al.*, and sustained a like demurrer to each of the other cross-complainants.

Thereafter the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustees, filed their joint and several answer, which, as amended, is set out in Volume II, pp. 859-1155 of the record.

The Union Trust Company filed an amended answer, which is set out in Volume III, pp. 1165-1281 of the record.

BILL OF COMPLAINT

(Vol. I, p. 1.)

After setting out the citizenship and residence of the respective parties, the bill of complaint, in Paragraph II, recites the Act of Congress of July 25, 1866, entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon." This act may be summarized as follows: (a) The Oregon & California Railroad Company, a California corporation, and "such company organized under the laws of Oregon as the legislature of said state shall hereafter designate," were authorized to construct a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California; (b) The California Company was to construct that part of the railroad and telegraph line within the State of California, from a line on the Central Pacific Railroad, north through the Sacramento and Shasta valleys to the northern boundary of the State of California. And the Oregon Company was to construct that part of the railroad and telegraph line within the State of Oregon, from Portland running southerly through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon, to connect with the part to be constructed by the first-named company; (c) The company first reaching the boundary line between California and Oregon had the right to continue to construct beyond that line with the consent of the state within which the unfinished part lay, until the parts should meet (Sec. 1); (d) A grant was made to the said companies "for the purpose of aiding in the construction of a railroad and telegraph line, and to secure the safe and speedy transportation of the mail,

troops, munitions of war, and public stores," of twenty alternate odd numbered sections of public lands, not mineral, per mile (ten on each side), with provisions as to indemnity lands, and for the sale of the even numbered sections within the grant, at double the minimum price of public lands, and for the protection of the pre-emption rights of actual settlers (Sec. 2); (e) The right of way through the public lands, to the extent of one hundred feet in width on each side of the railroad, and necessary ground for stations, etc., were granted to said companies, and also the right to use certain public materials (Sec. 3); (f) It was provided that patents should issue on report of Commissioners when twenty, or more, consecutive miles had been constructed (Sec. 4); (g) The grants are "made upon the condition that the said Company shall keep said railroad and telegraph in repair and use, and shall at all times transport the mail upon said railroad and transmit dispatches by said telegraph line for the Government of the United States when required so to do by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph, at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the Government of the United States free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road *at the cost, charge and expense of the corporations or companies owning or operating the same when so required by the Government of the United States* (Sec. 5); (h) It was further provided "that the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five;

and the said railroad shall be of the same gauge as the 'Central Pacific Railroad' of California, and be connected therewith" (Sec. 6) (i) The companies are required to operate the two parts as a continuous line (Sec. 7); (j) In case the companies fail to comply with the terms and conditions required, namely: by not filing their assent as provided in Section 6, or by not completing the same as provided in said section, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States." And in case the lines shall not be kept in repair, Congress may pass an act to put them in repair and apply the income to the repayment of the expense incurred (Sec. 8); (k) The 'Oregon & California Railroad Company' and the 'Oregon Company' shall be governed by the state laws in matters not provided for in this act (Sec. 9); (l) Mineral lands are exempted from the operation of the act, but such timber on them as shall be required to construct the road, is granted to the companies (Sec. 10); (m) Where the right of way does not pass over Government lands, the consent of the legislatures of their respective states shall be obtained by the companies, and they shall be governed by the statutory regulations in all matters pertaining to the right of way (Sec. 11); (n) "Congress may at any time, having due regard for the rights of said Oregon & California Railroad Company, add to, alter, amend or repeal this act." (Sec. 12).

The bill of complaint alleges that the sixth section of the Act of 1866 was amended by the Act of June 25, 1868, extending the time for the completion of the first twenty miles for eighteen months from the passage of the Act of 1868, and requiring the completion of at least twenty miles each two years thereafter, and the whole by July 1, 1880.

The complaint, subdivison III, sets out the attempted organization of the Oregon Central Railroad Company

der the laws of the State of Oregon, on or about Oc-
er 6, 1866, and the resolution of the legislature of Ore-
n adopted October 10, 1866, designating the Oregon
ntral Railroad Company as the company which shall
entitled to receive the lands granted, and all the bene-
of the Act of July 25, 1866. (This company was
own as the West Side Company.) And that on May 25,
7, the said company adopted a resolution accepting the
t of July 25, 1866, and filed its assent with the Secre-
y of the Interior on July 6, 1867, and on the 20th day
August, 1868, filed a general map of survey of the pro-
ted line of railroad in the office of the Secretary of
Interior. (The proposed line extended on the west
e of the Willamette River from Portland, westerly to
village of Forest Grove, and thence southerly to and
ond the village of McMinnville.)

The complaint then sets out the attempted organization
the Oregon Central Railroad Company (East Side Com-
ny), on or about April 22, 1867. This Company pro-
ted its line of road on the east side of the Willamette
er. The complaint alleges that on October 28, 1868,
Oregon legislature passed a resolution reciting the
mer resolution designating the Oregon Central Rail-
d Company as the company entitled to the lands
nted by the Act of July 25, 1866, and that no such
npany existed, and that such resolution was adopted
ler a misapprehension of facts as to the organization
l existence of such company, and that the designation
the company to receive the land in the State of Ore-
granted, and the benefits, conferred by the Act, yet
nained to be made, and thereupon designated the Ore-
Central Railroad Company, organized at Salem (the
st Side Company), as the company entitled to receive
lands in Oregon, and the benefits of the Act of July 25,
6. The complaint then alleges that the time to file an
ent by the East Side Company (which would expire
y 25, 1867), had expired, and that the East Side Com-
ny thereupon applied to Congress for an extension of

time in which to file such assent, and that the West Side Company likewise appeared before Congress and opposed the application, and thereupon Congress did grant the application of the East Side Company and passed an act under date of April 10, 1869, which allowed any railroad company theretofore designated by the Oregon legislature, in accordance with the first section of the Act of 1866, to file an assent within one year from the passage of the Act of 1869. That act provided "that nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land," and provided further, "that the lands granted by the act aforesaid, shall be sold to actual settlers only in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre." That the East Side Company thereupon adopted a resolution accepting the grant, which was filed June 30, 1869, in the office of the Secretary of the Interior, and a map of survey and location of the first sixty miles of the projected line was filed October 29, 1869, and on the 24th day of December, 1869, the East Side Company completed the first twenty miles, which were examined and approved by Commissioners pursuant to Section 4 of the Act of 1866.

It is alleged that the West Side Company wholly failed to complete the construction of any part of its line, and in or about the month of January, 1870, acquiesced in the substitution of the East Side Company as the recipient of the grant, and that no right, title or interest thereto passed to that company. In the meantime, the East Side Company became involved in litigation, questioning the validity of its incorporation and organization, and its right to its corporate name; and for that reason its officers, on or about March 17, 1870, organized the Oregon and California Railroad Company under the laws of Oregon, for the purpose of receiving and exercising the grants, franchises and privileges of the Act of July 25, 1866, and

reupon the East Side Company transferred to the Ore- and California Railroad Company all its property and rights under the said act, and it is alleged that the pose, intent and effect of this transfer was not to rate as a sale, but to constitute the Oregon and Cali- nia Railroad Company, the successor in interest of East Side Company, subject to all the terms and condi- s of the act. And that on April 4, 1870, the directors he Oregon and California Railroad Company adopted esolution, a copy of which is set out in the bill (p. 26, ord), wherein, after reciting the purchase of the prop- and franchises of the East Side Company, including interest in the lands and benefits under the Act of 6, the Company accepted the grant upon the terms conditions therein specified, and directed that copies he resolution and conveyance be filed in the office of Secretary of the Interior, which was done.

he complaint further alleges, subdivision IV (p. 28) t the West Side Company, having abandoned and waived claim to the grants, franchises and other benefits of the of 1866, applied to Congress for a similar grant to aid he construction of its projected line upon the west side, thereupon an act was passed entitled: "An Act grant- lands to aid in the construction of a railroad and tele- ph line from Portland to Astoria and McMinnville, in State of Oregon," which was approved May 4, 1870. t act is set out in full in the bill of complaint (Record, 8). It conferred upon the West Side Company a grant ach alternate odd section to the extent of ten such alter- e sections per mile on each side of the road. It con- ed a provision that as the company filed with the retary of the Interior maps of the survey and location twenty or more miles of the said road, the Secretary uld cause the granted lands coterminus with such lo- ed sections to be segregated "and thereafter the remain- public lands subject to sale within the limits of said nt, shall be disposed of only to actual settlers at double

the minimum price for such lands" (Sec. 2). It made provision for the issuing of patents (Sec. 3), and further provided that the lands granted, excepting those reserved for depots, etc., "shall be sold by the company only to actual settlers in quantities not exceeding 160 acres, or a quarter section, to any one settler, and at prices not exceeding $2.50 per acre" (Sec. 4). It also enacted as follows:

"Sec. 5. *And be it further enacted,* That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks and wood yards, not exceeding Thirty Thousand Dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the rate of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the District Court of the United States, concurrently with the state courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section."

And further:

"Sec. 6. *And be it further enacted,* That the said company shall file with the Secretary of the Interior its assent to this Act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date."

The complaint then alleges that the West Side Company adopted a resolution assenting to and accepting the provisions of the Act of July 20, 1870, and that all of the capital stock of the West Side Company was acquired by the owners of the capital stock of the Oregon and California Railroad Company, and that the affairs of the two companies were virtually conducted as a single enterprise until the dissolution of the West Side Company.

Under subdivision V (p. 33), the bill of complaint sets out that by means of mortgage bonds, the Oregon Central Railroad Company (East Side Company), procured approximately $8,000,000, and the West Side Company $2,000,000, with which the line of the former was extended by January 1, 1873, to Roseberg, a distance of 197 miles, and the latter to McMinnville, a distance of 47 miles. At the date last mentioned, both companies were insolvent, and work was suspended, and was never resumed by the West Side Company (p. 34). About July, 1874, the direction and control of both companies was taken by the "Bondholders' Committee," who acquired all the outstanding stock of both companies. In 1880 the West Side Company conveyed all its property to the Oregon and California Railroad Company, and was dissolved.

Under subdivision VI (p. 36) of the complaint, the reorganization of the Oregon and California Railroad Company is set forth, and the making of a deed of trust for preferred stockholders to Henry Villard and others, of whom the defendant, Stephen T. Gage, is the surviving trustee. It recites the issuing of first and second mortgage bonds, and the subsequent insolvency of the company, and the appointment of a receiver in 1885, and the suspension of the work, which was not resumed until April, 1887. By the latter date, patents had been issued to the Oregon and California Company for 323,000 acres of land, and no patents had been issued for the West Side grant (p. 40). The part of the West Side line extending from Forest Grove to Astoria, was not constructed, and in 1885 Congress forfeited the grant contiguous to that portion of the

line (Act of January 31, 1885). (*United States* v. *Oregon and California Railroad Company,* 164 U. S. 526.)

The complaint alleges that "of the aforesaid granted lands, approximately 250,000 acres had been sold prior to the 12th day of May, 1887, and your orator is informed and believes, and therefore states, that nearly all of the lands so disposed of were sold to actual settlers, and in small quantities, although in many instances in quantities and for prices slightly in excess of the aforesaid limitation prescribed by said land grants respectively."

Under subdivision VII (p. 41), the complaint sets forth the formation of the "Southern Pacific System," the acquisition by the Southern Pacific Company of the bonds and stock of the Oregon and California Railroad Company; an agreement, of which a copy is attached to the complaint as Exhibit E; the completion of the road by the Pacific Improvement Company, which it is alleged was owned and controlled by the Southern Pacific Company; the lease of the railroad and telegraph lines by the Oregon and California Railroad Company to the Southern Pacific Company and the mortgage to the Union Trust Company to secure bonds, of which $17,500,000 are now outstanding.

Under subdivision VIII (p. 51), the complaint alleges that until about the year 1893, there was no marked change in the disposition of the lands, but that after that the lowest price for which lands were offered for sale was greatly in excess of $2.50 an acre; that for the purpose of protecting itself from responsibility for violation of the terms of the grants, the Oregon and California Railroad Company and the Union Trust Company adopted quit-claim form of contracts and conveyances. That between the years 1894 and 1905, approximately 2,450,000 acres were patented under the East Side grant, and 128,000 acres under the West Side grant. The complaint then alleges that the defendants "from about the year 1894 until about January 1, 1903, sold and disposed of said granted lands in manner and upon terms in violation and breach of the aforesaid

terms and conditions of said land grants respectively, and with the sole object of securing the greatest possible financial benefit therefrom; and in that behalf a large quantity of said lands was sold to speculators and others than actual settlers, and for speculation and purposes other than actual settlement, and in quantities greatly in excess of one quarter section to one purchaser, to wit: in quantities from 1,000 to 45,000 acres to a single purchaser, and for prices greatly in excess of $2.50 per acre, to-wit: for prices from $5 to $40 per acre." Attached to the complaint is Exhibit J, showing the lands conveyed, the quantity and the price.

Under subdivision IX (p. 57), the complaint alleges that on January 1, 1903, there remained unsold of the granted lands 2,373,000 acres, of which approximately 2,080,000 had been patented, and 293,000 were unpatented; that approximately 1,800,000 acres are situated south of Eugene, and constitute approximately one-half of the lands within forty miles of a railroad from Eugene to the state line; that since January 1, 1903, certain persons have applied to the railroad company to purchase unsold lands in quantities of 160 acres, intending and desiring to purchase them for the purpose of actually settling thereupon and making a permanent home thereof, and that several of said applicants have actually settled and established a permanent home on the land, and that the applicants tendered to the railroad company $2.50 per acre; that a large number of persons are ready and willing to settle upon and purchase the land for the purpose of actual settlement "in quantities, for the prices and upon terms as prescribed by the said land grants," but that the railroad company has withdrawn the lands from sale and refused to sell to said applicants. The complaint alleges a combination between the railroad company and the Southern Pacific Company to create and maintain a monopoly, and to control and restrain the commercial and industrial development of the territory tributary to the railroad lines,

and that such development has been retarded thereby (p
60 and 61). It alleges that none of the lands have be
reduced to possession by the railroad company, and th
they are of the reasonable value of $40,000,000.

Subdivision X (p. 63) of the complaint sets out certa
benefits that the Oregon and California Railroad Compa
has derived other than from the purchase price of the land
For instance: payments on contracts which have be
forfeited; rents from leased lands and the sale of timb

Subdivision XI (p. 64) of the complaint charges was
committed by the company upon the lands.

Subdivision XII (p. 65) of the complaint charges t
railroad company with concealment of sales in excess
160 acres, and at prices in excess of $2.50 per acre, and i
norance thereof on the part of the Government, and charg
the railroad company with false and deceitful represent
tions as to the reasons why sales were not made after 190

Subdivision XIII (p. 66) of the complaint sets out th
a memorial was presented to the United States charging t
facts as above stated, and thereupon a joint resolution w
adopted by Congress, which is set out in the complaint
page 67, by which the Attorney General was authoriz
and directed to institute and prosecute suits, actions a
proceedings at law or in equity which he might dee
adequate to enforce the rights and remedies of the Unit
States arising out of the Act of July 25, 1866, the Act
June 25, 1868, the Act of April 10, 1869, and the Act
May 4, 1870; and in and by such suits, actions and p
ceedings, assert all rights and remedies in favor of t
United States relating to the subject of such suits, actio
and proceedings, including the claim that the lan
granted by each of said Acts, have been forfeited by reas
of any breach or violation of any of the terms or con
tions of either or any of said Acts, which may be alleg
and established in any such suit, action or proceeding,
not being intended hereby to determine the right of t
United States to any such forfeiture or forfeitures, b
it being intended to fully authorize the Attorney Gener

in and by such suits, actions or proceedings to assert, on behalf of the United States, and the Court or Courts before which such suits, actions or proceedings may be instituted or pending, to entertain, consider and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found, to enforce the same."

Under subdivision XIV (p. 69), the complaint alleges that certain of such granted lands are forfeited, to-wit: all the unsold lands, and all rights of defendants under the land grants, and adds: "pursuant to the authority and direction contained in said joint resolution of Congress, approved April 30, A. D. 1908, your orator does hereby assert title to, and does hereby resume the title of, all of said lands and estates in lands forfeited to your orator as aforesaid." The bill then excludes from the operation of the forfeiture such of the granted lands as were theretofore sold.

Under subdivision XV (p. 71) of the complaint, it is alleged that the property described (not including any of the said granted lands) in the mortgage to the Union Trust Company is of a value greatly in excess of the bonded indebtedness, but it denies that the Union Trust Company, as trustee, or otherwise, or any other person, has any right, title, interest or lien in, to or upon any of said lands by virtue of said mortgage deed.

In subdivision XVI (p. 72) of the complaint it is alleged that pursuant to the rules of the Department of the Interior, all the patents were issued and based upon applications in writing, filed by the Oregon and California Railroad Company containing lists of the lands claimed, each of which was accompanied by an affidavit to the effect that *all the lands so claimed were of the character contemplated by the grant, and that the patents were issued in reliance upon this statement.*

In subdivision XVII (p. 72) of the complaint, it is alleged that in the conveyance made by the Railroad Com-

pany, *it reserved the right of way, and other benefits, all of which, it is averred, should be forfeited.* Other formal matters are set forth in the subdivisions XVIII, XIX and XX.

The relief sought is an adjudication that the unsold lands be forfeited to and reinvested in the United States, quieting the title in the United States, or, in the alternative, that it be adjudged that the unsold lands are subject to purchase by a sale and conveyance to actual settlers in quantities not exceeding 160 acres, for a price not exceeding $2.50 per acre, and that a receiver be appointed and vested with title and possession to such lands, and be authorized and directed to sell to persons of the character and in the quantities and at the prices aforesaid; and provides for the care of the property, and for an accounting.

Or, in the alternative, that a mandatory injunction issue requiring the Oregon and California Railroad Company to offer the unsold lands for sale, and to sell them to any bona fide settler who may apply to purchase, in quantities not exceeding 160 acres, for the price of $2.50 per acre, in such manner as the Court shall deem adequate and expedient.

Or an injunction enjoining the defendants from making a sale of the property, or from committing waste.

That the Oregon and California Railroad Company, Southern Pacific Company and the Union Trust Company account for all moneys which they have received for lands sold to other than actual settlers, in quantities exceeding 160 acres and for a price exceeding $2.50 per acre. That the other defendants be enjoined and restrained from proceeding with suits instituted by them, and for other general relief.

DEMURRER AND DECISION THEREON

The Oregon and California Railroad, Stephen T. Gage and the Southern Pacific Company, interposed separate demurrers "upon the ground of no equity as to subject

matter, discovery or relief." No demurrer was interposed by the Union Trust Company to the Government's bill; but it interposed a demurrer to each of the cross bills and petitions in intervention filed by the other defendants. The demurrer to the cross bills was sustained, but the demurrers by the railroad company, Gage and the Southern Pacific Company were overruled by Judge WOLVERTON, who filed an opinion, which, for the reasons hereafter to be stated, it becomes necessary to examine with care.

The grounds of demurrer urged by the railroad company and the other demurrants were:

(1) That the proviso of the Act of 1869 did not become obligatory because the title to the land grant had passed to the railroad company previous thereto, and that Congress was without power to attach a limitation or condition to the absolute fee already vested in the railroad company.

(2) That the proviso did not create a condition subsequent, but was a personal covenant, the specific performance of which could not be enforced.

(3) That if the proviso be regarded as a condition, and if there had been breaches thereof, the complainant had waived the same and acquiesced therein.

(4) That *the land patents were conclusive,* but that if void—the title was confirmed by the Acts of *March 3, 1891, and March 2, 1896,* which bar the suit as to all lands patented prior to October, 1902.

(5) That a Court of Equity was without jurisdiction to declare or enforce a forfeiture. That the grantor had not declared such forfeiture, nor had such forfeiture been adjudged at law, and therefore, this suit could not be maintained.

Each of these grounds of demurrer was overruled by Judge WOLVERTON. He held that the title to the land grant had not vested in the Oregon and California Rail-

road Company at the time of the passage of the Act of 1869, by reason of the failure of that company to file an assent as required by the sixth section of the Act of 1866, and that by availing itself of the right to file such assent conferred by the Act of 1869, it became obligated by all the terms and conditions of that Act. (Opinion, Vol. II, pp. 733-742).

He held that the issuance of patents to such of the lands comprised in the grant as had been patented, did not supersede or annul the requirements of the Act of 1869. (Opinion, Vol. II, pp. 745-752).

He held that there was nothing contained in the bill of complaint to show that the Government did more than remain silent while the Oregon and California Railroad Company was disposing of the lands in violation of the condition, if it be a condition, and therefore, there was no waiver or acquiescence on the part of the Government in the mode of disposition of the lands adopted by the railroad company; and that the Acts of September 29, 1890, and January 31, 1885, could not be construed as a waiver of forfeiture of the lands not forfeited by those Acts.

He also held that the statutes (Sec. 8 of the Act of March 3, 1891, 26 Stat. 1099; and Sec. 1 of the Act of March 2, 1896, 29 Stat. 42), limiting the time within which suits could be brought to vacate and annul patents to lands, did not limit the time within which an action could be brought to forfeit the lands in question for a breach of condition.

Coming to the crucial controversy, he held that the proviso in question was a condition subsequent, and *not* a covenant or trust obligation. That the condition was that the granted lands should be sold to actual settlers only, in quantities not greater than one quarter section; and he held that the allegations in the bill of complaint to the effect that the defendant company had sold certain of the lands in quantities in excess of 160 acres to one purchaser, and for a price in excess of $2.50 an acre, was a ground of

forfeiture of all the lands unsold, as prayed in the bill of complaint. This conclusion was reached largely by a process of reasoning from the legislative intent, as shown by what transpired in Congress in connection with the passage of the Act of 1870, and the history of Congressional land legislation, that inasmuch as one of the purposes thereby disclosed was to secure the distribution of the public lands among actual settlers in order to build up the public domain, that this proviso should be construed in a light most favorable to attain that purpose. Having considered the Congressional discussion and legislation, he proceeds to the application of the rule that public grants should be construed in a sense favorable to the grantor, although it is said that inasmuch as the Government was to receive a consideration for its grant, namely: the transportation of its mail, troops, munitions of war, etc.—if this were a purely private grant, the absence of technical words appropriate to the creation of a condition subsequent, would evidence an intendment not to create such a condition.

The Court also found that the language of the Act of May 4, 1870, which contains no technical words that at common law would indicate a condition, none the less imports a condition.

A considerable part of the opinion is taken up with a discussion of the rights of the cross-complainants, who claimed that the railroad company took the lands upon an executory trust to be administered by it in behalf of any citizen who should become, or who in good faith purports to be, an actual settler upon the land, and that the railroad company became obligated as such trustee in the performance of its trust, to sell to such person the land claimed by him, to the extent of 160 acres at the rate of $2.50 per acre. The Court refused to yield to this contention, and sustained the demurrer as to the cross-complainants. This appellant leaves the consideration of that question to the brief in reply on the appeal of the cross-complainants. Finally, the Court considers the contention of the railroad

company that the suit could not be maintained as one to enforce a forfeiture, nor to quiet title, because the Government had not declared a forfeiture, nor had the fact of forfeiture been adjudicated by a court of law, while the defendant railroad company holds the legal title, and is in actual possession. The conclusion reached by the Court was that:

"While Congress has not declared a forfeiture leaving the judicial inquiry to follow, it has clothed the Attorney General with ample authority to institute a suit for determining whether forfeiture has been incurred or not, and the facts being such that equity may entertain jurisdiction of the cause, there remains no reason why it should not be maintained."

A review of the reasons given by the Court in reaching this conclusion, is reserved for the body of the brief.

ANSWER OF THE UNION TRUST COMPANY

(Vol. III, p. 1165.)

The answer of the Union Trust Company admits the various acts of Congress, resolutions and legal proceedings set forth in the bill of complaint. It denies the inferences and conclusions drawn therefrom adverse to the interests of the railroad company and to this defendant. It is unnecessary to state with minuteness all the admissions and denials of the answer. It is enough to refer to those which raise the issues which were intended to be presented upon the trial.

Referring to the allegations contained in the paragraphs of the complaint numbered VIII, IX, X, XI and XII, to the effect that the railroad company had sold granted lands in quantities in excess of 160 acres to one purchaser, and for prices in excess of $2.50 an acre, and that in 1903, and thereafter, it had withdrawn the lands from sale, this defendant, at paragraph VIII, p. 1195 of the answer, denies that the railroad company "on or about the year 1894 until

about January 1, 1903, or at any time, sold or disposed of said granted lands, or any part thereof, in manner or upon terms in violation or breach of the aforesaid terms or conditions of the said land grants, or either of them."

The defendant admits "that some of said lands were sold to persons who were not actual settlers thereon, and did not purchase the same for purposes of actual settlement, in quantities exceeding a quarter section to one person, and at prices exceeding $2.50 per acre."

It admits that in several instances lands in quantities of from 1,000 to 20,000 acres were sold to purchasers, at prices ranging from $5 to $20 per acre. In one instance at $35 per acre, and in one instance at $40 per acre, and in one instance a sale in excess of 20,000 acres, and of 45,000 acres at $7 per acre, was made to a single purchaser.

The defendant admits (Par. IX, p. 1198) "that since January, 1903, and principally since the passage on or about February 14, 1907, by the legislature of the State of Oregon of the memorial, a copy of which is attached as Exhibit L to the bill, communications have been received by the defendant, Oregon and California Railroad Company, purporting to be the several applications of persons, exceeding one thousand in number, to purchase certain of said unsold lands, generally designated and described in such communications as a single 160-acre tract, or quarter section, subdivision, to each person named;" but the defendant "denies that said applicants intended or desired to purchase the lands so applied for to be purchased by them, or in their names, respectively, for the purpose of actually settling thereupon, or making a permanent or any home thereon; and it denies, upon information and belief, that several of said applicants had actually settled or established a permanent or any home upon the lands so applied for by them, or in their names, respectively," and that the applicants tendered the sum of $2.50 per acre.

The defendant denies that "a large, or any number of persons, are ready and willing to settle upon said lands, or to purchase the same for the purpose of actually settling thereupon, or of making a permanent or any home thereupon, in quantities not exceeding 160 acres to each person, or for the price of $2.50 per acre, or upon any terms prescribed by the said land grants, or either of them, or are deterred therefrom by the defendant, Oregon and California Railroad Company, as stated in the bill, or at all; *and this defendant, upon information and belief, avers that the said lands generally are essentially timber lands, not susceptible of actual settlement, or the establishment of permanent or any homes thereon; and further, that all lands of the said land grants now, or at any time susceptible of actual and permanent settlement, or the establishment of homes thereon, at no time exceeded approximately* 300,000 *acres, consisting of small and widely separated tracts, all or nearly all, of which were sold to actual settlers or persons claiming to be such, during construction and prior to the completion of said railroad, respectively, in quantities of* 160 *acres, or less, to a single purchaser at prices not exceeding* $2.50 *per acre;* and this defendant avers, upon information and belief, that at the time said grant of July 25, 1866, was made by Congress, and the line of said railroads located, a large part of the lands susceptible of actual settlement and cultivation, within the ten miles, or granted limits, of said grant, had been occupied by Homestead settlers, pre-empted or otherwise disposed of, and that the railroad company was obliged to take, and did take in lieu thereof, under the direction of the Secretary of the Interior, in the indemnity limits of said grants, *lands which were valuable chiefly, if not wholly, for the timber growing thereon, and were not susceptible of actual settlement, residence and cultivation.*"

The defendant also avers "that the said applications to purchase said lands set forth in the bill and referred to above, were made by persons desiring to obtain title to said respective quarter sections because of the timber

thereon, and not otherwise, and for the purpose of speculation only, and not in good faith, as actual or any settlers; and that the said lands were chiefly, and in most instances solely, of value because of the timber thereon, and were not arable or susceptible of actual settlement and cultivation" (p. 1200).

Defendant denies that the railroad company "has at any time refused, or still refuses, to sell any part of said unsold lands to actual settlers, or for purposes of actual settlement, or in quantities or for purposes as prescribed by any terms of the said land grant acts, or either of them, or at all."

It also admits that the railroad company "has at all times refused, and still refuses, to entertain the pretended applications to purchase, or to sell any of the timber lands applied for as set forth in the bill, to the persons who made, or in whose names were made, the said pretended applications, upon the terms offered therefor in said pretended applications; but upon information and belief, the defendant denies that ever since January 1, 1903, or at any time, the defendant, Oregon and California Railroad Company, has failed or neglected to encourage or promote the settlement of any of the said lands which are susceptible of settlement and the establishment of homes thereon, or the purchase thereof by actual settlers for the purpose of actual settlement."

And it denies that the railroad company "has at all or any times encouraged, obstructed, forbidden or prevented the settlement of any of said lands which are susceptible of settlement, or the purchase thereof, or any part thereof, upon terms prescribed by the said land grants, or either thereof, either by actual settlers or for the purpose of actual settlement."

The defendant avers that the railroad company is in open and notorious possession of, and dominion, of the said lands as follows: "The said company has at all times openly and notoriously claimed, and prior to about the time of

the commencement of this suit was recognized as, and admitted by all to be, such owner thereof; has at all times openly and publicly mortgaged, leased and offered for sale the said lands; has at all times caused the said lands to be protected by field agents who traveled over and protected the land against depredations and waste; has at all times, since the same were patented to it, paid the taxes levied and assessed upon and against the said lands, which payments amount in all to $1,827,234.10; and in divers other ways has openly and notoriously proclaimed and asserted, and been in, possession of the said lands" (p. 1204).

The defendant admits and avers "that prior to the completion of the said railroad, timber lands, not being susceptible of settlement or the establishing of homes thereon, had but little, if any, market value, and could not be sold at any price to any person" (Par. XII, p. 1206).

The defendant also avers "that nearly all of the said lands remaining unsold at the time of the completion of the construction of the East Side Railroad, and its connection with the Central Pacific Railroad, as aforesaid, were timber lands having small market value, and for which there was substantially no demand by purchasers at the time, but it avers, upon information and belief, the fact to be that soon after facilities for transportation of lumber were afforded by the completion and connection of the said railroads, even numbered sections were entered by persons under the Timber Land Act, and the commutation provision of the Homestead Act, who thereupon conveyed the lands so entered to single holders of many such adjoining tracts, and the increase in value of the Oregon and California Railroad Company's intermediate odd sections of timber lands, arose out of the said completion and connection of railroads, and the demand for such lands at increased and gradually increasing prices, arose out of the ~~same~~ of ownership of the odd sections by the owners of the intermediate even sections, who desired, or

sought to procure, sufficiently large single timber land holdings to justify the establishment and equipment of lumber mills and factories to mill and market the timber product of said lands" (p. 1208).

The defendant further answering, avers "that the complainant at all times acquiesced in all and in many instances approved and ratified, certain of said transactions, and that a few of the many instances of such acquiescence, approval and ratification, other than those hereinbefore and hereinafter set forth, are shown by Exhibit No. 9 and Exhibit No. 10, attached to the joint and several answers of the defendants, Oregon and California Railroad Company, and others." (Par. XIII, p. 1210).

The defendant claims that it has an interest in the unsold lands under the mortgage made to it. It denies that the lands are of a value in excess of the bonded indebtedness secured by the mortgage deed, and it avers that it is impossible to foresee what the value of said property will be in the year 1927, when the bonds secured by said mortgage deed will become due (p. 1214). And it avers that the proceeds of the said bonds were used by the Oregon and California Railroad Company, and by the West Side Company, in constructing a railroad and performing the conditions of the Acts of 1866 and 1870, and that by the construction of the roads, the Oregon and California Railroad Company acquired an indefeasible title to the lands, and it avers that without the land grant and the mortgage thereof the funds could not have been secured for the construction of the railroads, or either of them, and that the pledge by way of mortgage deed of the lands constituted a valid application thereof, under the grant, as required by the Act of 1866; and that such mortgage did not constitute a sale within the meaning of the Act of Congress. That the bonds had been negotiated abroad, and are held by bona fide purchasers, and that if it be true, which it denies, that the lands are held by the railroad company upon condition of sale to actual settlers only, as aforesaid, and if

a relatively small proportion of said lands had been sold in breach of said conditions, as the bill alleges, "it would be harsh and contrary to equity to deprive by forfeiture the bondholders under said mortgage deed of the security on the face of which they purchased said bonds" (pp. 1215 and 1216).

As a special defense the defendant sets up the Act of Congress approved June 19, 1878, entitled "An Act to create an auditor of railroad accounts, and for other purposes" (Par. XXI), which provided that the office of auditor of railroad accounts should be established as a bureau of the Interior Department, and which made it the duty of the auditor under the direction of the Secretary of the Interior to prescribe a system of report to be rendered by the railroad companies to which the United States had granted any subsidy in bonds or land. To examine the books and accounts of such railroad company once each fiscal year; to determine the correctness of any report received from them; "to see that the laws relating to said companies are enforced; to furnish such information to the several departments of the Government in regard to tariff for freight and passengers, and in regard to the accounts of said railroad companies as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interest of the Government; and to make an annual report to the Secretary of the Interior on the 1st day of November, on the condition of each of said railroad companies, their road, accounts and affairs for the fiscal year ending June 30 immediately preceding" (p. 1220). And it contains certain other provisions set forth in the answer; and it is alleged that by the act approved March 3, 1881, the title of the said official was changed from "Auditor of Railroad Accounts" to "Commissioner of Railroads." It is alleged that the bureau was organized by the Department of the Interior, as required by said Act of Congress, and was active until the termination of said office in 1904. The answer sets forth the reports made by the Oregon and California Railroad

Company for the half year ending December 31, 1879, and consecutively thereafter to and including June 30, 1903, each of which states the cash receipts from sales of lands to date, the average price per acre, the average price per acre during the half year, the maximum price per acre from sales, the minimum price per acre from sales, the maximum price per acre now asked and the minimum price per acre now asked (pp. 1226-1247).

The answer further alleges that the chief of said bureau complied with the requirements that he should make an annual report to the Secretary of the Interior; that said reports were embodied in the annual reports of the Secretary of the Interior during each year from 1879 to the termination of said office in 1903, and were by him transmitted to the President of the United States, and by the latter transmitted to the two houses of Congress, and there referred to appropriate committees and printed as executive documents. That in many of said reports the Commissioner of Railroads stated the maximum price which the Oregon and California Railroad Company was demanding per acre on sales of the lands of said land grants. Each of the reports states the average price per acre received by the company (pp. 1247-1262).

The allegation of the answer is to the effect that information was brought home to the administrative officers of the Government and to Congress, that the railroad company did not consider itself obligated to sell all the lands included in the grant in quantities of 160 acres only to one purchaser, and at a price of $2.50 per acre; and that the complainant acquiesced in this construction of the proviso and continued, year by year, to issue to the railroad company patents for the lands so granted, although having full knowledge of the mode in which the railroad company was disposing of said lands.

The answer further alleges that the granted lands were mortgaged to this defendant by a deed dated July 1, 1887 (Exhibit H, attached to the complaint), to secure the

payment of money secured by the bonds of the company; but for many years before the making of the said deed of trust and the issuing of the said bonds, the course of dealing by the said company in the sale of the said lands, well known to the complainant, had been to make sale of certain of said lands in quantities greater than 160 acres to a single purchaser, and at prices in excess of $2.50 an acre.

"That the bondholders advanced their money to aid in the construction of a railroad, and for the benefit of the complainant, relying upon the grant of said lands without any reason to believe that there was any possibility of such claims as are now asserted by the complainant, but on the contrary, having reason to believe, from the conduct of the complainant for many years, that there were no such claims to be asserted." And this defendant claims a lien upon the property to the extent of $20,000,000, and denies that its lien is subject to forfeiture, and avers that the right of forfeiture now claimed by the complainant is unjust and inequitable, and would deprive the bondholders of an important part of the security upon which they have advanced money with the full knowledge of and for the benefit of the complainant (p. 1267).

For a separate answer, the defendant alleges that all the causes of action set forth in the bill are barred. (Par. XXIII.)

(a) By Section 3901 of Lord's Oregon Law.

(b) By Section 8 of the Act of Congress approved March 3, 1891, entitled "An Act to amend Section 8 of an Act approved March 3, 1891, entitled 'An Act to repeal timber culture laws, and for other purposes,'" published in Volume 26, Statutes at Large, 1093.

(c) By the first section of the Act of Congress approved March 2, 1896, entitled "An Act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes," published in Volume 29, Stat. L., p. 42.

(d) By acquiescence and laches of complainant; and that the United States has exercised and waived any right of forfeiture to the said lands which it may have had by reason of the passage of the Act of June 31, 1885, entitled "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," and the act of September 29, 1890, entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes."

The defendant further alleges, by way of defense, that the Court, as a Court of Equity, is without jurisdiction to inquire into the alleged breach of a condition subsequent, as sought by the bill, or to decree the forfeiture of the said granted lands, or any of them; and, as incidental to such decree of forfeiture, to require an accounting and payment by this defendant.

A joint and several answer was also submitted on behalf of the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage.

The denials and material allegations of defense set up in that answer are substantially similar to the denials and allegations of defense set up in the answer of this defendant.

PROOFS

Evidence on behalf of the complainant and the defendants was submitted before a master, but no findings were made by the Court. Hence, it becomes necessary to examine the evidence.

The questions of fact presented are, in the opinion of this appellant, of the utmost importance. *We think it has been established by an overwhelming weight of evidence that the lands included in the grant were, for the*

most part, of such a character as not to be susceptible of actual settlement, and that the proviso in the Act of 1869 had no application to such lands. It is, therefore, indispensable to the argument as presented by this appellant that the Court should ascertain and determine the physical characteristics of the lands which were the subject of the grant.

The decree for the plaintiff is not based upon the conclusion that the lands included in the grant were susceptible of settlement; on the contrary, the decree proceeds upon the theory that a sale of any lands in the grant on terms other than those prescribed by the proviso, whether susceptible of settlement or not, was a violation of the condition and a ground of forfeiture. This appears from the opinion of the judge rendered at the time of the signing of the decree. Nor is it the rule that a decree in equity, like the verdict of the jury, presumes a finding of all the facts necessary to support the decree. Particularly is this true where it appears that all the evidence introduced before the trial court was in the shape of depositions and not given before the Court orally (*Mt. Vernon Refrig. Co.* v. *Fred W. Wolf Co.*, 188 Fed. 160). Where the Court below has made no findings of fact nor recitals in the opinion, or otherwise of particular facts, a review of a decree in equity involves a reconsideration of all the evidence for the purpose of ascertaining the facts (*Gumaer* v. *Colorado Oil Co.*, 152 U. S. 88; *Johnson* v. *Harmon*, 94 U. S. 371).

We proceed, therefore, to a consideration of the proofs with especial reference to the physical characteristics of the lands included in the grant for the purpose of reaching a conclusion regarding the extent to which they were or were not susceptible of settlement and cultivation. We shall first refer to the general characteristics of the country within which the grant was situated, and then consider such evidence as was submitted relating to the grant generally or to large portions of it, and then we shall

group together the evidence as to the special characteristics of the lands granted in particular counties, and finally we shall formulate certain conclusions of fact bearing upon this subject gathered from the stipulated facts, the facts of which the Court will take judicial notice, and the evidence and exhibits submitted.

Before entering upon the examination of the record, however, we consider it appropriate and doubt not that it will be helpful to the court to consider the following extract from the statement certified by the Circuit Court of Appeals as follows:

"It appears from the record that voluminous testimony has been offered, oral and documentary, on behalf of the defendants-appellants tending to show that these lands involved in suit (where they have any value) are chiefly valuable for timber, and that they are unfit for and incapable of settlement, and are unfit for any agricultural, horticultural or other such use; that it would cost from $50 to $500 per acre to remove the timber and stumps and render the lands fit for cultivation or any settlement purpose, even where there is sufficient soil or where conditions, by reason of elevation or topography, would permit cultivation or use.

"There is voluminous testimony on the part of the Government tending to show that the major portion of these lands covered by timber involved in this suit are, when the timber has been removed and the lands have been cleared by grubbing the stumps and burning the brush, fit for cultivation and settlement, and would thereby be adapted to agricultural, horticultural and other such uses, and that the soil or the major portion of these lands thus covered with timber, when the timber has been removed, is suitable for such settlement purposes." (Certificate of the Circuit Court of Appeals, filed October 14, 1914, Vol. XIX, p. 9296.)

THE GENERAL FEATURES OF THE COUNTRY IN WHICH THE LAND GRANT IS SITUATED

The railroad was projected to join the City of Portland at the north with the Central Pacific Railroad in California at the south, running for a distance of approximately

367 miles parallel with the Pacific Coast, substantially through the valleys between the Coast range of mountains upon the west, and the Cascade range upon the east. This region of country in 1866 was for the most part unsurveyed. Its principal features are described in authoritative works of reference. Thus, from Lippincott's Gazeteer of the World we take the following description:

"The coastal strip of Oregon is mountainous and broken, terminating in bold sea cliffs and passing interiorly into a partial plateau which is densely timbered, except in the south, where the 'bald hills' rise in an open prairie-like region with groves of timber. This tract is bounded eastward by the Coast and Umpqua ranges. Between these ranges on the west and the great Cascade range on the east, lie the fertile Willamette Valley and the upper river basins being separated by the transverse Calapooya and Rogue River mountains. The west flank of the Cascade range is a densely timbered and greatly broken region, of which only the valleys are arable. These mountains present many cones of recently extinct volcanoes. Mt. Hood, the loftiest, situated forty-five miles southeast of Portland, is 11,225 feet in height."

The Territory of Oregon was organized in 1848, and the State of Oregon was admitted into the Union in 1859. The population in 1860 was 52,465. The total area of Oregon is 95,274 square miles—or 60,975,360 acres. In 1870 the population was 90,423 (Vol. XIV, p. 7146, Record), less than one to a square mile, and at that time the population was confined principally to Portland and a few smaller towns (Vol. XIV, p. 7258) the Willamette Valley and the Valleys of the Rogue and Umpqua rivers (Vol. XIV, p. 7253).

A history of the settlement of Oregon is found in the testimony of Himes (Vol. V, p. 2443, *et seq.*); Moreland (Vol. V, p. 2461, *et seq.*); Eddy (Vol. V, p. 2552). The first settlement of the Willamette Valley was made in 1843 (Vol. V, p. 2552). Large areas of that valley are open plains. These lands as well as those in the Valleys of the Rogue and Uumpqua rivers were largely taken up

under the Donation Act. That Act was approved September 27, 1850 (9 Stat. L. 496). By it there was granted to every white settler above the age of eighteen, a half section, or 320 acres, and if married, 640 acres, a half to be owned by his wife. Four years of continued residence and cultivation were required before a patent could issue. The laws of Congress relating to pre-emption by individuals had at that time no application in Oregon, because public lands there had not then been surveyed. (*Stark* v. *Starr*, 6 Wall. 402). The Donation Act provided for a survey of the lands, but provided "that no other than township lines shall be run *where the land is deemed unfit for cultivation.*" The Donation Act was, therefore, confined to lands which were fit for cultivation, and as a consequence the open lands in the valleys to which we have referred were first taken up and settled (Eddy, Vol. V, pp. 2558, 2559, 2560, 2561).

The extent to which lands within the grant were taken up under the Donation laws appears from defendants' Exhibit 258 (Vol. XIII, p. 6691). Thus, in the East Side grant the total number of acres in the primary limits were 3,823,426.71; the acres lost by donation land claims were 1,143,925.70; in the West Side grant the total number of acres in the primary limits were 50,187.38; the acres lost by donation land claims were 197,692.94.

A map introduced in evidence as Exhibit 259 shows the place and indemnity lands within the ten-mile limit which were lost by disposition prior to the grant (McAllister, Vol. IV, pp. 1937-1940). A very large body of the lands so lost were disposed of under the Donation Act and subsequent settlement laws prior to 1866. These lands are marked on the map in yellow. This exhibit demonstrates how extensively the agricultural lands in the several valleys had been taken up previous to the Act of 1866.

Ascending from the valleys, the sides of the mountains exhibit from time to time terraces which are known as bench lands. These tracts of a few acres in extent when untimbered, or when the timber has been removed fre-

quently are susceptible of cultivation. Ascending further along the sides of the hills and mountains, the lands exhibit fewer spots susceptible of cultivation, although they occasionally occur. Testifying as to the general character of the country, Mr. McAllister says:

"There is a very large part of the land involved in this suit that never will be suitable for agriculture. There is another part that after the land is logged off, if developments in the way of transportation facilities and opening of the country are sufficient, or if they ever become sufficient to warrant the expense of grubbing out the stumps, the land might then be used for agriculture; but that will be years and years from now. There may be some tracts that might warrant that expense in the near future, but they are a very small proportion of the whole" (Vol. IV, p. 2010).

The total number of acres involved in this suit is 2, 075,-616.45. Of these 847,795.98 have been examined. Of those which have been examined, 78 per cent. are classed as timber lands; 19 per cent. as grazing lands and 2 per cent. as agricultural lands (McAllister, pp. 1946, 1947). This is elaborated in a tabulation produced by the witness and marked Defendants' Exhibit 262 (Vol. XIII, p, 6701). A map showing the timbered and untimbered lands of the grant and the topography of the land is marked Exhibit 260 (Vol. XIII, p. 6699; McAllister, Vol. IV, p. 1947).

Some of the lands included in the grant are at high altitudes. A map showing the altitudes of the unsold lands within the grant was introduced and marked Exhibit 266 (Vol. XIII, p. 6709; McAllister, Vol. IV, p. 1954.)

Mr. Eberlein made the following general statement with regard to the lands in suit:

"The general character of the land that he has been over in the grant of July 25, 1866, the northern part of that grant, the extreme northern end of that grant, that is about east and southeast of Portland, there is some very heavy timber. It is rough country and no large agricultural possibilities at all. As to the south end of that

grant the land—practically all the unsold land—lies in the mountainous country or rough country, very much broken. The best part of the timber lies in the extreme southern end of the grant; that is the sugar pine country, in Jackson and Klamath counties, but that country lies high, very dry and is cold. There are practically no possibilities in there, for extensive cultivation, because the land is not suited for it, the character of the land is thin and sandy. It will be a forest country always, and in his opinion it would not be susceptible to cultivation on account of the climatic conditions and soil, rock, etc., even if the timber were removed. He cannot speak, except in a general way, of the lands in the eastern part of Josephine County, east of the railroad and immediately north of Jackson County, having skirted that country east of the range. The general character of this land is timber and wood land, very rough and broken. The land in the eastern part of Douglas County, on the Umpqua River, and the streams that lead into the North and South Umpqua, is a good timber country. It is all timber, practically. The valleys are narrow, and it is valuable chiefly for timber, so held to be now. The timber lands in Lane County, on the head waters of the Willamette River, Coast Fork, Middle Fork and the McKenzie, are good timber lands, but in a rough country, what there remains. There are small patches of land all through the country, isolated tracts here and there, where, if the timber was removed, the land would be susceptible to agricultural purposes, but the country is full of land, the Willamette valley is full of land, covered with brush now, that is very much better for cultivation than any lands that he knows of, in this grant and more accessible to transportation.

If for no other reason the stumps would be prohibitive to the adaptability of this land for agricultural purposes, because of the character of the growth, especially the fir growth, which is the principal growth of the country tributary on the slopes into these interior valleys on the west of the summit of the Cascades, and that by its resinous character, its long tap roots, as everybody knows in

this part of the country, are exceedingly hard to extract, and it costs from fifty to one hundred and fifty dollars an acre, that has always been his information, to clear the land of stumps, and there is plenty of land to be had in these interior valleys for less than that price. Well on toward 200,000 acres of this grant is rough, is absolutely barren, rocky slopes, without any possibility of growth of any kind. He would call it chaparral down to the lower country. The land that he speaks of has not even chaparral growth and would not even be goat pasture, and there is no value at all to that land that he knows of. You could not settle a colony of flies on there and get sustenance for them. He thinks it would not be valuable for a homestead or pre-emption if it were to become public land. It is just waste land, that is all. He can give only a general description of that land. He cannot give the particular section, township and range descriptions. He can only give the general locations (Vol. V, pp. 2275-2278). From the reports which were made to him by the field agents, Mr. Eberlein classified the lands within the grant as follows: 1,496,648 acres *covered with timber and unsuitable for agriculture;* 703,652 acres of *grazing land, unsuitable for agriculture; 7,320 acres which might be used for agriculture* consisting *of small isolated tracts, many of them remote from transportation and settlement, and scattered in small bodies in various spaces throughout the whole extent of the grant,* along *creek bottoms and on hillsides"* (Vol. V, p. 2290).

Mr. Elliott (Vol. VI, p. 2714), now State Forester, whose first annual report is in evidence as Exhibit 360, was employed by the railroad company from *1889* to *1906*. He assisted in cruising and classifying the lands, and was afterward *chief land examiner*. Mr. Elliott testified that he had cruised in all the counties except Curry (p. 2717); that *all lands that were considered unfit for cultivation were designated as grazing lands when denuded.* Taking Southern Oregon, beginning with Douglas County, there is a *great deal of land among the unsold portion that is*

barren, rocky or covered with chaparral or brush—practically worthless for any purpose—that was *classified as grazing lands simply because it was of no value for anything else.* It has more or less brush, chaparral and all kinds of brush on the land, and is *rocky, very rough land.* There is *more or less scattered all through the grant back in the mountains and foothills.* He presumes *Douglas County* has more than any other kind of this character of *worthless land,* because *there is more railroad land in Douglas County. Josephine County would probably have a higher percentage of that kind of land than any other.* Off hand, he would say that *40 per cent.* of the lands in Jackson and Douglas counties would be worthless. The heaviest and most valuable timber lands of the grants are in parts of Columbia, Washington, Multnomah, Clackamas, Yamhill, Polk, Benton, Linn, Lane and Douglas counties. There are tracts of pretty good timber in Jackson and Josephine counties; also in Lincoln County. Coos County is a very heavily timbered county. The comparative stand of timber on the unsold lands compares favorably with the timber on the even sections, and with the timber in Western Washington and other parts of the world (Vol. VI, pp. 2712-2718). The average value of the best unsold quarter sections of timber land you would be safe to say is $3,000, and the maximum price $10,000 (p. 2720). Taking the grant as a whole, from five to ten per cent. would be available for agricultural use (p. 2722). The cut-over land should, in his judgment, be reforested (p. 2724). If the land were sold at $2.50 an acre in quantities not exceeding 160 acres, they would no doubt be purchased for the timber and would go into the large timber holdings (pp. 2722-2723). Lands acquired under the Homestead Act or under the Timber and Stone Act, or other public laws, in the even sections, have very largely gone to large timber holders. The agricultural land is generally in small patches, from an acre to a few acres. Little creek bottoms or level benches, what are called bench lands, are scattered all through (p. 2726). The witness stated that he did not call to mind any quarter section

that he thought a man could make a living on. He said: "I don't call to mind now any quarter section that the company has ever sold since I have been with them, that a man has gone on to it and actually made a home and made a living on that quarter section" (pp. 2726-2727).

Very few of the homesteaders are on the land at present. They stayed on the land long enough to get title to it and have abandoned it, and their improvements have gone to rack lots of times, and generally you might say they have no improvements left on them. The improvements in the beginning were just makeshifts, as a general thing. Occasionally one would find a claim with pretty fair improvements, maybe five or ten acres in a fair state of cultivation, but this is largely now grown up to brush. These lands in the timbered portions of the even sections thus homesteaded are now largely owned by large timber owners (p. 2727).

The Government produced a written statement of information received from this witness taken down at an interview with the Government's counsel, which it is claimed is to some extent inconsistent with his sworn testimony. This statement is Exhibit 122 (Vol. VI, p. 2742).

A. W. Rees, who had been engaged in the sawmill business and timber business, or cruising timber, and who had charge of the Portland office of the railroad company, and was manager of the field work in Oregon, and a practical cruiser of timber lands (p. 2801), after stating his knowledge respecting the unsold lands in the grant, and in the various counties, testified as follows:

"Taking the entire grant over which he has examined in its present condition, he believes that not over four or five per cent. of it is suitable for agriculture, and he thinks about seventy-five per cent. of the total area of this land grant in its present condition, in his judgment, would be classified as timber and chiefly valuable for timber only. He would say that about 20 per cent. of this total grant in its present condition, in his judgment, would be classified as grazing, including old burns, where there is some

soil and timber, but not suitable or valuable for timber; and including also lands that are rocky, barren or unfit for any useful purpose, and making three classes, timber, agricultural and grazing. He may have the timber estimate too high, he does not know, but that is approximately correct, he thinks, as nearly as he can tell. There are lands if the timber is cut off and cleared they could be used for agricultural purposes—lands that are level enough and soil good enough. From his knowledge of the grant such lands that could be thus cleared and grubbed and made available for plowing after the timber is removed, they would be classified as agricultural, would be a pretty small per cent., especially a small per cent. that the value of the land would justify the cost of clearing. He has made some inquiries at different times about the cost of clearing and has cleared a little bit of land himself. There is a great deal of this land where it is heavily timbered that he does not think could be cleared for less than $100 an acre. That is, cleared of stumps, and some of it much more than that. He presumes there are places where it might cost $500 an acre to clear an acre of land, but he would place the general cost for clearing timber lands at from $100 to $150 an acre; it would be above $100 an acre the average over the grant" (Vol. VI, pp. 2815-2816).

Exhibit 362, which classifies the land, is a compilation from other exhibits. They do not pretend to include or cover any cruisings made prior to April 18, 1906. Exhibit 362 is substantially correct (p. 2816). He had previously testified as to the method of classification as follows:

"His instructions were to classify the land as timber, grazing or agricultural lands. The timber lands are lands chiefly valuable for the timber—the stand of merchantable timber thereon. Agricultural lands are lands of very little timber, and which could be plowed and cultivated in quarter sections or less, used for agricultural or orchard purposes, and that would yield a reasonable return on the investment. All other lands are classified as grazing lands,

regardless of whether they have any value for grazing purposes or not. That is to say, if they were neither timbered or agricultural they would be classified as grazing" (p. 2804).

Mr. Lander (Vol. VI, p. 2845), supervising fire warden for the State of Oregon, formerly engaged in the land business, testified to his acquaintance with the lands in Douglas, Jackson, Josephine, Washington, Polk and Yamhill counties, considerable in Benton and some in Lane, Linn, Clackamas, Marion and Columbia. The witness produced reports made by him (Exhibit 350; p. 2854) and stated his acquaintance with the lands in various counties and then proceeded as follows (p. 2849):

"From his knowledge of the land in Douglas County, and his acquaintance during the good many years that he has had charge of the fire patrol, he would say that without clearing the unsold lands of the company in Douglas County in their present state, there would be very little, he does not know of any that could be utilized for agricultural, horticultural or farming purposes. Probably three or four per cent. of these lands, if they were cleared, would be valuable or could be used for agricultural or grazing purposes in Douglas County. Some of these timber lands that are heavily timbered if they were cleared and grubbed might be used for grazing or some agricultural purpose. Some of the burns might be cleared—there are burns in these timber lands—for probably $50 to $75 an acre up to $300 or $400 an acre in heavy timber. The chief value of these unsold lands in Douglas County is for their timber" (p. 2849). "A settler could not make a living on 160 acres at $2.50 an acre. They would be just the same as on the even sections where they have dug out little homes there. The people are not there—they have sold out to timber companies. They are not living there as a general thing." The witness further testified (Vol. VI, p. 2851):

"Q. Well, why do they not live on these lands?

A. Well, they wouldn't be profitable to stay there. They couldn't make a living on them.

Q. Then, if I understand you, these lands are chiefly valuable for the timber that is on them?

A. That is what I said a while ago.

Q. And they are not capable of actual settlement?

A. No.

Q. Now, you may state whether or not that same condition obtains as to all of the unsold lands of the Oregon and California Railroad Company in the various counties where you have examined them?

A. *The same condition prevails.*"

The witness further stated that when he came to Douglas County twenty-five years ago, these unsold timber lands of the company *were not worth anything because there was too much timber on the land. Timber was not worth anything,* and it *cost too much to clear it* (Vol. VI, p. 2854).

R. A. Booth, a large timber dealer, and a director in the Booth-Kelly Lumber Company, testified (Vol. V, p. 2577), that in 1880 the timber lands of the railroad company had no market value (p. 2589). All the principal valleys of Western Oregon had been settled about 1898 in a general way. They were used mostly for agricultural and grazing purposes (p. 2589). The first large claims were taken under the Donation Land Act, and subsequently under the Homestead, the Pre-emption law and Public Entry (p. 2589). The timber lands in Josephine County were purchased earlier than those in the Willamette Valley (p. 2590). Most of the pine was taken from granite lands. The soil has little value after the timber is removed (p. 2591). On cross examination, he stated that milling could not be done on any large scale on alternate sections. Even much later than 1880 settlers burned the timber in order to make settlements (p. 2627). On redirect examination he stated that the lands had about all been taken up on the even sections, either by homesteaders or entrymen, under the Timber and Stone Act, but there were no residents in there except along Mill

Creek (p. 2633). The lands were chiefly valuable for timber, and the party holding the title disposed of them for that purpose. That is the case in all the lands we own, and that would apply to other lands in the grant of the same class (p. 2634). It would not have been at all practicable to have sold these lands to these so-called actual settlers and required them to stay there (p. 2634). The only industrial development that would have resulted from sale to actual settlers of these lands, would have been the vesting of the title ultimately in timber investors, and their consequent use in due time when they desired them to manufacture (pp. 2634-2635).

A. C. Dixon (Vol. V, p. 2637), the manager of the Booth-Kelly Lumber Company (p. 2637), in a statement made by him to a Committee of Congress (p. 2658), said:

"Going back to the purpose of Congress in granting these lands, it was primarily that the road be built, and secondarily, that the country be developed as a result of this grant of land. We take the position that we have aided in the development of that section of the country to the fullest extent, and that in no other way could the lands have been used for the development except in the way we have used them. The reason for that is this: the land is heavily timbered, much of it on steep hillsides, and in most instances the soil is rocky and not susceptible of cultivation. Now, no actual settler could have taken 160 acres of these lands, nor 1,600 acres, nor any other number of acres, and made a living for himself and family. It would have been practically impossible, and is to-day, with the better means of transportation and other facilities that we have now."

He further said:

"The fact that we purchased the lands for lumbering purposes is pretty good evidence that the land is not fit for actual settlers. As to the railroad grant itself, I have been over it pretty well a number of times, and out into the timber, and I think the actual percentage—anything that I might say would be a guess, but 20 per cent. would be a pretty close guess—I think there might be 20 per cent. of these lands that might be cultivated" (p. 2683).

Q. The Chairman: What area of them, if any, has been cultivated?

A. Mr. Dixon: Practically none. They are not susceptible of cultivation. Our idea has been to reforest them, and we have left the small timber standing for that purpose" (Vol. VI, p. 2685).

A map of the lands cruised and examined by S. C. Bruce, and others, was introduced and marked Exhibit 342 (Vol. VI, p. 2825), and a compilation showing a list of the lands in their present condition, and when denuded, and where situated. This shows the total acreage 170,309 acres, and the present condition to be timber, 134,312; grazing, 27,133; agricultural, 8,864 acres. And when denuded, grazing, 132,669 acres, and agricultural 37,640 acres (p. 2827). In making this estimate the lands having 100,000 feet and over were classified as timber lands. Lands that were level enough to be tilled were classified as agricultural lands, and the other lands as grazing (Vol. VI, p. 2827). This applies to the lands in Marion, Polk, Benton, Lincoln, Lane, Linn, Coos and Josephine counties.

McLeod, one of the parties who assisted in the cruising and classification of the lands shown upon the map above referred to, testified that they made no classification of lands that were unfit for any purpose. They were classified as grazing lands (Vol. VI, p. 2834). This witness testified that a man could not make a living on 160 acres of this grazing land, confining his herd or his stock and its increase to 160 acres, and that as to the best timber land, it would not be possible to settle on the land and support a family by living on the land—making a home on it. He would have to sell the timber (pp. 2836-37).

Eberlein testified (Vol. V, p. 2277) that there were well on two hundred thousand acres absolutely barren rocky slopes, without any possibility of growth of any kind.

See also Kribs (Vol. VI, p. 2909).

The lands in the grant beginning at the south are situated in the following counties:

Klamath, Jackson, Josephine, Curry, Coos, Douglas, Lane, Linn, Benton, Lincoln, Polk, Marion, Clackamas, Yamhill, Multnomah, Washington, Tillamook, Columbia and Clatsop.

Considerable testimony was given, specifically as to the lands in some of these counties, and particularly as to the unsold lands within the grant.

The southern tier of counties in which the grant is situated, bounded on the south by the California line are, beginning at the east: Klamath, Jackson, Josephine and Curry, the latter lying along the Pacific Coast.

The railroad runs in a southeasterly direction from Leland, in Josephine County, to Ashland, in Jackson County, and thence through the Siskiyou mountains to the boundary line.

The Rogue River rises in the Coast range in Josephine County, and runs eastwardly and southeastwardly.

We have grouped together the evidence of certain witnesses as to the character of the lands in particular counties.

Klamath and Lake Counties.

In Klamath County there are 43,015 acres of unsold land in the railroad grant. The area of the county is 5,854 square miles, amounting to 3,746,560 acres. The population in 1900 was 3,970, being somewhat more than one person to two square miles. The number of families was 929, a little more than one family to six square miles.

Kimball, manager for the Forest Fire Association for Klamath and Lake counties for defendant (Vol. VI, p. 3164), testified that the lands in Klamath and Lake counties were chiefly valuable for timber. Not more than 1,000 acres would be suitable for agriculture (p. 3167). If a settler bought 160 acres, he could graze sheep, but it would require from 200,000 to 250,000 acres for 2,000 sheep

to graze on (p. 3170). In the opinion of this witness, there is not a single piece of land where a settler could make a living out of the land (Vol. VI, p. 3171).

Palmerlee, for Government, testified that in the vicinity of Swastika, in Klamath County, 80 per cent. of the land could be cultivated (Vol. VIII, p. 3927). In other parts about 25 per cent. (p. 3928). And in others 40 per cent. (p. 3928). The chief industry is stock raising, and the stock runs at large (p. 3931).

Jackson County.

The unsold railroad lands in this county amount to 441,791.15 acres. The area is 2,721 square miles, amounting to 1,741,440 acres. The population in 1870 was 4,778, and in 1900, 13,698. The number of families was 3,242—between one and two families to the square mile.

The Rogue River Valley is principally in this county, and there are a number of streams and creeks, particularly the Big Butte and Mill Creek. The Siskiyou mountains are in the southern portion.

As to the lands in Jackson County the witnesses for the defendants testified that they were rocky and covered with brush, and not suitable for agriculture, except in small tracts along the streams (Angell, Vol. VI, p. 2768). A man would require 14,000 to 15,000 acres to pasture 3,000 or 4,000 sheep (Kribs, Vol. VI, p. 2917). The timber is considered about the largest in the United States (p. 2919).

The witnesses for the Government differed very widely in their estimates of the agricultural character of the lands in this county. They vary in their estimate from 35 per cent. to 75 per cent. as being a fair proportion of the lands suitable for agriculture (Randles, Vol. VII, pp. 3589-3594; Lamb, Vol. VII, p. 3568; Houston, Vol. VII, p. 3623; Kelsoe, Vol. VII, p. 3649; Bailey, Vol. VII, p. 3688; Beeman, Vol. VIII, p. 3947; McWilliams, Vol. VIII, p. 3914; Mahan, Vol. VIII, p. 4132).

These estimates, however, were based upon the assumption that the timber had been removed, and the cost of clearing the land from stumps. Various witnesses stated the cost of clearing the timber lands at from $50 to $250 an acre.

The Government introduced as an exhibit (Exhibit 120, Vol. XI, p. 5526), a statement of Grieve, Assessor of Jackson County, who was very familiar with the lands owned by the railroad company in certain described townships, which he classified, and estimated the proportion of lands suitable for settlement purposes. His estimate varied from fifteen to fifty per cent., the average being about 35 per cent., of the quarter section which he thought was susceptible of cultivation, and he further stated that the quarter sections which he estimated as suitable for settlement would average about twenty acres of plow land to the quarter section.

The cross examination of the Government's witnesses developed in almost every instance an interest adverse to the railroad company, either because the witness was an intervener or because he was an unsuccessful applicant for the lands under the Act of 1869 or an unsuccessful litigant against the company, and only in a few instances were any of the witnesses actual settlers.

Josephine County

In this county there are 167,480.98 acres of unsold railroad land (Whipple, Vol. VI, p. 2934). The total area is 1,684 square miles, amounting to 1,077,760 acres. The population in 1870 was 1,204; in 1890, 4,878, and the number of families in 1890 was 1,736 or a little more than one to the square mile.

Witnesses for the railroad company all agree that the land is mostly mountainous and the soil too poor and too broken to be cultivated (Vol. VI, p. 2935). (Fallin, Vol. VI, p. 3015-20; Angell, Vol. VI, p. 2769; Stites, Vol. VI, p. 2878).

Whipple said (Vol. VI, p. 2936), that all the ground that is fit for cultivation has been settled years ago. The timber land when cleared is nearly all poor, rocky, shaley soil, not susceptible of agricultural use after it is cleared (p. 2936).

Fallin, Assessor of the county, says (p. 3016), that the barren land is rough, rocky granite. Not over 5 per cent. suitable for agricultural purposes. In many townships there are no settlers. There are thousands of acres in that county where there is no timber at all. They are bald hills, and there is no grass there except for a short time (p. 3018).

Josephine County is unsurveyed; about 20,000 acres are under cultivation, as shown by assessor's rolls. The Rogue River Valley is in this county, and the total population is about 9,000 or 10,000 (p. 7254).

Shank, real estate agent at Grants Pass, testified (Vol. VI, p. 2957), that most of the present occupied land was taken up under the Donation Act (p. 2959), first the river bottoms and then the first and second benches, and then the hillside lands. About 16 per cent. of the land is chiefly valuable for timber; 4 per cent. to 5 per cent. is capable of agricultural use. Not over 2½ per cent. is available for practical settlement (p. 2960).

Angell (Vol. VI, p. 2764), testified that the soil is poor —a great deal of granite soil, which is of no use.

The story told by the witnesses for the Government is not substantially different.

Martin (Vol. VII, p. 3308), says that from 15 per cent. to 25 per cent. of the land is susceptible of cultivation and would support a family after the timber was removed (p. 3309).

Kearns (Vol. VIII p. 3981), says that 50 per cent. of the quarters could be occupied by settlers so as to enable them to make a living. He thought they could make a

good living if they could get from five to ten acres that they could cultivate (Vol. VIII, p. 3996).

Sherman (Vol. VIII, p. 4199), says that there was some land too rough to be cultivated (p. 4202); 30 per cent. to 35 per cent., in his estimate, was of that character. This witness went at considerable length into the subject of the cultivation of fruit, and the raising of poultry, and gave his views at large with regard to the possibilities of the county, which were almost wholly of a prophetic character. As a summary he stated that in his judgment about 65 per cent. of the railroad lands could be reduced to cultivation for the different purposes which he had mentioned (Vol. VIII, p. 4222). It was quite apparent that he meant 65 per cent. of the land after it had been cleared. He said that he knew that prior to 1903 the railroad company had offered these lands for a period of more than twenty years to anyone who would care to buy, in tracts of 160 acres, or less, on liberal terms at low prices, and on long installments, and that the lands remained unsold practically up to that time (p. 4227). He testified that the lands in the Rogue River Valley had been largely taken under the Donation Act (p. 4232). He estimated the timber in Josephine County at 9,000,000,000 square feet (p. 4233). Upon cross-examination, it appeared that only a very inconsiderable quantity of grapes or fruits grow upon the hillsides at any distance from the valleys.

Keller (Vol. VII, p. 3727), also testified with regard to the character of the lands in this county.

A fair conclusion from the evidence of the witnesses respecting the land in this county, we think, is that of the 167,000 acres of land in the grant, not more than 5 per cent. was naturally arable, the arable lands in the valleys having been taken up under the Donation and earlier settlement acts. In the western part of the county the land is heavily timbered. In the easterly part, there are many thousand acres of open lands, rocky and broken,

known as the "bald hills." After the timber has been removed, not more than 50 per cent. of the land would be susceptible of cultivation, and until it has been removed not more than 5 per cent. or 10 per cent. is susceptible of cultivation.

Curry County

In Curry County there are 7,844.64 acres of unsold railroad land. The total area is 1,454 square miles, amounting to 930,560 acres. The population in 1870 was 504; in 1900 it was 1709, or a little more than one to a square mile.

Curry County runs along the Pacific Coast and a large portion of it is now included in the Siskiyou National Forest. There are settlements along the ocean front, but the interior is mountainous and scarcely inhabited. The granted lands lie in Townships 34 and 35, Range 11, and Townships 31 and 35, Range 12, and Township 31, Range 13.

Coos County

There are 106,563.36 acres of railroad land unsold in this county. The total area is 1,578 square miles, amounting to 1,009,920 acres. The population in 1870 was 1,644, and in 1900, 8,874. The number of families was 2,204, being somewhat more than one to a square mile.

Coos County is heavily timbered (McCarthy, Vol. VI, p. 3072). Steep mountain slopes, gulches and generally rough country. In the opinion of the only witness who gave a detailed description of the county, none of the land is fit for cultivation in its present state (p. 3072). Its chief value is for timber, and it would not be practicable to cut the timber off and cultivate it. If cut, 5 per cent. would be level enough to plow. The elevation of the land is from 1,500 to 3,000 feet. Most of the land has been taken up under the Timber and Stone Act. The witness said that he did not know of any 160-acre tract that

it would be practicable for a settler to go on and make a living.

McLeod (Vol. VI, p. 2842), testified that in his opinion the percentage of land valuable for agriculture is about 5 per cent.

Douglas County

In Douglas County there are 616,843.14 acres of railroad land unsold. The total area is 4,861 square miles, amounting to 3,111,040 acres. In 1870 the population was 6,066, and in 1900, 14,565; the families amounting to 3,165, or less than one to the square mile.

A map of the timber land belonging to the railroad company in this county was produced and marked Defendants' Exhibit 312 (Vol. VI, p. 2995). This map was prepared by defendants' witness, Zurcher, an abstracter of titles and a dealer in timber lands, residing at Roseberg. The map was verified by the personal inspection of the witness (p. 2996). He testified that in its present condition there would be about 1/10 of 1 per cent. of the land that was agricultural land. That if the timber were removed, from 15 per cent. to 20 per cent. would be available for agricultural or horticultural purposes (p. 2997). He estimated that it would run all the way from $100 to $300 or $400 an acre to cut the timber off and clear it (p. 2997). This is what is known as first bench land, and ordinarily the soil is best where the best timber grows (p. 2998). The first settlements were along the creek bottoms, and the best soil was taken up under the Donation Entry laws. These were in the valleys (p. 2998). Practically all such lands granted to the railroad company have been sold to settlers (p. 2998). About 70 per cent. of the railroad land has merchantable timber, and about 30 per cent. of the land is practically worthless, rocky and unfit for cultivation of any kind (p. 2999). A very considerable part of the timber land in this county has been taken up by large timber companies.

Gardner, for defendants, a surveyor and timber estimator, who has cruised 100,000 or 125,000 acres of timber land in Douglas County (Vol. VI, p. 3026), testified that the remaining lands of the railroad company would average probably 35,000 feet board measure per acre, and the chief value of such land is its timber (p. 3028). In its present condition, less than 1 per cent. of the land is available for agricultural purposes. Probably 25 per cent. to 30 per cent. could be farmed after the timber was removed (p. 3029). The average cost of clearing the land would be from $75 to $100 per acre (p. 3029). The majority of the lands are in the Cascade and Cascade foothills, and in the Coast range and Coast range foothills. The Umpqua River at Roseberg is 500 feet above the sea level and the land rises in points to 5,000 feet elevation. A large percentage of the grant would probably be at an elevation of 2,000 feet (p. 3030). The lands along the Umpqua River were taken up under the Donation Act (p. 3032). The even sections have passed into the hands of timber companies, under the Timber and Stone Act, and under the Commutation Clause of the Homestead Act, and under the Northern Pacific Scrip (p. 3032). Very few of the homestead entrymen have remained as residents (p. 3033). In the main, the homestead claims have passed to timber companies (p. 3034). A good deal of the land is used for grazing. The grazers graze their cattle through the timber land and through the railroad land, but the grazing will not support stock except for a small part of the year. In the opinion of the witness, he could not support a cow the year around upon a quarter section (p. 3037). This witness was minutely cross-examined as to the railroad lands in the various townships in the county. His evidence is intelligent and very persuasive. His conclusion was that there is not one 160-acre parcel of the unsold land that a person could go on and make a living (p. 3055). See statement (Vol. XII, p. 5523).

Angell, for the defendant (Vol. VI, p. 2764), who was

a practical surveyor, and who, with others, was engaged in taking the photographs which were introduced in evidence, testified with regard to the lands in Douglas County—that the lands were very mountainous and covered with heavy timber or undergrowth, and with the exception of isolated tracks on creek bottoms or streams, are not suitable for agricultural purposes. Chiefly valuable for its timber and there are portions that are suitable for grazing, but not any great extent back in the mountains.

Stites (Vol. VI, p. 2878), a timber cruiser, testified as to the timber lands in Douglas County, which he had cruised. He did not think there was any possibility that any of the land could be used for agricultural or horticultural purposes (p. 2881). He testified that as to the unsold lands he did not think that a man would be justified in undertaking to settle upon them and inclose a quarter section and make a living for himself and his family on that quarter section; if he confined his stock range or horticultural productions to that section (p. 2884). He gives as his opinion that if the timber lands had been sold in quantities not exceeding 160 acres, and at a price not exceeding $2.50 per acre, the purchasers would sell at the first opportunity. (p. 2885).

There was considerable conflict of opinion between the witnesses for the Government as to the relative proportion of agricultural land in this county. (Martin, Vol. VII, p. 3300; Creason, Vol. VII, p. 3338; Tipton, Vol VII, p. 3409; Boyle, Vol. VII, p. 3519; Bogard, Vol. VII, p. 3659; Shields, Vol. VII, p. 3681; Taylor, Vol. VII, p. 3718; Neuner, Vol. VII, p. 3731; Miller, Vol. VII, p. 3747; Jackson, Vol. VIII, p. 4099; Spiker, Vol. VIII, p. 4176). None of these witnesses had actually cruised the county and actually inspected the railroad lands in this county, professionally, or for any other purpose. Taylor, who had been a farmer, and who is now a locator, thought that if the timber were removed 50 per cent. of the land would be suitable for cultivation. He thought that 1/3 of the

land could be cultivated and made homes of (Vol. VII, p. 3720). It appeared on cross-examination that he has located probably 150 timber claims, mostly under the Timber and Stone Act, and a few under the Homestead Act. The timber first began to be considered as an object of value about ten years ago (Vol. VII, p. 3720). And he testified that the timber sections ran from 3,000,000 to 10,000,000 feet. He said that he meant to say that the lands could be made farm lands after the timber had been cleared off and the stumps grubbed up (p. 3721).

Keller, who was a farmer and laborer, thought that 66 2/3 per cent. could be cultivated after the timber or brush had been removed (Vol. VII, p. 3723). Neuner (p. 3731), a farmer on bench land in the Umpqua Valley, testified that the lands he was acquainted with about 70 per cent. would be fit for agriculture, and 25 per cent. to 30 per cent. for cultivation (p. 3733). He was also a timber locator. Located people from the cities and from the East. They took up lands under the Timber and Stone Act, but not much under the Homestead law. They averaged 3,000,000 feet an acre; 6,000,000 would be considered the best. The stumpage is worth 50 cents (p. 3737). He knows of two men who remained and are farming (p. 3747). The people who came in there were speculators purely. They came solely for timber (p. 3736-7) and not to settle.

Miller (Vol. VII, p. 3747), who had also been a locator and an applicant for railroad land, testified as to his acquaintance with certain townships in Douglas County, and thought that 30 per cent. to 35 per cent. of the land could be made suitable for cultivation (p. 3748). Taking the lands generally, 30 per cent. would be about right. The witness thought that this average would hold good as to each tract, although there might be sections that contained no plow land, while other places it might be almost all tillable land (Vol. VII, p. 3748). Most of the settlers are on streams or headwaters (p. 3755).

Jackson (Vol. VIII, p. 4099), a lawyer, residing at Roseberg, testified that practically all the Government lands had been settled upon or taken. That 75 per cent. to 80 per cent. of the railroad lands, in his opinion, would some day be taken for cultivation (p. 4104). The witness said:

"The settler does not have to have 160 acres of plow land in order to maintain himself and his family. He knows people there who are making a good living where they do not have more than three or four acres of plow land cleared, and using four or five acres, will produce some hay for their horses and cows, and they have their chickens and a few head of stock ranging in the mountains. None of it is fenced in there. The Oregon laws do not require them to keep stock on their own land and they let them run at large, and everybody gets the benefit of all the out country, and they all use it."

He testified that on account of the general lay of the country, there being hills and valleys everywhere, there is hardly a quarter section but what some portion of it will extend down to the leveler portions and furnish sufficient level land to build a home. Some portions have cliffs and rocks which would prevent its use for almost any purpose except mineral. These portions would not be suitable for agriculture, but stock range on them (p. 4105). As to the timber lands, a settler might market a portion of the timber; the remainder he would have to burn up (p. 4108). This witness has been engaged in several political and legal controversies with the railroad company and showed a certain amount of bias.

Spiker, a young man whose father managed a ranch at Oakland, testified that 50 per cent. of the land that he had testified about would be tillable if it were cleared (Vol. VIII, p. 4181). He was also an applicant for railroad land—timber land (p. 4185).

Lane County

The unsold railroad lands in this county amount to 299,606 acres. The total area is 4,380 square miles,

amounting to 2,803,200 acres. The population in 1870 was 6,426; in 1900, 19,604, and the number of families 4,473, or a little more than one to a square mile.

According to Hunt (Vol. VI, p. 3138), who was a civil engineer, and who is familiar with the land, a witness for defendants, 15 per cent. could be used for agriculture. This land is chiefly valuable for timber. A forty where you come down to a stream or creek, there would be a few acres out of the forty that would be valuable for agriculture if it were cleared, but the majority of the unsold lands are farther back in the county. The settlement of the country has taken up all the lands that would be suitable for agriculture. And the lands that are left are rough and mountainous—covered with timber—so that it would be very poor for agricultural purposes (p. 3140). For grazing purposes there would be a greater percentage than for agricultural purposes. If it were logged and burned over and seeded, there would be available for grazing for some four months 60 per cent. or 70 per cent. (p. 3141). It would cost all the way from $100 to $150 an acre to clear the land (p. 3141). The average timber for the county would be in the neighborhood of 1,000,000 feet to a forty. It would be worth $4,000 for the quarter section; the best timber would be worth twice that (p. 3142). If a man should take one of these timbered quarter sections, he could not make use of it as a home. The value would be in the timber (p. 3143). The even sections were taken up under the Homestead law, but within the last ten years, they have been taken under the Timber and Stone Act. In nearly every case it was sold to some timber company. A man could not take a quarter section and use it successfully for grazing purposes and make a living on it if he were confined to his quarter section. In order to do grazing, the man would have his headquarters on the quarter section and graze on the common (p. 3144). In the western part of Lane County, most of the settlers have sold their lands and moved out. Their buildings

are there yet. The timber men have bought the land for the timber (p. 3160). There is not a commercial vineyard in Lane County (p. 3163).

According to the witness Bruce, not over 6 per cent. or 7 per cent. of the lands in Lane County are valuable for agricultural purposes (Vol. VI, p. 2825).

According to the witness Angell, the land tributary to the MacKenzie River is chiefly valuable for timber. The burned-over land, if denuded of brush, would be suitable for grazing, but the cost is prohibitive (Vol. VI, p. 2770).

For the Government several witnesses testified as to the land in Lane County.

According to the witness Kebelbeck, the land will be valuable for farming (Vol. VII, p. 3245). Has land near Cottage Grove which he bought fourteen years ago (3250). He says he never found a section outside the high mountain that four families could not make a living on, but for his estimate of living see 3246. He was an applicant for railroad land (3250).

Lawrence says he is familiar with four townships as the Deputy Assessor, and has hunted over two other townships; testified that these lands could be used for agricultural or horticultural purposes (Vol. VII, p. 3259). He says that in that territory there is not a single quarter section that would not support a family, except one (3259). He applied to purchase a quarter section which was covered with very good timber, and says that if he were a younger man he might be willing to take it without the timber (3260). The section he applied for would be worth $3,000 for the timber (3261). He would have been glad to buy it for $2.50 an acre, because it was worth $3,000 (3266). The witness thought the land could be cleared for $50 an acre (3273). The testimony of this witness is interesting as disclosing the extent of cultivation and residence he thought sufficient to secure a homestead. The

ground which he planted and cultivated was about ten feet by fifteen (3284).

Whitford, a cruiser by occupation, testified that if the lands were cleared, 50 per cent. would be good for farming, and the remainder for grazing (Vol. VII, p. 3295).

Hilleman, who is a rancher, made substantially the same estimate (Vol. VII, p. 3370). He owned 120 acres, of which four were cultivated, but ranges over railroad land (3374).

Currin, Government Surveyor, also County Surveyor, estimated that 30 per cent. or 40 per cent. of the land could be used for agriculture (Vol. VII, p. 3390). The rest might be used for grazing or orchards. Some is very steep and rocky and would not be practicable for any other purpose than forest (3390). In making this estimate he included as agricultural lands, lands which when cleared would be sufficiently level to put to agricultural use. A good deal of the land classified as agricultural is covered with the heaviest timber in Lane County (3395). The largest fir trees rise to a height of 200 feet and range from six feet to ten feet at the butt (3395). He testified that the timber was now an asset when formerly it was an expense to the settler (3407). The people who settled and remained on the sides of the mountain had outside range of other lands (3408).

Pengra, stock ranger, says that of the land in the Mohawk country, perhaps 50 per cent. is suitable for cultivation when the timber and brush is off (Vol. VII, p. 3445). The balance is suitable for grazing. Stockmen range their cattle in the mountains. His estimate is on the general territory and not merely on railroad lands (3448).

Caldwell, who testified that he had had a homestead, but had abandoned it, said that a settler could make a living on almost any quarter in the vicinity, which he knows best by creeks and towns (Vol. VII, p. 3503).

Deadmond testified that 40 per cent. of each 160-acre tract could be cultivated. He runs a rooming house in Springfield, and formerly did work as a contracting logger. Purchased timber land from the railroad company (Vol. VII, p. 3775). Cleared about eight acres—made a pasture of it (3776). He sold it. Claimed to be familiar with portions of the county, having hunted over it, and said that in determining the percentage which could be rendered suitable for cultivation, that would depend upon the purpose for which a man wanted it. The timber would have to be removed. It was a timbered country, but part of it has been burned over. West of the meridian line, one-half would be good for agricultural purposes after the timber was removed (3773). On the east side of the meridian it would not be quite so much—probably one-third. In some places he thought nothing could be raised (3774). He sold the timber on the railroad land he bought amounting to about 2,000,000 feet (3776). This witness describes the use made of the Homestead laws. He said the homesteader would buy a little shack and go out to it two or three times in the six months until the fourteen months had expired, and then he would commute and pay $2.50 an acre, or else he would stay the five years. If they commuted generally you would not see them any more. I call them speculators. Some of them were working for the timber companies (3780). Some of them proved up and some of them are still living on the land (3782).

Withrow farmed some bottom land near the MacKenzie River (Vol. VIII, 3800). Testified that he was acquainted with the lands along the MacKenzie River. He was a fire warden for four months in the year for seven years in the MacKenzie River territory. As you come down the river, the land would grow about 50 per cent. suitable for agricultural purposes. On the south side of the river it is broken. There are good little patches in there, but hard to get at (3822). In the north, if divided into 160-acre tracts, it would average about 50 per cent. plow land, but

not in one township. The railroad quarter sections—the best ones are worth $5,000 (3808). Over townships that he beat through the timber would average 3,000,000 (3808). The rush for the timber lands began in 1894 and continued up to 1908. There was a good deal of activity in 1906. People rushed in from Salem, Albany and Eugene and went through the form of complying with the Homestead law where they did not take it under the Timber and Stone Act (3812). They kept their business in town until they finally commuted. That is the way they got a good deal of the timber. That was the custom of the country at that time (3813). He cleared about three acres on his homestead (3810).

Kinman, a rancher, bought 80 acres and sold off the timber. Applied to buy some railroad land and got no answer. Township 15, Range 1 West, and some other sections which he described between the Mohawk and Calapooia rivers, if cleared off—half the land could be used for farming (Vol. VIII, p. 3817). Paid $960 for his land and it is worth, in his judgment, $3,500 (3820). The land would be worth more for farming if the timber were off (3820). As an illustration of the value of the land for agricultural purposes, Kinman testified that the land that he wanted to buy at $2.50 per acre had timber which was worth $50 an acre. The stumpage would be worth about 50 cents. But it would take $50 an acre to take out the stumps, so that the land would be more valuable without the timber than with it for agricultural purposes. A profit could be made by selling the stumpage and abandoning the land (3823).

Collier, a civil engineer and County Surveyor for Lane County, and Government Surveyor of certain townships in that County, testified that taking Lane County from its northern and southern boundaries and within the limits of the grant, approximately 75 per cent. of the land would be suitable for settlement. Fifty per cent. of said area is agricultural in character, and 50 per cent. thereof grazing.

A considerable portion of this area is timber or brush land, which would have to be removed before the agricultural lands can be utilized for agricultural purposes (Vol. VIII, p. 4262).

See also Renne (Vol. VII, 3449-3450).

Linn County

The unsold railroad lands in Linn County consist of 61,966.23 acres. The total area is 4,380 square miles, amounting to 2,803,200 acres. The population in 1870 was 8,717; in 1900, 27,713, and the number of families 4,258, or a little less than one to a square mile.

Angell for defendant testified that the chief characteristic of the land in this county was its timber. The agricultural tracts are isolated and separated from one another. They lie chiefly along the streams. There are certain level patches of land on the divides that might be adapted to agriculture, but there is no body of land of any considerable size (2770).

Brenner, for the Government, who is a farmer at Scio, testified that 90 per cent. of the land in these townships is susceptible of civilization, but he went on to say some quarters are practically level—others are rocky; some of it is too rough, and the rest—part of it would be, say—a rocky cliff on it—and the rest of it you might say practically level or in canyon-shape like. The witness said it would take a good big piece for him to make a living; some people would make a living on a small tract (Vol. VII, p. 3636). Some of the land cannot be cultivated at all where the rocks are—but there is some good timber on it (3638).

Carlson for government took a homestead in Township 15, Range 3 East. After the timber and brush has been removed, he thought that 80 per cent. of the land would be suitable for ploughing and raising crops (Vol. VII,

p. 3760). On cross examination he testified that there might be 3,000,000 feet of timber on his homestead (3761). He had four acres under cultivation (3758). The land is situated on the river bottoms on the Calapooia River (3761). A man might clear a quarter section of land alone but he might be thirty or forty years in doing it (3763). He knew of two settlers in the timber lands both of whom are now dead (3763). The people who are farming there now are on lands which have been cleared, and they first settled on the streams and got creek bottoms and river bottoms, and what little clear land there was. Some of them took donation lands (3765).

Mariels testified that he knew of but one or two 160-acre tracts in certain townships that a family could not go on and make a living (Vol. VIII, p. 3839). But on cross examination it appeared that he had never homesteaded any land, and lived on land his father had homesteaded, who died in 1888 (3836). His father had about six acres under cultivation. The witness and his two brothers had tried to buy railroad lands in 1908 carrying about three million feet to each quarter section (3845-3849). He testified to what he claimed to have been an attempt to make a homestead, but what was apparently only an effort to get a valuable timber quarter without compliance with the law (3849-3855), and he was certainly not a reliable witness.

Shelton (Vol. VIII, p. 4053) thought that 75 per cent. of the entire lands, including the railroad lands, could be cultivated after it is cleared. That percentage would not hold on each 160-acre tract (4055). Some of it is rocky, and steep, and could not be cultivated, but could be used for grazing.

Young (Vol. VIII, p. 4060) testified that between Crabtree and Thomas Creek he thought that 65 to 75 per cent. of the land would be suitable for cultivation.

Wilson (Vol. VIII, p. 3934) testified that half the land is susceptible of cultivation and that the average of 50 per cent. would apply to each 160-acre tract.

According to Stewart, County Clerk and County Judge, 30 or 40 per cent. could be cultivated if the timber were taken off. It costs from $150 to $200 per acre to clear. It is chiefly valuable for timber. The agricultural lands were taken up before the grant was made (Vol. VI, p. 3007). It does not pay to clear land in order to cultivate it; life is too short for that (3012). He also testified that he knew of quite a number of settlers who, as soon as they acquired their title, sold it to some of these timber land syndicates. Its value was in the timber, and not in the land (3015).

Polk County

In Polk County there are 37,017.79 acres of railroad land unsold. The total land area of this County is 701 square miles, or 448,640 acres. The population in 1870 was 4,701, and in 1900, 9,923.

This County is situated west of Marion County. The railroad line runs through the Willamette Valley at the east of the County. The townships in 6, 7, 8 and 9, Range 6, 7 and 8 West, are in the Coast Range of mountains. The elevation is from 1,000 to 3,500 feet. It is well timbered.

According to the witness Fuller, for defendants, who is in the timber business, the value lay wholly in the timber. Not 10 per cent. could be used for agricultural or horticultural purposes (Vol. VI, p. 3128) in the main for the reason that the elevation is too great for farm products or fruit to grow successfully. Probably 30 per cent. could be used for grazing (3129). It would cost from $75 to $100 an acre to clear the land. He said, I have known a good many people who have undertaken to make a living up in those hills, cleared little patches of land at different times, and I know at this time you cannot find any of

them living there. They don't seem to be able to make a living. The witness said that he knew practically every forty acres of land in Polk County; that the land owned by the timber companies was mostly taken under the T. & S. Act (3129-30) and the Homestead entries are exactly in the same condition as the T. & S. entries. The timber companies when buying did not pay any more or any less for a homestead entry than for a T. & S. entry, except where the homesteader had cut off timber, and that was deducted from the value of the land. The homestead cabins that were put up there are not occupied (3131). The witness gave his cruisings and estimates of the amount of timber on the sections in the western part of the County (3134, *et seq.*).

Angell (Vol. VI, p. 2771) testified that the lands were chiefly valuable for timber. A portion burned over which is of very little use without a great deal of expense.

Clackamas County

In Clackamas County there are 89,162.07 acres of railroad land unsold. The total area of this County is 1,861 square miles, or 1,191,040 acres.

In 1900 the total population was 19,658, comprising 4,392 families, or about two families to the square mile. In 1870 the population was 5,993. This County lies directly south of Multnomah, in which Portland is situated. Oregon City is the principal town and has a population of 5,000.

The Willamette River runs through the western portion of the County with several important branches, such as the Clackamas River. The eastern part of the County has been set off for forest reserve.

Exhibit 353 shows the classification of lands which have been cruised (7345). These lands show a larger proportion of agricultural lands in the grant than in any other County, because the cruising was done along the Clackamas River where they include the bottom lands among the river.

Nelson, for defendant, who was the County Assessor from 1902 to 1909, and before that Deputy Assessor (Vol. VI, p. 3099), says that the railroad lands lie in the southeastern part of the County. Nearly all the lands are in the Cascade Range (3099). The majority of the land is timbered, or land that is worthless. The majority of it is up in the Cascade Mountains (3099). A very little of this land is down in the valley where it could be put into agriculture. It is not bought very generally; most of it is up in the mountains where it would be beyond settlements. In the opinion of this witness, not over 4 per cent. would be good for agricultural purposes (3100). About 20 per cent would be fit for grazing purposes. A settler could not make a living by grazing his stock upon one quarter section (3101). About 30 per cent. of the land has been burned over in the southern part in Townships 6 and 7, 2 and 3 East. In the opinion of this witness, very little of the land would be valuable for agriculture after the timber was removed, because it is too far back in the mountains (3102). A good deal of the soil is rocky. More than half is up in the mountains. It is cut up with canyons. Wherever the creeks come are canyons—and deep canyons. The timber grows right on the sides of the canyons. There is hardly any level land to amount to anything between the canyons. The little creeks make deep canyons up there and the Molalla and the Clackamas and all these creeks have all deep canyons (3104). It costs from $75 to $100 to clear the land of stumps.

McLeod, a cruiser for the Railroad Company, cruised 65,681 acres, part of which was in Clackamas County. The lands in Clackamas County are classified as 16,358 acres of timber land; 31,297 acres of grazing land in the state of nature, and 4,238 acres of agricultural land. He said that some that is classified as grazing, could not be made grazing under any conditions, because it is too steep and stony; in fact, some of it is mountains of rock (Vol. VI, pp. 2834-5). In order to make it fit for grazing, the land must be cleared. It would cost anywhere from $75 to $500

an acre. In his opinion, a person could not settle on the timber land and make a living on it (2835). He would have to sell the timber. The witness testified that of the 65,681 acres cruised by him, 12.44 per cent was more valuable for agricultural purposes than for other purposes after being denuded of the timber (1536). He did not attempt to separate the worthless lands. They are included in the lands classified as grazing (2837).

Angell testified that the unsold lands in the grant are timbered lands with the exception of portions that are scattered and burned, but the chief value of the lands belonging to the Company that he had examined, was its timber (Vol. VI, p. 2772).

The Government witnesses place a much higher estimate upon the proportion of lands that could be cultivated. Standinger, who lived in Township 5, Range 3 East, testified that in the four townships—4 and 5 South, and 2 and 3 East, most any tract of 160 acres would support a family (Vol. VII, p. 3468). That 25 per cent. of the quarter sections would be plough land.

Dix, whose father took a homestead in Section 34, 4 South, 3 East, testified that the lands in this neighborhood were generally capable of settlement. His land is situated on Mill Creek (Vol. VII, p. 3508).

Kandle lives at Springwater on an old Donation claim. He testified that lands south and east of Springwater had been burned over, and the majority of it would be called "deadening" covered with more or less dead timber. A certain portion of it could be farmed. If you run ten miles southeast of Springwater, you will get into the foot of the mountains. Of course, that is rough, rocky and hilly. It is not good for anything, only some pasture land—but as far as eight miles back, southeast, there are settlers. The settlements extend up to the foot of the mountains and up the Clackamas River (Vol. VII, p. 3554).

Marion County

The unsold railroad lands in this County are 30,256 acres. The land area is 170 square miles, or 748,000 acres. The population in 1890 was 27,713. The County is situated southwest of Clackamas County. The Willamette River constitutes its western boundary. Salem is the principal city with a population in 1900 of 4,250. A considerable portion of the land in the western part of this County is in the Willamette Valley. Of the railroad land, according to the witness McLeod, about 7 per cent. are valuable for agriculture (Vol. VI, p. 2842).

The Government appears to have called no witness to testify as to the railroad lands in this County.

Yamhill County

In the East Side Grant there are 27,120.21 acres unsold, and in the West Side Grant 1,563.11. The population in 1890 was 10,692 and the number of families was 3,130.

Yamhill County lies between Washington County on the north and Polk County on the south. The principal town is McMinnville, with a population of 2,000. The Willamette River runs along the western boundary for a part of the way.

Booth, for defendant, testified that he has a knowledge of the country within a circle of six miles. The railroad lands not covered with timber have been burned over (Vol. VI, p. 2969). It would cost from $100 to $125 an acre to clear it. In his opinion 25 per cent. of it could be cultivated if cleared (2970). The land on the higher points where the snow falls six feet in the winter is not practicable for agricultural purposes (2970). All the agricultural lands on the Willamina Creek were taken up under the Donation Law long ago (2972).

Jones, for defendant, who is now County Clerk of Yamhill County, residing at McMinnville, testified to his knowledge of the country in Townships 2 and 3, 6 West. He

says the country is very abrupt; cut into deep ravines and gulches; with the exception of isolated tracts, it is not agricultural (Vol. VI, p. 2990). Not 5 per cent. could be used for agriculture. Most of the lands taken up by homesteaders have been abandoned after the timber was taken off (2992, 3).

Angell, for defendant, testifies that the railroad land in this County has a good stand of commercial timber, and in places there are burns (Vol. VI, p. 2772).

Maloney, for the Government, testified that he had been over the land south of Sheridan and Willamina, Townships 4 and 5, South. He stated that in his opinion this land is too high to be very profitable for agriculture (Vol. VIII, p. 4038). It is high and mountainous and valuable principally for stock. Township 4 South, 6 and 7, 40 per cent. to 50 per cent. could be considered as agricultural (4039). The altitude is something like 2,000 feet (4040); the lower levels are adapted for fruit raising. He says he presumes they could raise grain, but has never seen it (4040). The higher mountains are coarse shot land (4040) without much timber. It is burned over, and the timber is small. In 4 South, Range 6, and Range 7, there are only a few of the quarters but what would have from 5 per cent. to 25 per cent. of the land that could be cultivated. As to these higher sections, he says that a man could not make a living on the land he could cultivate unless he had stock to utilize the grazing (4045).

On cross examination the Government introduced under objection a statement purporting to have been verified before a special agent of the Government (p. 4049) in which it is stated that 90 per cent. of the quarter sections have at least 10 acres of tillable land.

Columbia County

There are 17,678.83 acres of unsold railroad land in this County. The West Side Grant is in Columbia, Tillamook, Washington, Multnomah and Yamhill Counties. The land

area is 677 square miles, or 433,280 acres, with a population of 6,237, and 1,426 families. The country is generally rough, broken and heavily timbered.

Scott, for defendant, testified that a great deal of the land is rocky and unfit for cultivation. In many cases the altitude is quite high. The soil is generally coarse mountain land, very unproductive, and in order to clear this land for cultivation, it would require from $100 to $200 an acre (Vol. VI, p. 2979). The lands in Columbia County through which he passed and with which he is acquainted are generally heavily timbered. He would not say there was over 15 or 20 per cent. of these lands that would be available for any agricultural purpose with the timber removed, and without the timber removed there would not be any (p. 2970). Here and there throughout the grant in the low little valleys and ravines and draws leading down into the larger streams, there is here and there a spot where a house could be built, where a settlement could be made, but the balance would not be good for anything. A man would starve to death on a settlement like that (pp. 2980-2987).

Angell testified that in Columbia County the lands are heavily timbered. That the commercial value is for timber only (Vol. VI, p. 2773), usually worth from $5,000 to $20,000 a quarter section. The stumpage is about $1.00 a thousand. If the Company had sold these lands to so-called actual settlers, the only use they could have made of them would be to sell the lumber (p. 2774). He states his experience has been that lands taken in quarter sections under homesteads, or purchased in timber areas, are never occupied for any appreciable period after the title has been acquired. I have never known a half dozen instances of such occupation (p. 2774). He says that it would be impossible to make a living on the lands by agriculture, except in some isolated cases (p. 2775). A settler could not make a living by grazing, except by

pasturing on outlying lands (p. 2776). He said,—I do not think there is a quarter section in the grant, in the burned region, that a settler could make a living on by pasturing on that section (p. 2776). One reason is that the lands are in high altitudes; considerable snow falls there. It would be necessary to raise hay to winter stock, or else take them to some other place (p. 2776).

Anderson, for the Government, who lives at Scappoose, not a homesteader, said that in his opinion, after the timber is taken off, 50 per cent. could be put under the plough. The railroad lands are back in the foothills and on the mountains. He had applied for railroad land in 1907 (Vol. VIII, p. 3862).

Grant lives in the southern part of Columbia County and knows adjoining property for about three or four miles around. He said that about 50 per cent. is tillable land; 45 per cent. pasturage and 5 per cent. worthless. But says that he cannot distinguish the railroad lands from other lands (Vol. VIII, p. 3868).

Quick, for the Government, stated that in his opinion 70 to 80 per cent. of the lands in the townships with which he is acquainted, speaking of the land generally, including railroad land, could be used for agricultural purposes when the timber is removed (Vol. VII, p. 3480). Stumpage in that county is worth two dollars a thousand (p. 3488). He adds:

"Now, suppose that these Lafferty people, who have attempted to buy this land from the railroad company or made application to buy it, at $2.50 an acre, should get a deed from the railroad company and a good title at $2.50 an acre, what would they be able to do with the best quarter sections of timber that is situated in that group of claims or quarter sections that these clients of Mr. Lafferty have applied for? What would they be able to do with that quarter section—what could they sell it for?

"A. Well, if it was accessible to any of these railroads they could sell it for possibly two dollars a thousand.

"Q. What would be the stumpage—I mean, what would be the quantity of merchantable logging timber that the best quarter section of this land would carry—about how many million feet board measure?

"A. Well, I think there is tracts out there in that section of the country that will go six million to the quarter section. That is an exceptionally good one, though.

"Q. What would they average, the timber lands?

"A. Well, take it all the way through, they would average probably three million."

Benton County

In Benton County there are 53,626.99 acres of railroad lands unsold. The total area is 677 square miles, or 433,280 acres, with a population of 6,706 in 1890.

The Willamette River runs along the eastern boundary. Corvallis is the principal town, having a population

According to Vitido, a witness for defendant, an assessor, the land is chiefly valuable for timber (p. 3060). There is much burned land. Some of the unsold lands could be utilized for grazing. There is no land in the southwestern townships that anybody could make a living on (Vol. VI, p. 3061). There is nobody living in Range 13 South, 8 West; there is no inhabitant in the township, either on the even or odd sections (p. 3062).

Gray, who patrolled the lands for the fire patrol, says that three-fourths is covered with fir timber. Its chief value is the timber. Not 15 per cent. would be suitable for agricultural or horticultural or any useful purpose other than timber (Vol. VI, p. 3120.)

Warfield, for the Government, testified that the railroad sections were as suitable for settlement as the homesteads taken up, except right along the Alsea (Vol. VIII, p. 4157). In Township 13, Section 8, not very much can be cultivated (p. 4158). The altitude is 3,000 feet. If a man had 160 acres and there were three cleared, he would call that a farm (p. 4175). Twenty years ago there was

no demand for the land (p. 4171). The land in the mountains or in the timber or in the foothills was practically unsought until 1890 (p. 4172).

Lincoln County

The railroad lands unsold in this County comprise 15,906 acres. The total land area is 1,008 square miles, or 645,120 acres. The population is 3,575, the number of families 909—less than one family to a square mile.

Lincoln County lies along the Pacific Coast, west of Polk and Benton—of which it was formerly a part. A railroad runs from Corvallis in Benton County across the mountains along the Valley of the Yaquina.

According to the testimony of the witness Vidito, for defendant, there is no land available for agricultural purposes in this County. Vidito, who for several years ran sawmills in the Coast Range, testified that he did not know of any of the lands within the grant that would be available for agricultural purposes (Vol. VI, p. 3064). A settler could not make a living upon 160 acres, either by pasturing stock or any other useful avocation relating to agriculture or horticulture. He says: "I never have advised anybody in years past, or in the last ten or fifteen years, to take a homestead. I knew where there was vacant Government land, but I would not recommend anybody to take it." (p. 3065.) There is nobody living on the homesteads that were sold to timber syndicates. He said they cleared up five or six, and some of them ten acres. That is, they cut off the timber and sowed grass and burned up part of the logs, and they had timber enough on their claims so they sold out at a good figure and just simply left—vacated—and timber owners own it now.

Ball who resided at Toledo in Lincoln County and assessor of the County for five years, testified that Lincoln County was set off in 1893. He says that outside of the timber, there were perhaps six or seven thousand acres,

portions of which are good for pasture. About 15 per cent. could be used for fruit or for agriculture. These are small patches, small benches and small bottoms on creeks scattered pretty generally through this tract of land. There are about 3,000 acres that are better than the hills just described. It is a little leveler in character. This is scattered through the remaining region. It is nearer the settlements—nearer the roads. Perhaps 30 per cent. of this could be utilized for agricultural purposes (Vol. VI, pp. 3230, 3231). The balance is chiefly valuable for its timber. About 1,500 to 2,000 acres, after it is cleared, would be valuable for agricultural or horticultural use—in tracts ranging from perhaps five to fifty acres in a place.

The Government called no witness in rebuttal.

In *Klamath and Jackson* Counties, there are 441,791.15 acres unsold.

Grieve (Vol. VI, p. 3199), a witness for the Railroad Company, testified that 190,000 to 192,000 acres are worthless (p. 3201), as far as farming is concerned; and that the chief value of the remaining 251,000 acres is timber. In some districts the timber runs 20,000 square feet to the acre (p. 3203). In the opinion of this witness, if the timber were cut, 12 per cent. of the land could be used for agriculture (p. 3204).

From this review of the evidence respecting the character of the granted lands, we summarize the conclusions of fact which should, as we think, be derived therefrom.

(1) At the time of the passage of the Act of 1869, the greater part of the arable land within the limits of the grant had passed from the ownership of the Government, and was not available for the purposes of the grant.

This fact is made evident to the eye by the colored map, Exhibit 264. The witnesses for the Government and for

the defendants testify with unanimity that the agricultural lands in the Willamette Valley and in the Valleys of the Umpqua and Rogue Rivers, were largely taken up previous to 1869 under the Donation Law and early settlement laws. There was very little land in western Oregon which was arable in its natural condition. This land was situated along the rivers and creeks and was taken up by the first settlers. It was only after these lands had been taken up that settlements extended to the bench lands upon the hillsides. It is necessary to keep this fact in mind in reading the evidence of the witnesses for the Government, most of whom reside in the valleys; their personal acquaintance with the land within the grant is for the most part limited to their own localities, and they frequently testify as to the agricultural character of the land on the assumption that it has been cleared without expressly so stating.

(2) The greater part of the granted lands were heavily timbered. These lands were incapable of settlement and cultivation while the timber was upon them. At the time the grant was made, and for many years thereafter, the timber was without value. The expense of cutting the timber and clearing the land was prohibitive of its use for actual settlement, even though the land itself, after being cleared, should be found to be susceptible of settlement and cultivation.

(3) A large proportion of the granted lands in their natural state, and a large proportion of the timber land when cleared, was mountainous, broken and sterile, and for that reason incapable of settlement and cultivation.

In support of these three conclusions of fact we refer to the evidence which has already been reviewed.

(4) Of the granted lands 163,431.28 acres were sold by the Oregon and California Railroad Company prior to May 12, 1887. Nearly all of the said sold lands were sold to

actual settlers in small quantities, although in a few instances such sales were made in quantities exceeding 160 acres to one person, and at prices slightly in excess of $2.50 an acre. These lands were capable of settlement and cultivation, but when they had been disposed of, the remaining lands with some exceptions, were either incapable of settlement and cultivation, or were chiefly valuable for timber.

The first part of this finding is taken from the stipulation as to the facts by the parties, Subd. VI, Item 8 (e), (Vol. IV, p. 1565). The last sentence rests upon the evidence to which attention has already been called. See also Defendant's Exhibit 279, 280, advertisements published in 1871, 1872 (pp. 6776-9).

(5) When by reason of the construction of the railroad and the increase of population, the remaining lands became salable, they were chiefly valuable for timber, and substantially the only persons who sought to acquire them did so to secure the timber, and not for the purpose of actual settlement. It never has been possible to sell such lands for purposes of settlement and cultivation, except in rare instances.

It is stipulated between the parties, subdivision XII, Item 1 (Vol. IV, p. 1584), as follows:

"Until about the year 1890 or 1891, there was substantially no demand for said granted land, except for the purpose of settlement, or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding $2.50 per acre."

"Item 2. During a large part of the time prior to the year 1894, the defendant Oregon and California Railroad Company maintained an immigration bureau engaged in inducing immigration and settlement upon said land, and the greater part of the sales of land to persons not settlers thereon, or in quantities exceeding 160 acres to one person, or for prices exceeding $2.50 per acre, were made after the year 1894."

The evidence is to the effect that the timber lands in Oregon became valuable about 1894, and from that time there was an increasing demand for them at prices in excess of $2.50 an acre. Large timber companies bought up the land, established mills and created the lumber industry. The timber lands then acquired value for the immediate mercantile product which was upon them, and for which there was a market. This created a demand for the timber lands, not for the purposes of occupation and cultivation, but in order to secure the immediate profit in the sale of the timber. The result was that lands could not be sold except in rare instances to actual settlers (McAllister, Vol. IV, pp. 2014-5).

Mr. McAllister testified in substance:

One could not to-day sell those lands that we are speaking of for agricultural purposes. Nobody would buy them for that purpose. I refer generally to the lands in this suit. When the land is principally valuable for timber it is safe to assume that a purchaser offers to buy it for the timber (p. 2014).

Mr. Angell testified:

"My experience has been in surveying in the timbered areas of this state as well as other states that lands acquired by homestead from the Government on the timbered areas are never occupied for any appreciable period after title has been acquired. I suppose that in all the lands I have surveyed and that I have been connected with since 1892 there were not half a dozen that were acquired either by homestead or purchase that the parties lived in after they secured their title" (Vol. VI, p. 2774).

The whole body of the evidence submitted for the plaintiff and for the defendants corroborates these statements. They are strongly corroborated by the following citation from the report of the Secretary of the Interior, Mr. Lane, for the year 1913.

"I am not satisfied with the operation of the homestead law as to the timber lands of the far western lands. As

the law now is, a man may enter upon 160 acres of these lands, and by living a total of 21 months on the land during three years and cultivating at a maximum 20 acres of the land it becomes his. He promptly proceeds, if he is wise, to sell it to some lumber company for from $10,000 to $20,000. The land is allowed to lie for an indefinite period as a part of the company's forest reserve or is logged off, leaving the stumps in the land, and eventually sold for agricultural purposes, if so adapted.

"Experience justifies the statement that few men take up these heavily timbered lands under a bona fide attempt to meet the purpose of the law, which, as its name implies, is to convert the public land into homes. By the investment of a few months' time and a few hundred dollars the homesteader gains a property worth many thousands of dollars. Yet all the conditions of the law are complied with and patent must issue. The government loses the timber and the land and does not gain a real home-maker. Such homesteaders add nothing to the wealth of the nation. The law should punish them, in fact, as frauds. Whether with the connivance of the lumber companies or not, they are the agencies by which the law is defeated and the lands conveyed where it is not intended that they should go."

(6) To a considerable extent the timbered lands within the grant, if denuded of the timber, are not susceptible of settlement and cultivation.

There is a considerable difference of opinion between the various witnesses as to the proportion of the timber lands which, when denuded, would be available for agricultural purposes. But perhaps the most convincing evidence that no very considerable part of the heavily timbered lands are or have been available for agricultural purposes, is found in the circumstance that few witnesses were called by the Government who had actually settled upon timber lands and undertaken to cultivate them. If it were true that the timber lands were a good agricultural investment at $2.50 an acre, surely many persons could have been found who had made the venture. Not more than four or five of the witnesses called by the Government were now actual residents on timber lands taken

up under homesteads or by purchase from the Railroad Company.

Mr. Edmundson, called for the Government, had lived in Jackson County for twenty-seven years, engaged in farming and stock, but he never took up a homestead until the land became valuable for timber about eight years ago, and the lumber was the inducement. The timber on the homestead which he took was 3,000,000 feet, worth $3,500 (Vol. VII, pp. 3617-21). But it is said that an actual settler might dispose of the timber and thus secure ready money enough to extract the stumps and prepare the soil for cultivation. But this involves permission to sell the timber before actual residence and cultivation has been continued for any considerable time; and it involves the possibility that the person selling the timber may not use it in clearing the land. Moreover, it proceeds on the assumption that the money secured from the sale of the timber would pay for the clearing of the land. The evidence is that an average timber claim of 160 acres has about 3,000,000 feet of timber. At a stumpage of $1, it would realize $3,000 if sold, or less than $20 an acre; but the evidence is that the cost of clearing the land is from $25 to $100 and upward per acre, so that it would be more profitable to buy the quarter section for $400 and sell it for $3,000 than to sell the timber and invest the proceeds in the clearing of the land. This accounts for the non-appearance of actual settlers on timber lands as witnesses for the Government.

(7) From about 1894 to 1903 the Oregon and California Railroad Company sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person, and at prices exceeding $2.50 per acre, and in several instances between the said dates the said Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one purchaser, at prices ranging from $5 to $20 per acre, and in one instance at $35 per acre, and in one instance at $40 per acre, and

in one instance 45,000 acres at $7 per acre were sold by said Company to a single purchaser. But each of said sales in excess of 160 acres and at a price in excess of $2.50 per acre, was of lands chiefly valuable for timber and incapable of settlement and cultivation.

(8) The defendant Oregon and California Railroad Company has heretofore made approximately 5,360 sales of its land-grant lands, aggregating 820,000 acres, approximately 4,930 of which sales were in quantities not exceeding 160 acres to one purchaser, aggregating about 269,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. But the said 376 sales were of lands which were chiefly valuable for timber and were not capable of settlement and cultivation.

(9) Substantially all of the said 524,000 acres were sold to persons other than actual settlers who purchased the land for purposes other than settlement, and at prices in excess of $2.50 per acre; approximately 478,000 acres of said 524,000 acres were sold since the year 1897, and approximately 370,000 acres of the said 524,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser. But the sales herein referred to were of lands incapable of settlement and cultivation.

Each of these conclusions, except the concluding clause of each, is taken from the stipulation as to facts, Subdivision VIII, items 4, 5 and 6 (Vol. IV, p. 1577). The last clause of each of these paragraphs is, we think, clearly established by the evidence. Thus the sales to the Booth-Kelly Company, which were among the large sales referred to, were of timber lands (Eberlein, Vol. V, pp. 2262, 2263).

(10) The timbered lands of the reserved even sections and Government timber lands generally in the vicinity of the grant, have not been disposed of exclusively or generally to actual settlers, but have been sold under the Timber &

Stone Act, which does not require settlement or cultivation, and under the Commutation Clause of the Homestead Act, to persons other than bona fide settlers who entered merely for the timber and sold the lands on acquiring title thereto to timber speculators.

This conclusion is supported by substantially the unanimous testimony of all the witnesses who were examined on the subject. There are instances in which it is claimed that Government timber land has been taken up and is still occupied by actual settlers under the Homestead Law. They are very rare. The witnesses called by the Government who were homesteaders, were living upon lands which were Donation lands, or which were valley or bench lands, except in a few instances. And no witness was called by the Government who was now residing upon lands which he had entered as a homesteader, which were chiefly valuable for timber, except a few recent entries where the witnesses testified that the timber was of very great value.

Mr. Booth testified (Vol. V, p. 2633) that the lands had all been taken up on the even sections either by homesteaders or under the T. & S. Act, but there were no residents. The lands were chiefly valuable for timber, and the party holding the title disposed of them for that purpose. He said that was the case with regard to all the lands which the Booth-Kelly Company owned.

The map introduced in evidence verifies this statement and shows that substantially all the even sections were taken up under the T. & S. Act.

(11) No evidence was submitted that the lands sold in greater quantities than 160 acres to one purchaser and at greater prices than $2.50 per acre, were lands susceptible of settlement and cultivation.

The theory of the Government's case did not necessitate any such proof. It was that every quarter section of the

grant must be sold to actual settlers, irrespective of its character, and that a sale of any one quarter section to a person other than an actual settler, was in violation of the proviso. Consequently, the Government rested its case without making any proof that the lands sold in quantities greater than 160 acres to one purchaser were susceptible of settlement and cultivation. The defendants did prove that a very large proportion of the unsold granted lands were incapable of settlement and cultivation. The Government in rebuttal undertook to introduce evidence to the contrary, but it introduced no evidence respecting the character of the lands actually sold by the Railroad Company.

(12) Shortly before the commencement of this action, a considerable number of persons applied to the Railroad Company to purchase various sections of said granted lands. In each instance the lands they sought to purchase were timbered and were chiefly valuable for timber, and were of a value largely in excess of $2.50 per acre. The Railroad Company had no reason to believe, nor was it a fact, that these applicants were actual settlers upon the said lands, or that they intended to purchase the lands for actual settlement.

It is stipulated between the parties (Stipulation, Subd. IX, Item 3, Vol. IV, p. 1577) that

"Since January 1, 1903, and principally since February 14, 1907, persons exceeding 4,000 in number have severally applied to the defendant Oregon and California Railroad Company to purchase certain of the said unsold lands in quantities not exceeding 160 acres to each person; said applicants claiming that they desired such lands to settle and establish a home upon; and in a few instances claiming that they had settled and established a home upon the lands applied for by them; and at or about the time said applications were made, each applicant stated that he then was willing and able to tender payment at the rate of $2.50 per acre for the lands applied for by him, and in a few instances such tender was made."

Considering the general evidence respecting the disposition of timber lands, together with the specific evidence as to the applications for the purchase of these lands from the Railroad Company, we think the conclusion is inevitable that the Company had no reason to believe, nor was it a fact, that the applicants were actual settlers upon the land, or that they intended to purchase the lands for actual settlement.

McAllister testified that approximately 10,000 applications for quarter sections were made previous to March 1, 1909. There were 7,991 applications covering 6,168 tracts of land in quarter sections or less; there were 4,749 tracts of land covered by one application; 1,097 tracts covered by two applications; 256 covered by three applications; 54 covered by four applications; 8 covered by five applications, and 4 tracts covered by six applications (Vol. IV, p. 1959).

The best timber lands were included in these applications. The lands were chiefly valuable for their timber (p. 1961), and ranged in value from $10 an acre to $100 an acre (p. 1962). Mr. McAllister gave a description of the manner in which these applications were made. He said:

"Usually some person comes into the office with a bunch of applications—anywhere from five to ten—from 50 to 100—and presents the applications; presents one application and tenders the sum of $400 with it; and that being rejected he follows by presenting another application, tendering the same $400; and that being rejected the process is gone through with the entire bunch he brings in. He claims to be the agent of the applicants" (p. 1959).

Since the starting of this suit the business of presenting these applications has grown up all over the country. The record contains advertisements and circulars showing the character and extent of the business, in encouraging people to believe that they could acquire the timber land in the grant at $2.50 an acre, the timber being immediately salable for sums largely in excess of the price to be paid. A

sort of get-rich-quick-game, stimulated by brokers and agents who receive a cash payment in advance, leaving to the applicant the lottery of success in the event that these lands should be forfeited and become public lands,—or in the event that it should be held that the interveners had acquired rights under the Act of 1869. Brokers and attorneys charge the applicant generally $75,—sometimes $50 (p. 1965).

Packages of advertisements and forms used by timber locators were produced and offered in evidence. The character of these advertisements is illustrated by the following:

Advertisement of John M. Kreider (Vol. IV, p. 1964) reading:

"Oregon Timber. The United States Government gave six million acres of choice timber lands in Oregon to railroad company over forty years ago to be sold at $2.50 per acre; 1,300,000 acres remain unsold. Now worth $50 per acre. Male and female American citizens only can now apply for 160 acres of this land at $2.50 per acre. Only $75, payable now. For full particulars address J. M. K., 806-7 New Bank Com. Building, St. Louis, Mo."

Again—

"For Sale Timber Lands. Parties wishing to make an application for some choice railroad lands, heavily timbered, cannot do better than to call at our office and get full particulars. We are prepared to locate several at this time, and our fees, including making all the papers, and location, are within the reach of all. Hoose & Miller, 66 Sixth Street."

(Taken from The Telegram, July 18, 1907.)

Again—

"Timber. We are still in a position to locate several parties on railroad lands in southern Oregon. Cruisings better than four million feet per quarter section; for making tender to the company and filing papers in the clerk's

offices afterwards, location, including all attorney's fees, we charge the sum of $25. Now come and look into this proposition. If you have never bought any lands from the company before, remember this does not interfere with any of your rights. Call and get full particulars. Hoose & Miller, 66 Sixth Street."

Also—

"Timber Lands. Intending purchasers desiring to locate upon lands with heavy timber in the land grant of the Oregon & California Railroad in southern Oregon, can secure the same by acting quickly. Location fees, including all the necessary attorneys' fees, are reasonable. Address J. E. Verdin, Grants Pass, Oregon" (p. 1971).

Again—

"Cotes and Horsemen. Railroad timber lands $2.50 per acre, ranging from 3,000,000 to 6,000,000 feet to quarter section, direct purchase. No rights required. Telephone Main 7245. Office 415-416 Mohawk Building, Spokane, Washington."

Among the witnesses for the Government who were applicants for these lands, were the following:

O. J. Lawrence, who applied to purchase lands which were worth $3,000 for the timber (Vol. VII, p. 3267).

Whitford, applied to purchase land that had 4,000,000 feet of timber upon it. He was eighty-three years old and claimed that he wanted to buy the land for settlement (Vol. VII, p. 3296).

Creason, tried to buy a quarter section of timber land worth $5,000 for $400. Admitted that none of it could be farmed; that he had to go right into the timber and stumps to start with,—but he classified the land as agricultural (Vol. VII, p. 3356). He also applied for one hundred others (p. 3354), the majority of whom lived in Roseburg (p. 3354). The lands which he tried to get for the others were similar to those which he wanted for himself,—worth $5,000.

Hileman, tried to purchase eighty acres (Vol. VII, p. 3367).

Boyle, tried to buy 120 acres at $2.50 an acre, which he says is worth $10 an acre (Vol. VII, p. 3519).

Lamb, applied to purchase a quarter for $400, which he could have sold for $3,600, and which he picked out because it has good timber (Vol. VII, pp. 3568-3588).

Miller, tried to purchase a quarter section of timber land which he expected to get for $2.50 an acre. He had never been over it, but a cruiser told him it was good timber land (Vol. VII, p. 3753).

Anderson, put in an application for timber land and went upon the land once and put up a notice, but never did a thing on it (Vol. VIII, p. 3863).

Martin, describes how locators placed interveners, receiving from $25 to $200 (Vol. VII, pp. 3314-3317).

Bailey, testified that he offered to locate a quarter under the Act of 1869 (Vol. VII, p. 3707). It was timber land, worth $4000 or $5000. The person for whom he was to locate the land was to pay him $150,—he actually paid only $50 (p. 3707).

McLafferty, tells about the efforts of the McLafferty family to buy railroad lands (Vol. VIII, p. 3872).

McMasters, applied to buy timber land which had upon it about 3,000,000 feet of timber (Vol. VIII, p. 4010).

The overwhelming weight of evidence in the case is that timber lands, whether belonging to the Government or to the Railroad Company, were not entered or purchased for purposes of settlement,—but for purposes of speculation; and that the lands acquired were immediately turned over to timber companies.

(13) The withdrawal of the lands from sale in 1903 was occasioned by the necessity which had then arisen for the survey, cruising and classification of the lands, and was continued after 1906, by reason of the destruction by the San Francisco fire of the records theretofore made of such surveys, cruisings and classification, and such withdrawal was afterward continued by reason of the institution of this suit and the uncertainty as to the rights of the parties in the disposal of said lands.

The stipulations of the parties are that nearly all of the granted lands sold previous to May 12, 1887, were sold to actual settlers in small quantities (Subd. VI, Item 8 e), (Vol. IV, p. 1565); and the disposition of lands between 1894 and 1903 covered by the stipulation cited above (Subd. VIII, Items 4, 5 and 6, Vol. IV, p. 1578). It is also stipulated (Subd. VIII, Item 3) that a rapidly increasing demand for the lands of the Oregon and California Railroad Company in large quantities and at increased prices commenced about 1889, or 1890, and has continued ever since; and Subd. IX, Item 4, reads, that

"On or about January 1, 1903, the Oregon and California Railroad Company withdrew from sale all the said unsold lands, and the said Company at all times refused, and still refuses, to approve or accept any of the applications to purchase referred to in the next preceding Item 3 of this Subdivision hereof (quoted on previous page) claiming that all the lands so applied for are essentially timber lands unsuitable for any other purpose."

Mr. Eberlein testified that in the Spring of 1903 the sales of land were suspended (Vol. V, page 2230). This was because of the confusion into which the system had fallen. The lands had not been fully surveyed (p. 2233). The work of examination was begun in the Spring of 1903 and completed in the Fall of 1904. Then it was necessary to have the tax titles examined (p. 2237). That work was not completed until March, 1906, and the fire at San Francisco destroyed all the records (pp. 2230-2248).

He describes the loss of the papers and the efforts made to supply the loss (pp. 2248-2251). He testified that no applications were made for lands not timber (p. 2254) although in some instances they were for water power and sometimes for mineral. Notice was given that the Railroad Company would sell agricultural lands, but not timber lands (p. 2258). So far as applications were made for agricultural lands, either then or later, they were investigated and negotiations for sale entered into (pp. 2286-7). After the San Francisco fire, which occurred in April, 1906, the Company obtained copies from abstract companies and from public offices from which tabulations of their lands were prepared (Exhibit 23, p. 22). The Company reserved certain unsold land for timber, iron, coal and oil; Exhibit 8 attached to answer, is a statement of those lands.

Mr. Dixon, Secretary of the Booth-Kelly Lumber Company, testifies that since the agitation commenced in 1906, there has been virtually a cessation of sale because of the uncertainty of title (Vol. V, p. 2637 *et seq.*).

There was considerable evidence offered on behalf of the Government to the effect that the withdrawal of the lands from sale had arrested the development of the country.

(14) The Railroad Company has paid taxes upon the lands patented to it to the aggregate of $3,182,169.57; in some of the Counties the taxes have exceeded $2.50 per acre.

The defendants' answer alleges that at all times since the lands were patented to the Railroad Company it paid the taxes levied and assessed upon and against the said lands, which payment in all amounted to $1,827,234.10. A statement of the taxes paid was produced and offered in evidence (Ex. 320, Vol. XIII, p. 7167), and the assessment rolls were produced for the Counties of Washington, Multnomah, Yamhill, Clackamas, Polk, Marion, Lincoln, Benton, Linn, Lane, Douglas, Coos, Josephine, Jackson,

Klamath, Columbia and Tillamook showing the taxes paid from 1904 to 1911 (Eddy, Vol. V, p. 2554, Exhibits 319-7150). The total taxes paid from 1891 to 1911 are shown upon Exhibits 319, 320 and 321 (Vol. XIII, pp. 7150, 7167, 7251). These Exhibits show that in Columbia County the total tax per acre for the same period of time was $2.75; Coos County, $2.54; Multnomah, $2.55.

Eddy (Vol. V, p. 2552) testified from the best available data that prior to 1899 the Company paid in eight counties $59,927.52. From 1891 to 1904 $737,601.12. From 1905 to 1911 $1,637,314.69, or a grand total of $2,434,-843.33.

In 1911 the holdings of the Company were 2,119,927 acres, so that on this acreage the taxes paid would average $1.15 per acre. From 1874 to 1898 inclusive, the taxes paid were $326,420.61; in the latter year the holdings represented 2,322,084 acres, so that the taxes paid at that time would average, with a very small fraction, fourteen cents an acre.

The average tax paid per acre was a fraction over 76 cents (Vol. V, pp. 2568, 2569). The total tax paid before the bringing of this suit was 38 cents per acre, apportioning the tax upon the whole land grant, excluding the lands that had been sold. More than one-half the taxes have been paid since the suit was brought (2569), but manifestly the average could not be computed upon the total land grant, but varies as the lands are sold, since the purchaser pays the tax upon the sold land.

Hence, the percentage per acre paid by the Company would be very much larger than 38 cents per acre. Moreover, the rate of taxation in some counties is much less than in others. The sum paid for taxes per acre in those counties where the lands are not salable, exceeds in some instances $2.50 an acre.

(15) Continuously from the opening of the line the Railroad Company has handled freight and passengers for the Government without cost. The value of these services was very great.

Mr. Shelburne, head clerk of the Government Accounts of the Southern Pacific Railroad Company, who has been continuously in the Department since 1881, produced a statement of Government freight and passenger transportation between Portland and Roseville Junction for the years 1906 and 1910 (Vol. V, p. 2405). The accounts previous to that date were destroyed by the San Francisco fire. The witness testified that the volume of business was approximately the same as that shown upon the statement by years, with the exception of the period of the Spanish-American War in 1898, when it was heavier by reason of the great many regiments coming to Portland from San Francisco (2406). The witness testified to the Department Regulations as to the manner in which the bills for charges are to be rendered and the settlement made with Government officials (2407-2411). These were the services rendered gratuitously to the Government. Everything handled over the line for the United States, except the mail, is free. The testimony of this witness was corroborated by the Chief Clerk, Ormandy.

Mr. Adams testified that this free movement applied to all shipment from any part of the United States received and carried over the line, except United States mail; comprised the transportation of troops, and the Government has continuously and constantly used the road for that purpose (Vol. V, p. 2146).

It may properly be assumed that the estimates given by the defendants' witnesses with regard to the value of the services, is substantially correct, since it is in the power of the Government through the records in the Quartermaster's Department to produce the statistics.

(16) From 1879 to 1903 inclusive, under and in compliance with the provisions of law to that effect, the Railroad Company reported to the Commissioner of railroads the sales made by it of the granted lands, and the prices realized, showing that it continuously assumed and exercised the authority to sell certain of said lands at prices in excess of $2.50 an acre, and in quantities larger than 160 acres to one purchaser. The Commissioner of Railroads reported these facts to the Secretary of the Interior, and such report was annually, during the period mentioned, laid before the President and the Congress of the United States.

The stipulations which justify this finding are contained in Subdivision XXI (Vol. IV, p. 1572) and the semi-annual reports thereto attached.

(17) On or about the 1st of July, 1887, the Oregon and California Railroad Company made a mortgage deed of trust to the Union Trust Company to secure the payment of its first mortgage bonds to the amount of $20,000,000. The bonds were issued and used in large part to retire bonds secured by earlier mortgages of June 1, 1881, and May 26, 1883, and a large part of the remainder was negotiated abroad. There are now outstanding bonds to the aggregate amount of $17,745,000, most of which are held abroad. The earlier bonds referred to were used to provide funds, aggregating approximately $5,000,000, which were used in the construction of the railroad. The bonds secured by the Union Trust Company mortgage were used to retire the aforesaid bonds and to complete the construction of the railroad.

These facts are all stipulated, Subdivision VI, Items 16, 17, 18, 19, 20, 21 and 22 (Vol. IV, p. 1572). The balance sheet as of February 11, 1912, shows the outstanding bonds to be $17,745,000 and with the capital stock makes an aggregate of $36,000,000. The evidence is that this bears a close relation to the cost of the property.

The testimony of Mr. C. P. Lincoln (Vol. V, p. 2126), head clerk of the Auditor's Office, shows that there have been additions and betterments amounting to $4,000,000, making a total cost of $40,000,000.

The railroad, however, has its chief value in its connecting line of the Union Pacific System, and if that system is broken up, the Oregon and California Railroad Company as an independent line, would unquestionably depreciate greatly in value.

Mr. Koehler, who was the receiver and afterward the general manager of the Company, was called by the Government; he estimated the value of the road at $50,000 a mile, but testified that the Company was once in the hands of a receiver in 1885, and that it was near bankruptcy quite often (Vol. IV, p. 1904). He also testified that without through traffic, the value of the property would not be as much as it is by enjoying this through traffic, but he does not undertake to give an estimate of what it would be worth if the present traffic arrangements should cease (1905). Other lines of road have been constructed and are being projected which are likely to interfere with the monopoly which at one time this Company had, and which will tend to depreciate its value (1906-8).

FINAL HEARING

The case came on for final hearing at Portland on April 29, 1913, before District Judge Wolverton, and was submitted without argument upon the merits.

DECREE

Vol. III, p. 1296.

The decree adjudges as follows:

(1) That all the lands set out in Schedules A and B, attached to the decree

"have become now and are forfeited to, and the title to all the said lands, and the estates in land have reverted to and now is revested in the United States of America, and all of said lands, and estates in land now are the absolute property of the United States of America, free from any and all claim of right, title, interest or lien in, to, or upon the same, or any part thereof, by or in favor of the defendant, cross-complainants and intervenors herein, or either or any of them."

(2) Quieting and confirming the title, as against the claims of the defendants, cross-complainants and intervenors.

(3) Enjoining the defendants, cross-complainants and intervenors from claiming or asserting title, or from interfering with the property as set forth in Subdivision III.

(4) Stating with more particularity the property affected and covered by the decree.

(5) Providing for the operation of the decree upon certain lands in the State of Washington.

(6) Dismissing the cross-complainants, and bills and petitions in intervention.

(7) Denying the complainants' prayer for accounting by the defendants.

(8) Awarding costs.

ASSIGNMENT OF ERRORS

The defendants, the Railroad Company and the Union Trust Company, filed a large number of assignments of errors (137 in number, Vol. XV, p. 8021).

It is unnecessary to set forth at length all of these assignments of error. They are sufficiently full to raise all questions of fact and of law which are presented by the pleadings and proofs, and they challenge the correctness of each of the particular matters adjudged and decreed by the Court. This defendant calls attention to some of the errors, assigned as follows:

> "16. The Court erred in holding that the abovementioned defendant, Union Trust Company, had no lien on said lands, or any part thereof, and in holding that the lien of the said defendant evidenced by the deed of trust of July 1, 1887, was of no avail, and without force or effect, and did not express or constitute any right, charge or lien in or upon the said lands, or any part thereof, and should be set aside and cancelled."

> "17. The Court erred in holding that this defendant, as trustee for the owners and holders of bonds issued under and by virtue of the trust mortgage of July 1, 1887, was not entitled to the rights, and to all or any of the rights, of an innocent purchaser for value."

> "18. The Court erred in holding that whatever interpretation might be given to the proviso touching actual settlers of said Act of April 10, 1869, or whether the same created a condition subsequent or not, this defendant, Union Trust Company of New York, was not entitled to a lien upon the right of way and the whole land grant of the said Act of July 25, 1866, as security for the sum of $20,000,000, as provided in

said mortgage of July 1, 1887, and in holding that this defendant was not entitled to have said lien impressed upon said right of way, and said entire land grant to be satisfied first and before forfeiture or reversion to the complainant, or said United States of America, if forfeiture or reversion should be decreed."

"19. The Court erred in holding that the right to forfeiture for breach of condition subsequent, is not a right that may be waived, and in holding that in this case as to this defendant, said right, if it ever existed, was not waived by said complainant, and said United States of America, and in holding that complainant and said United States of America is not estopped to allege a breach of said condition, or to pray or have forfeiture as against this defendant."

"24. The Court erred in holding that in respect of the said land grants, or either of them, there had been an application thereof, or either of them, or their successors in interest, or by this defendant, individually, or as trustee of the said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, other than in fulfillment of and compliance with the paramount and primary purposes of Congress in making the said land grants, or either of them."

"26. The Court erred in holding that the application of the said East Side Grant to the construction of the railroad contemplated in said Act of July 25, 1866, by way of a deed of trust, or mortgage of said land grant to raise funds or to refund the same for the construction of such railroad, was in subjection of and subordination to and restricted by the proviso in said Act of April 10, 1869, relative to actual settlers."

"27. The Court erred in holding that a sale or sales of lands forming part of said East Side grant pursuant to the mortgage or mortgages, deed or deeds of trust of said grant for the purposes of raising such construction fund, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness so secured or refunded, constitute a departure from or violation of any purpose or enactment of Congress in the premises, or were other than a fulfillment of and compliance with the policy, intent and legislation of Congress."

"28. The Court erred in holding that the lands of said East Side Grant, or any part thereof, had been sold in breach or violation of any provision of said Act of July 25, 1866, or of the said Act of April 10, 1869."

"29. The Court erred in holding that the grantee of said East Side Grant, or its successors in interest, or this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, had dealt or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same, or any part thereof, in breach of any Act of Congress, or otherwise, than in fulfillment of and compliance with the policy, intent and legislation of Congress in the premises."

"30. The Court erred in holding that the application of the land grant under the said Act of May 4, 1870, denominated by way of distinction, the West Side Grant, to the construction of the railroad therein contemplated by way of mortgage or deed of trust of said grant, to raise funds, or to refund the same for the construction of such railroad, was in breach

of any provision of said last mentioned Act, or in violation of any Congressional intent or legislation in the premises, or other than a fulfillment and compliance with the intent and legislation of Congress."

"31. The Court erred in holding that the application of the said West Side Grant to the construction of the railroad contemplated in said Act of May 4, 1870, by way of a mortgage, or deed of trust of said grant to raise funds, or refund the same, for the construction of such railroad, was in subjection and subordination to and restricted by anything in said last mentioned Act as to actual settlers."

"32. The Court erred in holding that a sale or sales of land forming part of said West Side Grant, under any mortgage or deed of trust of said grant for the purpose of raising such construction funds, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness so secured or refunded, constituted a departure from or violation of any purpose or enactment of Congress in the premises, or were other than a fulfillment of and compliance with the policy, intent and legislation of Congress."

"33. The Court erred in holding that the lands of said West Side Grant, or any part thereof, had been sold in breach of any provision of the said Act of May 4, 1870."

"34. The Court erred in holding that the grantee of said West Side Grant, or its successors in interest, or this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company or said Stephen T. Gage, individually or as trustee, or any or either of them, had dealt or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same, or any part thereof, in breach of said Act

of May 4, 1870, or otherwise than in fulfillment of and compliance with the policy, intent and legislation of Congress in the premises."

"38. The Court erred in not holding that the said granted lands, East Side and West Side, both or either, are timbered in character and were and are not capable of actual settlement."

"64. The Court erred in holding that the said proviso of said Act of April 10, 1869, was a condition subsequent."

"65. The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of said proviso."

"67. The Court erred in holding that any provision in said Act of May 4, 1870, touching sales to actual settlers was a condition subsequent."

"68. The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of any provision in said Act of May 4, 1870, touching sales to actual settlers."

"69. The Court erred in holding that there was any cause for action or foundation of jurisdiction in respect either to said East Side Grant, or to said West Side Grant, or any part thereof."

"70. The Court erred in holding that there was any cause of action or foundation of jurisdiction in respect to either of said grants, in any re-entry for breach of condition, or legislative equivalent thereof, or in any legislative declaration of forfeiture."

"71. The Court erred in holding that there was jurisdiction in the Court on the equity side of the

cause or subject-matter of this suit, and in not dismissing the bill of complaint."

"72. The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture of said East Side Grant for the breach of an assumed condition subsequent, if such breach there was, in said proviso of said Act of April 10, 1869."

"73. The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture for the breach of an assumed condition subsequent, if such breach there was, in any provision of said Act of May 4, 1870."

"74. The Court erred in holding that the complainant was entitled to a decree quieting its title to either of said grants against this defendant, individually or as trustee, said Oregon and California Railroad Company, said Southern Pacific Company and said Stephen T. Gage, individually or as trustee, or any or either of them, or any party to the cause."

"75. The Court erred in holding that as foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant Oregon and California Railroad Company, or its grantees, if such there were, did not have the legal title to such grants."

"81. The Court erred in holding, on the assumption of a condition subsequent, in respect to the said proviso, or on the assumption of any cause of forfeiture in respect to said East Side Grant, that any breach of said assumed condition subsequent, or any assumed cause of forfeiture, had not been waived by Congress and complainant."

"82. The Court erred in holding, on the assumption of a condition subsequent, in any provision of said Act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to the said West Side Grant, that any breach of said assumed condition subsequent, or any assumed cause of forfeiture, had not been waived by Congress or complainant."

"83. The Court erred in holding, on the assumption of a condition subsequent, in respect of the said proviso, or on the assumption of any cause of forfeiture in respect to said East Side Grant, that a breach of said assumed condition subsequent or any assumed cause of forfeiture, had not been acquiesced in by Congress and complainant."

"84. The Court erred in holding, on the assumption of a condition subsequent, in any provision of said Act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to said West Side Grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture had not been acquiesced in by Congress and complainant."

"88. The Court erred in not holding, on the assumption that the said proviso in the said Act of April 10, 1869, or said provision in said Act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by acceptance and use of the said railroad."

"95. The Court erred in not holding that the proviso for the sale of the lands granted to actual settlers contained in the Act of April 10, 1869, and the provision as to settlers in the Act of May 4, 1870, are, and each of them is, void because the same is repugnant to the grant, and tends to defeat and destroy the primary purpose and intent of Congress in

making said grants in aid of the construction of said railroads and telegraph lines."

"101. The Court erred in not holding that the grantees under said Acts of Congress, or their successors, associates or assigns, had a right to mortgage the whole or any part of said land grant to obtain money herewith to construct the said railroad and telegraph line."

"102. The Court erred in not holding that under the terms and provisions of said Acts of Congress of April 10, 1869, and of May 4, 1870, the grantee or grantees mentioned in said land grants, cannot and could not perform said provisions as to the sale of the lands granted to actual settlers, and by reason thereof, the performance of said provisions was excused and the said granted lands vested in said grantees absolutely and discharged of said conditions."

"115. The Court erred in not holding that this suit cannot be maintained as one to enforce forfeiture, nor to quiet title, because

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture has not been adjudicated by a Court of Law; and

(c) The defendant, Railroad Company, holds the legal title to and the possession of said granted lands."

"116. The Court erred in not holding that the said defendant, Oregon and California Railroad Company, was entitled to a trial by jury of the issue as to whether or not any of the conditions of said grants, or either of them, had been breached."

"117. The Court erred in not holding that the complainant and Congress had knowledge of all the alleged breaches of the provisions in each of said

land grants for the sale of the granted lands to actual settlers; and that the complainant and Congress acquiesced in said breaches, with the knowledge thereof, and complainant is estopped to claim a forfeiture of said land grant, or any part thereof."

"118. The Court erred in not holding that during the year 1879, down to and including the year 1903, reports were regularly and semi-annually made of the transactions of the land Department of said defendant, Oregon and California Railroad Company, to the auditor of Railroad Accounts created by the Act of Congress of June 19, 1878, showing the total cash receipts from all sales of the said granted lands to the date of said report; the average price per acre for all sales to the date of said report, and the average price per acre for all purchases to the date of said report; the maximum price per acre from sales (not town lots); the minimum price per acre from sales (not town lots); the maximum price per acre asked at the time of making such report; the minimum price per acre asked at the time of making such report; and that the Auditor of Railroad Accounts, pursuant to the provisions of the said Act of Congress of June 19, 1878, made like annual reports during the whole of said period to the Secretary of the Interior, and that annually, during the whole of said period, the Secretary of the Interior transmitted the said reports to Congress, and that said reports showed that during the year 1879, down to and including the year 1903, the said defendant, Oregon and California Railroad Company sold some of said granted lands at a price in excess of two dollars and fifty cents ($2.50) per acre; also in quantities exceeding one hundred and sixty acres; and that Congress and complainant with the knowledge of the said matters and things contained in said reports, acquiesced therein and permitted the said defendant

Railroad Company to take action accordingly and to alter its position and to continue to so administer said grant, and that complainant was, and is, therefore, estopped from claiming a breach of any of the conditions, if such there be, in said grant, or a forfeiture on account thereof, and has waived said alleged breaches and acquiesced therein."

"122. The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein."

"123. The Court erred in not holding that the evidence in this case is insufficient to support or sustain the decree rendered herein."

"124. The Court erred in not holding that the evidence in the above-entitled case was wholly insufficient to sustain and support the decree rendered in said cause, in that there is no evidence in the record showing any breach or violation of the proviso of the Act of April 10, 1869, or any of the provisions of the Act of Congress of May 4, 1870, as to the sale of said granted lands to actual settlers only, in quantities not exceeding one hundred and sixty (160) acres to one purchaser, and at a price not exceeding two dollars and fifty cents ($2.50) per acre."

"125. The Court erred in not holding that the evidence in said cause was insufficient to support the decree rendered herein, or any decree in favor of the complainant, and that there is no evidence in this cause showing any breach or violation of the proviso in the Act of Congress of April 10, 1869, or of any of the provisions of the Act of Congress of May 4, 1870, as to the sales of the said granted lands to actual settlers."

"127. The Court erred in rendering the judgment and decree herein against the said defendant, Oregon

and California Railroad Company, forfeiting the lands and the estates in lands described in the said decree, or any of said lands, and that there is no evidence whatever in the record in this cause showing that the said defendant violated or breached any condition in either of said Acts of Congress of July 25, 1866, June 25, 1868, or April 10, 1869, or May 4, 1870."

"130. The Court erred in holding that the title to so much of either of said grants as had been patented prior to October, 1902, was not concluded against complainant herein and that the alleged cause of action had not been barred, and the title to such patented lands made absolute."

ARGUMENT FOR THE DEFENDANT THE UNION TRUST COMPANY

PRELIMINARY NOTE

The brief submitted by the counsel for the Railroad Company upon this appeal presents in full and able form many important propositions sustained by elaborate argument and citation of cases to which we have nothing to add.

The purpose of this brief is to present a view of the controversy which seems to us controlling.

Our contention is that the second proviso in the Act of 1869 and the somewhat similar provision in the Act of 1870, apply only to lands susceptible of settlement and cultivation, and that they do not include timber lands; that they are not conditions subsequent but restrictive covenants which can be enforced under proper circumstances by a Court of Equity, but that the Government has failed to show a state of facts calling for the enforcement of such equitable rights in this suit.

On behalf of the appellant, whom we represent, we shall deal with this subject in the following order:

First: The proviso of the Act of 1869 and the somewhat similar provision of the Act of 1870 apply only to lands susceptible of settlement and cultivation and do not include timber lands.

Second: The proviso of the Act of 1869 and the somewhat similar provision of the Act of 1870 as construed by the Court below are void, as being impossible of performance and repugnant to the express purpose of the grant.

Third: The proviso of the Act of 1869 was not intended to create and did not create a condition subsequent.

Fourth: The provision of the Act of 1870 respecting actual settlers was not a condition subsequent.

Fifth: The provisions of the Act of 1869 and of the Act of 1870 respecting actual settlers are restrictive covenants and if enforcible at all are enforcible in a Court of Equity as to lands susceptible of settlement and cultivation only.

Sixth: No evidence was submitted of a breach of the provisions of the Act of 1869 or of the Act of 1870 relating to actual settlers, whether regarded as conditions or covenants, which justifies the decree herein, or requires any decree in favor of the complainant.

POINT I.

THE PROVISO IN THE ACT OF 1869 AND THE SIMILAR PROVISION IN THE ACT OF 1870 APPLY ONLY TO LANDS SUSCEPTIBLE OF ACTUAL SETTLEMENT AND CULTIVATION, AND DO NOT INCLUDE TIMBER LANDS.

It is, we think, apparent that the proviso in the Act of 1869 "that the lands granted by the Act aforesaid (Act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser,

and for a price not exceeding two dollars and fifty cents per acre," must be construed either as applying (1) only to such persons as were actual settlers on the land when the grant took effect, or (2) to persons who should thereafter become actual settlers on so much of the land as was susceptible of actual settlement and cultivation, or (3) to all persons who should seek to purchase the lands asserting an intention to settle upon and cultivate them, whether capable of actual settlement and cultivation or not.

It is of the first importance to ascertain the true interpretation of the Act in this particular. As preliminary to this inquiry, a brief reference to prior federal land legislation is essential.

(1) Previous federal land legislation relating to "actual settlers."

Early Statutes.

The term "actual settlers" was used in early federal legislation usually, if not always, to designate persons who were in the occupation and cultivation of public land previous to a period named in the particular statute. Thus, by the Act of March 20, 1805, every person who had become an actual settler upon land in Louisiana prior to the treaty of cession, was confirmed in the tract of land he had inhabited and cultivated (2 Stat. 325). So similar protection was afforded to actual settlers in the Territory of Missouri (2 Stat. 751). Again, the act for ascertaining claims and titles to land in the Territory of Florida (Law of May 8, 1822, 3 Stat. 709, Amended 3 Stat. 755) directed that claims in favor of actual settlers should be confirmed; and by a later Act (4 Stat. 6) it was provided that no person should be taken or deemed to be an actual settler within the provisions of the act last cited, unless such person, or those under whom he claimed title, should have been in the cultivation or occupation of the land at or before the period of cession. By the Act of April 22, 1826 (4 Stat. 154) pre-emption rights in Alabama, Mississippi and Florida were given to actual settlers who were

described as persons who actually inhabited and cultivated the land.

The public lands were early appropriated by Congress to the payment of the public debt (Act of August 4, 1790, 1 Stat. 138), and until the public debt was paid, the proceeds of the sales were applied to that purpose. The first law regulating the sale of public lands was enacted in 1796, and was applicable only to the Northwest Territory (1 Stat. 464). It provided for a survey, and after survey, for sale in sections, at public auction, at a price not less than two dollars an acre. No limitation was placed upon the number of sections that could be bought by the same purchaser. An amendment in 1800 (2 Stat. 73) authorized the private sale by the registers of the land office at not less than two dollars an acre, of lands that remained unsold after public auction; this Act authorized sales on credit, and a resale in case of default. The latter provision was temporarily suspended in favor of actual settlers in 1806 (2 Stat. 378) and the credit system was abandoned in 1820 (3 Stat. 566). By the Act of March 3, 1807 (2 Stat. 437) regulating grants of land in Michigan Territory, persons in actual possession, occupancy and improvement of any tract of land prior to July 1, 1796, which occupancy and possession had continued to that time, were confirmed in title. In the same year an act was passed prohibiting settlements on public lands, but permitting actual settlers to remain as tenants at will of the United States (2 Stat. 445) and a series of such acts followed down to 1820 (March 28, 1816; March 3, 1817; April 20, 1818). By the Acts of July 5, 1813, and April 12, 1814, actual settlers were given rights of pre-emption in the Territory of Illinois, Missouri and that part of the State of Louisiana formerly comprising the Territory of New Orleans.

In 1820 (3 Stat. 566) a general law for the sale of public lands was enacted. It provided that the public lands when offered for sale at public auction should not be sold

for less than one dollar and a quarter an acre. Lands offered at public sale and remaining unsold at its close, were made subject to private sale by entry at the land office at one dollar and a quarter an acre. The substance of this Act was carried forward into the Revised Statutes (R. S. Sec. 2353, *et seq.*)

The Pre-emption Laws.

The first general pre-emption law was enacted in 1830 (4 Stat. 420). It provided that any settler or occupant of the public lands who was *in possession* and *cultivated* a part thereof in the year 1829, should be authorized to enter with the register of the land office not more than 160 acres, upon paying the then minimum price of the land. The Act was temporary and was extended by the Act of June 22nd, 1838, down to 1842 (5 Stat. 251); (5 Stat. 382). The Extension included only settlements prior to its passage.

The "Pre-emption Law" of 1841 (5 Stat. 543) provided a general system of pre-emption. It allowed *future settlements* to be made with the right of *pre-emption*—which was a new feature in the pre-emption system (*Johnson* v. *Towsley*, 13 Wall. 72). To secure this right of future pre-emption, the proposed settler was authorized to enter upon unoccupied public land; *he was required to inhabit and improve it and to erect a building thereon,* and if the land was subject to private sale, he was required to file a notice of entry within three months and make final proof and payment within twelve months. The Act extended only to lands which had been surveyed prior to settlement.

At the time of the passage of the Pre-emption Law, only an insignificant part of the public domain had been surveyed. No lands had been surveyed west of the Mississippi River, except in Missouri. The lands which had been surveyed were agricultural in their character. No arid, mountainous or forest lands had been to any appreciable extent, surveyed. The Pre-emption Law was not in its

terms applicable to lands incapable of residence and cultivation, and at the time it was enacted it could not have been applied to any other than agricultural lands. It was finally repealed in 1891.

The Donation Act.

The Territory of Oregon was organized in 1848. At that time the population was only 13,294. Previous to that date, while the ownership of the soil was in dispute between the United States and Great Britain and a treaty for joint occupation of territory was in operation, the people in governing themselves had adopted land laws which made occupancy the basis of ownership as between the settlers. The first of these acts was passed in 1844 (Laws of Oregon, 1843-1849, p. 77). Permanent improvement and continuous occupation and cultivation were essential to the rights conferred under that act (*Hull* v. *Russell,* 101 U. S. 503). After the territory was organized in order to induce settlement, Congress in 1850 passed what was known as the Donation Act (Act of September 27, 1850, 9 Stat. 496). A surveyor general for the State of Oregon was appointed, and it was provided that he should cause to be surveyed in townships and sections in the usual manner, and in accordance with the Laws of the United States which may be in force, the district or country between the summit of the Cascade Mountains and the Pacific Ocean, south and north of the Columbia River, provided, however, that *none other than township lines shall be run where the land is deemed unfit for cultivation.* By this Act there was granted to every white settler above the age of eighteen, a half section, or 320 acres,—and if married, 640 acres, a half to be owned by his wife. *Four years of continued residence and cultivation were required before a patent could issue.*

The laws of Congress relating to pre-emption by individuals had at that time no application in Oregon, because public lands there had not then been surveyed. (*Stark* v. *Starr,* 6 Wall. 402). The Donations Act was

amended in 1853 (Act of February 4, 1853, 10 Stat. 158) so as to permit the settler, after an occupancy of two years, to commute by payment of $1.25 an acre. This Act also provided that all lands within the territory west of the Cascade Mountains not claimed under the provisions of the Donation Act, could be sold at public sale and private entry as other public lands of the United States. In 1854 (Act of July 17, 1854, 10 Stat. 305) the period for commutation was reduced to one year, and it was also provided that the pre-emption privilege under the Pre-emption Law of 1841 should be extended to lands in Oregon and Washington Territories, whether surveyed or unsurveyed. The result of this extension of the pre-emption right to unsurveyed lands, was to permit the settlers to acquire a prior right of pre-emption to such lands, which could be perfected, however, only upon notice given after the lands had been surveyed and plotted. (*Lansdale* v. *Daniels,* 100 U. S. 113). The lands entered under the Donation Law were of an agricultural character. They were situated, for the most part, in the Willamette Valley, and to some extent also in the valleys in southern Oregon. By the provisions of the Act, the entries were limited to lands which were fit for cultivation. The Donation Act expired by limitation in 1855.

The Homestead Law.

Popular agitation for the disposal of public lands, without price, to persons desiring to settle upon and cultivate the soil, resulted in the passage of the Homestead Act in 1862 (Law of May 20, 1862, 12 Stat. 302), which was entitled "An Act to secure homesteads to actual settlers on the public domain." The Act permitted an entry upon a quarter section, or less, of unappropriated public lands, after the same had been surveyed. The applicant was required to make oath that the application was honestly and in good faith made for the purpose of *actual settlement and cultivation,* and that he would faithfully and honestly endeavor to comply with all the requirements of law as to

settlement, residence and *cultivation* necessary to acquire title to the land applied for; that he was not acting in collusion with any persons to give them the benefit of the land entered, or the timber thereon; and that he did not apply to enter for the purpose of speculation, "but in good faith to obtain a home for himself or herself." At the expiration of five years from the date of such entry, if the applicant should have resided upon or cultivated the same for the term of five years, he might make final proof and obtain a patent to the land.

The homesteader was authorized to commute by paying the minimum price for the quantity of land entered at any time before the expiration of the five years on making proof of settlement and cultivation as provided by the law granting the pre-emption rights (Revised Statutes, Section 2301). At the time of the passage of this Act, Oregon had been admitted to the Union, and the population, under the impulse of the Donation Act, had risen to 52,465, or about one inhabitant to every two square miles. The Homestead Law was limited to lands which had been surveyed, and at that time the whole area of surveyed lands in the State of Oregon was about 6,000,000 acres, out of a total area of 61,000,000. The Willamette Valley, a fertile, level country, about as large as the State of Connecticut, embraced much the largest portion of the surveyed lands—the remainder being found in the valleys of the Rogue and Umpqua Rivers, and in other scattered parts of the state.

From this summary of the land legislation previous to 1866, it appears that when the Act of July 25 of that year was passed, there were four methods by which title ot public lands might be acquired. (1) By public auction at not less than the minimum price. (Repealed March 3, 1891). (2) By private sale of lands which had been exposed to sale at public auction and remained unsold. (Abrogated May 18, 1898 (30 Stat. 418).) (3) Under the Pre-emption Law of 1841, (repealed 1891) and (4) Under the Homestead Law of 1862.

(2) The term "actual settlers" as employed in the proviso construed in connection with prior land legislation means either (a) those who were on the land as actual settlers when the grant went into effect, or (b) persons to whom lands susceptible of actual cultivation are sold and who actually improve and cultivate the same.

(a) The term "actual settlers" as used in the proviso refers to those who were on the land as actual settlers when the grant went into effect.

"Actual" as Distinguished from Prospective.

The claim was early made that the proviso was intended to secure a right of pre-emption to those who were on the land as actual settlers at the time the grant went into effect. (See letter of Joseph S. Wilson to George H. Williams, U. S. Attorney General, Vol. X. Govt. Exhibits, p. 5338; Opinion of S. M. Wilson, Ibid. p. 5347). Such an interpretation of the proviso is in harmony with the early legislation to which we have referred and is consistent with a literal construction of the words employed.

There is a plain distinction between an actual settler and a prospective settler. In its primary meaning, the word "actual" represents an existing condition. It notes a distinction between that which is constructive—resting upon implication, and that which is concrete and obvious. It notes a distinction between that which is now existent, and that which may exist in the future.

The signification of the word "actual" in connection with "settler" connotes the idea of actual, existing settlement. "Actual (Lat. *Actualis*) belongs to that which is beyond the state of mere probability, possibility, tendency, progression, evolution. The actual . . . is the conceivable *realized,* and where this conceivable thing is not only possible but natural to conceive or to be expected in a certain order of things, actual, like the French *actuel* comes to have the force of *present in time.* As the *actual* is opposed to *possible, probable, conceivable,* or approxi-

mate, true to false, positive to indeterminate, dubious, indirect, or negative, and veritable to supposititous, or unauthentic, so real (Lat. *realis*) is opposed to imaginary or feigned. It expresses that which has an existence of its own and not such as our fancy might attribute to it or our ingenuity imposed upon it." (Smith's Synonyms Discriminated).

Subsequent and Contemporaneous Legislation.

Force is added to this contention by reference to subsequent and contemporaneous legislation of a somewhat similar character.

If the intention of Congress was to permit persons to make future settlements upon the land in order to become actual settlers, the words employed in the proviso must be given not their primary meaning—but an extended meaning, imposing restrictions upon the grant of a very general and uncertain character. There are no directions to secure intelligent action upon the part of the Railroad Company in ascertaining who should be regarded as actual settlers under such a construction of the proviso. If it had been the purpose of Congress to arrange a scheme for the future disposition of the grant by the Railroad Company to persons who should thereafter come within the designation of actual settlers, it would have been natural to adopt a plan similar to that which was inserted in the grant to the Union Pacific Railroad Company. That grant contained the following provision (July 1, 1863, see Chap. 120, 12 Stat. 489, Section 3):

"Provided that all mineral lands shall be excepted from the operation of this act, but where the same shall contain timber, the timber thereon is hereby granted to said Company. *All such lands so granted by these sections which shall not be sold or disposed of by said Company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 an acre, to be paid to the said Company.*"

When an additional grant was made upon the extension of the Northern Pacific Railroad Company (16 Stat. 378), it was provided:

"That all lands hereby granted to said company which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized at the expiration of five years after the completion of the entire road shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding $2.50 per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other regular proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the states and territories in which they shall be situated after not less than sixty days' previous notice in single sections or subdivisions thereof to the highest and best bidder."

In the grant to the Texas Pacific Railroad Company (16 Stat. 573-576), it was provided further:

"That all such lands so granted by this section to said company which shall not be sold or otherwise disposed of as provided in this act within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of $2.50 per acre for all the lands herein granted."

If the purpose of the proviso of 1869 was to give to the Railroad Company only the proceeds of the land at $2.50 an acre, and also to provide that all the land of every description should go to persons thereafter claiming that they had become actual settlers, or who had established their rights as actual settlers, this result could have been brought about naturally and effectively by providing for the sale of lands under Government superintendence, or by opening it to homestead entry and providing for the payment of the proceeds to the Railroad Company as aid in constructing the road.

Similar Use of "Actual" in the Act of 1866.

Moreover, it is an established rule of construction that where words are used with a certain meaning in a statute they will be given the same meaning in an amendment to that statute (*Reiche* v. *Smythe,* 13 Wall. 162).

The words "actual settlers" are used in the Act of 1866 with a meaning which is obvious and indisputable as referring to persons who are actually upon the land and in cultivation of it previous to the passage of that act. Section 2 of that act reads as follows:

"Provided that bona fide and *actual settlers* under the Pre-emption Laws of the United States may, after due proof of settlement, improvement and occupation as now provided by law, purchase the same at the price fixed for the said lands at the date of such settlement, improvement and occupation."

It may fairly be argued therefore that when the same words were employed in the amendatory act of 1869 they were employed with the same meaning.

This Construction Preserves the Rights of Settlers After 1866 and Before Title Is Ultimately Fixed.

It is a very powerful argument in support of the reasonableness of this construction of the Statute that no grantee was named in the Act of 1866 of the Oregon portion of the grant; that a conflict had arisen as to the corporation qualified to become the grantee by designation of the Oregon Legislature; that a default in filing the asset had occurred which it was the purpose of the Act of 1869 to remedy; that the construction of the road had thus been delayed and that a considerable time would necessarily elapse before it would be completed; that in the meantime the lands might be kept out of the market by withdrawal within the indemnity limits, as the law at that time was thought to permit (*Holmes* v. *U. S.,* 118 Fed. 995. The previous ruling to that effect was reversed in *Hewitt* v. *Schultz,* 180 U. S. 139; *Southern Pacific R. Co.* v. *Bell,* 183 U. S. 675).

To preserve the right of entry on the land for settlement and cultivation, as well as to secure the prompt completion of the railroad and telegraph lines, it would be reasonable to require, as this proviso does require, that the Railroad Company should sell lands to persons becoming actual settlers and acquiring a settlement before title was ultimately fixed.

To the arguments in support of this construction of the proviso, the Government replies that such construction would practically defeat the purpose for which the proviso was intended—namely, to devote the lands to future settlements in small tracts. But this contention appears to beg the question, which is whether Congress intended to devote the lands to future settlement, or whether it intended simply to protect those persons who were on the land at the time the grant should take effect.

Considerable attention is given in the opinion on the demurrer by the Court below to a consideration of the history, policy and purposes of the general Government in its control, administration and disposition of the public domain. The learned counsel for the Government in their argument addressed to the Court upon that subject treat the inauguration by the Government of the bestowal of public lands to aid in the construction of railroads as a temporary abandonment of what they designate as "the settler policy." In this they are mistaken. The public lands in Iowa and the States which were carved out of the Territory of the Northwest, include a vast area of prairie lands easily accessible for settlement and fit for cultivation. The same thing a little later was known to be true of Nebraska and Kansas, but the fate which overtook many of the wagon trains and cattle of settlers and their families who travelled the trail across the plains to find homes in the Far West, from attacks by Indian tribes, and the slowness of the methods of travel at that time, and the hardships entailed thereby, together with the fact that the only other method of getting from coast to coast was around

Cape Horn, made it not only a matter of national military policy, but in the interest of settlement and development of the great region beyond the Mississippi, that there should be connection by rail between the eastern and western coasts. In every grant of public lands by the Government to aid in the construction of railways, there is found undoubted evidence of the solicitude of Congress that the settlement of the public domain should be facilitated as one of its paramount purposes for each reserve of the ungranted sections within the land grant limits for settlement in tracts not exceeding 160 acres as did the Union Pacific grant and the grant of 1866. The construction of the railways aided by land grants facilitated settlement on the ungranted sections and the public lands generally, by affording easy access to them, and not only that, but it enabled the Government to protect settlers from the Indians and enabled and encouraged settlers to improve the land, increase their cattle and multiply their agricultural products by affording them opportunities for transportation to markets which they otherwise could not reach.

While securing to persons actually upon the land their rights in the land, the policy of Congress was to open up and develop the new country and secure its settlement and prosperity, and it was thought that this could be best effected by giving to the Railroad Company absolute title and right of disposal of such lands as Congress might deem it advisable to grant. In no railroad grant had Congress attempted to restrict the absolute power of disposal, except in favor of persons who were actually upon the land.

If the proviso shall be construed as limited to persons who are actually in possession of the land granted at the time the grant became effective, that will be the end of the plaintiff's case—for, whether the proviso be regarded as a covenant or as a condition, there is no evidence that the Railroad Company at any time failed to sell to a

person in actual possession at the time the grant took effect, upon the terms named in the proviso.

But if this construction of the proviso be rejected, the plaintiff's case stands in no better condition, unless the Court shall also reject the construction of the proviso limiting it to lands susceptible of actual settlement. Thus we are brought to the second definition of the words "actual settlers" as stated above.

(b) Actual settlers are persons to whom lands susceptible of cultivation are sold and who actually improve and cultivate the same.

If we assume that the proviso is to be given a prospective construction, and that Congress intended the Railroad Company should provide by some suitable form of conveyance, or otherwise, that the lands should pass only into the hands of actual settlers, there is a necessary inference that the lands referred to should be susceptible of actual settlement and cultivation.

The proviso either cut down the grant to such lands as were susceptible of cultivation, and so amounted to a repeal, by implication, of the Act of 1866, *pro tanto,* or else, lands not susceptible of cultivation were exempted from its operation.

It is not possible to adopt the former of these alternatives, because there is nothing in the Act of 1869 to indicate an intention to cut down the grant made by the Act of 1866. On the other hand, the Act of 1869 authorized the filing of the assent and provided that "such filing of its assent shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act." We must, therefore, accept the other alternative, to wit: that lands unfit for cultivation were excepted from the operation of the proviso.

The Grant Subordinate to General Land Policies.

Moreover, if it be true, as is claimed in the Brief for Government at Circuit Court of Appeals (p. 159), that the specific intent and purpose of Congress was to subordinate the benefits of land grants to the general land policies of the United States, then the Pre-emption, Donation and Homestead Laws must be taken as the best indication of Congressional intent in enacting the proviso of 1869, and it then becomes plain that the intent was that only lands susceptible of cultivation should come within its operation.

The Donation Law by its terms applied only to lands fit for cultivation. The Pre-emption and Homestead Laws were necessarily applicable only to such lands, because no one, in good faith, could procure a patent under either of those laws without proof of actual residence, occupancy and cultivation of the soil. "What is implied in a statute is as much a part of it as what is expressed."

United States v. *Babbitt,* 1 Black. 55.
Gelpecke v. *Dubuque,* 1 Wall. 220.
Wilson Co. v. *Third Nat. Bank of Nashville,* 103 U. S. 770.
Wood Co. v. *Lackawanna Iron Co.,* 93 U. S. 619-624.

"Actual Settlers" Defined.

The term "actual settlers" used in those laws, has often been defined in the reported decisions. Thus:

"An actual settler upon the land is one who has actually established his residence upon it, and not one who has enclosed it and cultivated it intending at some future time to live upon it. The use of the word 'actual' would seem to be intended to prohibit the Courts from extending the meaning of the word 'settlers' by construction, and to confine the benefits of the provision of the law to those only who come within the literal meaning of the term."

Baker v. *Millman,* 77 Texas 46.

Again—

"An actual settler upon land belonging to the State, is one who establishes himself upon the land or fixes his residence upon it, to take possession for his exclusive occupancy and use, with a view to acquiring title to it by purchase from the State."

Gavit v. *Moore,* 68 Cal. 506.

Again—

"The policy of the Homestead Act, no less than the specific statement of the filed oath, looks to a holding for a term of years by the actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none other, homesteads have been freely granted by the Government."

Adams v. *Church,* 193 U. S. 510.

Again—

"Actual settlers within the land laws of California, providing that lands belonging to the State which are suitable for cultivation, can only be granted to actual settlers thereon, means actual residents."

Mosely v. *Torrence,* 71 Cal. 318.

Again, Constitution, Texas, Article VII, Section 6, provides:

" 'That actual settlers residing on school lands shall be protected in the prior right of purchasing the same.' This means a settler residing on the land, and not a settler not residing thereon, though he had fenced the entire tract and cultivated a portion thereof."

Baker v. *Millman,* 77 Texas 46.

The learned counsel for the Government have discovered a happy instance of the definition of "an actual settler" in the language employed by Daniel Webster in debate as far back as 1839. He is quoted by them as having said:

"As to donation to actual settlers, I have often expressed the opinion, and still entertain it, that it would

have been a wise policy of the Government from the first to make a donation of a half or whole quarter section to every actual settler the head of a family *upon condition of habitation and cultivation.*"

These definitions of the term "actual settler" exclude the possibility of using it in connection with lands which are incapable of actual settlement and cultivation.

There can be no serious dispute as to the primary significance of the words "actual settlers" or as to the statutory or judicial construction which has been placed upon them. The learned counsel for the Government are, therefore, driven to rely upon what seems to be a very forced and unnatural construction of the words. They say:

"To be a settler on land does not necessarily imply cultivation of the land. There are old settlers' associations in almost every city in the West composed of persons who never tilled a foot of the soil on which they have settled, yet they are actual settlers. No one would think of denying this." (Brief for Govt. at Cir. Ct. of Ap. p. 136.)

This definition would defeat the plain purpose of the proviso. It would compel the Railroad Company to sell to every class of persons, whatever their occupation, either actual or prospective land of any description, provided only the applicant had lived in the country long enough to be regarded as a settler. Agricultural lands could be acquired from the Railroad Company by merchants, clerks, professional men; indeed, by any one without improvement or cultivation of the soil and held for speculative purposes, provided only that they were residents of the state or county. This would simply obliterate the words "actual settlers" from the proviso.

As indicating the favor with which the Government looks upon actual settlers, the Court below quotes from the opinion in the case of *Clements* v. *Warner,* 24 How. 394, 397, as follows: "Later statutes enlarged the privilege of pre-emption so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers." But the

Court in the same connection notes the limitation inherent in the idea of actual settlement. It proceeds in its opinion as follows:

"No act of Congress has defined the meaning of the term 'reserve' as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. But all other public lands *fitted for agricultural purposes,* after they have been offered at public sale, *are affected by the privilege of the actual settler* to have the preference of entry."

As bearing upon the intention of Congress in passing the Act of 1869, it is well to note that in the land states and territories there were then 1,338,113,646 acres of land unsurveyed, and 496,884,751 acres of land which had been surveyed. Of the lands which had been surveyed, almost all of them were in the non-mountainous, untimbered, agricultural country. In the great timber states of California, Nevada, Oregon, Washington, Idaho, Montana and Wyoming, there were 518,347,021 acres of unsurveyed land, and only 39,499,970 acres of surveyed land, two-thirds of which were in the State of California. Since the Preemption and Homestead Laws were applicable only to surveyed lands, it is apparent that at that time they had no application to the densely timbered, mountainous districts of the Pacific Coast.

The predicate of *"an* actual settler" is land capable of actual settlement. The supposition that Congress intended that the Railroad Company should be obligated to sell lands incapable of actual settlement to actual settlers, is utterly unreasonable and excludes serious discussion.

But what lands are susceptible of actual settlement and cultivation? Much of the land granted was heavily timbered; much of it was inaccessible. Some of it was so mountainous and broken as to be plainly not susceptible of cultivation. Of the timbered lands, some of them, after the timber had been removed, might be susceptible of cultivation, and others of them not. What lands then, did Congress have in mind when it required the Railroad

Company to sell them to actual settlers? Is it only reasonable to suppose that the statute did not refer to the probabilities of the future, but to the facts of the present, and that those lands which were naturally adapted and ready to be taken up for habitation were within the purview of the proviso, while those which were not fit for cultivation, but were chiefly valuable for their timber, were not within its operation.

What Congress had in mind as within the operation of this proviso, we think, is made manifest by subsequent legislation.

(3) When timbered lands had been surveyed and became valuable for the timber, it was found that they were not adapted to entry under the Pre-emption or Homestead Laws, because not valuable, or not chiefly valuable for cultivation.

Acquisition of Unclassified Public Lands.

From 1869 to 1877, the disposition of public lands by auction sale, and of offered lands at private sale, fell into general disuse, and except in certain special instances the public lands could be acquired only under the Pre-emption and Homestead Laws. No attempt had been made to classify the public lands, or to provide particular methods for the disposition of particular classes of lands, except so far as such classification was inherent in the Pre-emption and Homestead Laws by reason of the requirement of settlement and cultivation. To this statement, however, there should be made an exception of mineral lands. The discovery of gold in California in 1848 led to the adoption of a special statute as to mineral lands which was passed July 26, 1866 (14 Stat. 251). Previous to the enactment of that statute, owing to the fact that the lands in which the precious metals were found were unsurveyed and not opened by law to occupation and settlement, the taking up of mineral lands was controlled by a system of local rules and customs, which were recognized and received

the sanction of law in the Act to which reference has been made. (See opinion of Mr. Justice Field in *Jennison* v. *Kirk*, 98 U. S. 453). In the meantime, the construction of the Union Pacific Railroad and the Northern Pacific Railroad opened up vast tracts of timber lands in other parts of the country, but conspicuously in the Pacific States of California, Oregon and Washington.

Immigration followed the construction of the railroads, Before 1878 the Oregon and California Railroad had been extended from Portland, south, a distance of nearly 197 miles. In Oregon, as well as in the more easterly States of Wisconsin, North Dakota and Montana, successful attempts had been made to enter timber lands under the Pre-emption and Homestead Laws, although such entries, where the lands were chiefly valuable for timber, were generally fraudulent. In other portions of the country the tide of immigration had reached the desert lands, and upon these also no entry could in good faith be made under the Pre-emption and Homestead Laws.

Fraudulent Entries of Timber Land Under Homestead and Pre-emption Laws.

The attention of Congress had been called to this situation; a special law providing for the acquisition of desert lands was passed March 3, 1877 (19 Stat. 377). Timber lands were made the subject of special study.

In the report of the Secretary of the Interior for 1877-8, a report to him of J. A. Williamson, Commissioner of the Land Office, was submitted, which stated, among other things, as follows:

"It is a fact which cannot be successfully denied, that most of the pine lands in Michigan, Wisconsin and Minnesota, also those on the Pacific Coast, have very little value as agricultural lands and should be withdrawn from the operation of the Homestead and Pre-emption Laws. Millions of acres have been taken under these laws which contemplate settlement and cultivation, whereon now no vestige of agriculture or cultivation exists. These laws

are used in the pine land portion of the country mainly as covers for fraud."

Consequently he recommended that Congress should, by proper legislation, withdraw all lands chiefly valuable for pine timber from the operation of the Homestead and Pre-emption Laws, and from all manner of sale and disposition, except for cash, at a fair appraised value, to be ascertained in such manner as Congress should provide under direction of the Secretary of the Interior. He added:

"As the law now is, men procure title by swearing to a compliance with the laws requiring cultivation. The Homestead and Pre-emption Laws are now educating thousands of men in the crime of perjury. It would be better to pass a law granting the land to the persons who would manufacture the timber upon it into lumber, railroad ties and charcoal, as that is in fact what they do, and all they do now, after taking them under the Homestead and Pre-emption Laws. I would recommend that the Homestead and Pre-emption Laws be so amended as to be applicable only to arable agricultural lands, and in no case to land *chiefly valuable for the timber growing upon it.*"

A commission was appointed by Congress (Act of March 3, 1879) consisting of the Commissioner of the Land Office, the Director of the Geological Survey and three civilians appointed by President Hays—Carl Schurz being then Secretary of the Interior. The Commission said, in their report, among other things, as follows:

"In the case of timber lands, the position of the settler with respect to the laws is practically anomalous. * * * A very great proportion of the lands of the West cannot become settled and pass into private ownership because, under the terms of existing laws, it is not desirable to the settler to acquire them."

"These difficulties have, in the main, grown up out of the want of adaptation to the present public domain of the laws which were originally framed for the Northwest Territory. In the latter region nearly all the land had a value fully equal to the price which the Government had put upon it at the time it was first opened for settlement,

and so far as natural advantages and the value arising from natural causes, as distinguished from artificial, are concerned, one acre of that region was about as valuable as another. There was a kind of homogeneity in the quality and value of that region. It was all valuable for agricultural habitation. But in the northwest portion of our country, it is otherwise. Its most conspicuous characteristic, from an economic point of view is its heterogeneity. One region is valuable exclusively for mining, another solely for timber, a third for nothing but pasturage, and a fourth serves no useful purpose whatever. The very small proportion which is capable of agriculture must, in the greater part of the West, be irrigated in order to yield a crop. Hence, it has come to pass that the Homestead and Pre-emption Laws are not suited under the terms of the conditions attached to them, for securing the settlement of more than an insignificant portion of the country. Hence, too, it has arisen that the want for lands which could not be advantageously acquired under those laws, led to practices not contemplated by the statutes, for the purpose of acquiring them in quantities and at prices more acceptable to occupants, and has even led to their occupation by usurpation of title, or rights which amount to practically ultimate seizure without record or notice."

Again:

"The administration of land affairs in the United States with its system of parceling, method of survey and modes of disposal, was inaugurated at the time when all the lands were considered as available for agricultural purposes; *that is, all the lands were supposed to be arable.*"

The report goes on to say:

"The most valuable timber in the Territories and in the States on the Pacific Coast grows upon lands possessing very little, if any, value for agricultural purposes. * * * Until the passage of the Act of June 3, 1878, entitled 'An Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory,' there was no manner in which timber or timber lands in either of the States or the Territory mentioned, could be obtained, except by settlement under the Homestead and Pre-emption Laws; and by the location of certain kinds of scrip and

additional homestead rights which cost several dollars per acre."

"Settlements upon timber lands in the States and Territory mentioned in the Act under the Homestead and Preemption Laws, are usually a mere pretense for getting the timber. Compliance with these laws in good faith where settlements are made on lands having timber of commercial value is well nigh impossible, as the lands in most cases possess no agricultural value, and hence, a compliance with the law requiring cultivation is impossible."

The Timber and Stone Act.

The Act referred to above, which is known as the Timber and Stone Act (20 Stat. 89) provided in substance that the surveyed public lands 'valuable chiefly for timber, but unfit for cultivation,' might be sold in quantities, not exceeding 160 acres to any one person, or association of persons, at the minimum price of $2.50 per acre. A person desiring to avail himself of the act was required to file with the Register of the proper district a statement designating by legal sub-division, the particular tract of land he desired to purchase, setting forth the same as *unfit* for *cultivation* and *valuable chiefly for its timber and stone;* that it was *uninhabited* and contained no mining *or other improvements,* except as specified; that the applicant had made no other application under the act, and did not apply to purchase the same on speculation, but in good faith, to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made an agreement or contract in any way or manner with any person or persons whatever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself. A notice of this application was to be posted and advertised, and upon proof of notice and advertisement, and that the land *was of the character contemplated in the act, unoccupied and without improvements other than those excepted,* and that it contains apparently no

valuable deposits of the minerals specified, and upon payment of the purchase money, the applicant might be *permitted to enter, and a patent might issue.*

The true interpretation and effect of this Act was stated by Justice Brewer in *U. S.* v. *Budd* (144 U. S. 154) in these words:

"With regard to the second question: The description in the Act is of lands 'valuable chiefly for timber, but unfit for cultivation.' It is conceded that these lands were valuable chiefly for timber. It is claimed, however, that they were fit for cultivation, and therefore not within the description of lands purchasable under this Act. But obviously at the time of the purchase the land was unfit for cultivation. It was covered with a dense growth of timber; fir trees, many of them two hundred feet in height and five feet in diameter. In respect to the testimony the trial court makes this comment:

" 'Thirteen witnesses were called who testified that the soil is stony and inferior for farming purposes; that it contains excellent fir and cedar timber, besides hemlock and an undergrowth of various shrubs and brush; that the trees are large, tall and straight, and sound, and will yield from 50,000 to 150,000 feet of the best quality of lumber per acre, and this testimony and estimate is not controverted. The field-notes made by the government surveyor at the time of surveying the land, more than twenty-five years ago, describe the land as being stony and second rate, and the timber as fir, cedar and hemlock, and the most convincing testimony of all is a series of twelve photographs taken near the centers of each legal subdivision of the tract. These pictures exhibit, with unerring certainty and faithfulness, magnificent trees standing so near together as to force each other to grow straight and tall. They satisfy the court that this tract is valuable and desirable for the timber upon it, and also that no *man would be willing to subjugate this piece of forest for the mere sake of cultivating it.*'

"If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is that the statute does not contemplate what may be, *but what is. Lands are not excluded by the scope of the Act because in the future by large expenditures of money and labor, they may be rendered suitable for*

cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill-slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming lands; but surely no one before the commencement of these labors would have called them fit for cultivation. We do not mean that the mere existence of timber on the land brings it within the scope of the Act. The significant word in the statute is 'chiefly.' Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation."

Amended Regulations Under Timber and Stone Act Defining Timber Lands.

It was the established practice under this act to fix the price of the lands at $2.50 per acre, and this continued to be the practice until the regulations of the Land Department, approved November 30, 1908, and revised and approved August 22, 1911, by which, among other things, the character of the lands covered by the act were defined as follows:

"Lands valuable chiefly for timber, but unfit for cultivation, *are lands which are more valuable for timber than they are for cultivation in the condition in which they exist at the date of the application to purchase,* and therefore, include lands which could be *made more valuable for cultivation by cutting and clearing them of timber.* The relative values for timber or cultivation must be determined from *conditions of the land existing at the date of the application to purchase.*"

The amended regulations provide for an appraisal of the land after examination and of the timber upon the

land, and the land is to be sold upon this appraisal, but at not less than $2.50 an acre.

It has been held by the Commissioner of the Land Department that the Commissioner had jurisdiction to make these regulations (Verinda Venson, 39 L. D. 449).

As defined by the amended regulations, the Timber and Stone Act applied to land *chiefly valuable for timber,* even though *after being cleared they could be made more valuable for cultivation,* and that they were subject to sale at the appraised, that is, at *their actual value.* It is thus determined that such was the meaning and scope of the act at the time of its enactment. We have thus a Governmental construction of the policy of the Government with reference to timber lands when *attention was called* to the *working and effect of the Pre-emption and Homestead Laws in the disposal of timber lands.*

(4) It was the intention of Congress that the Pre-emption and Homestead Laws should apply only to lands susceptible of cultivation, and that lands chiefly valuable for timber should be sold at their actual value. This intention having been to a considerable extent, defeated by the administration of these Acts, Congressional intention was emphatically declared by subsequent legislation.

Departure in Administration from the True Intent of the Homestead and Pre-emption Laws.

A message was submitted to Congress by President Roosevelt accompanying the second partial report of the Public Lands Commission appointed October 22, 1903, to report upon the condition, operation and effect of the then land laws, and to recommend such changes as were needed to effect the largest practical disposition of the public lands to actual settlers who will build homes upon them, and to secure in permanence the fullest and most effective use of the resources of the public lands. In that report the Commission said:

"In our preceding report reference was made to the fact that the present land laws do not fit the conditions of the *remaining public lands.* Most of these laws, and the departmental practices which have grown up under them, were framed to suit the lands of the *humid region.* It is evident that the decisions often contemplate conditions such as prevail in the *Mississippi Valley and Middle West.* * * * In short, the precedents established, and which now have practically the force of law, have so completely modified the apparent object of the original statute, that the *statute* and the *prevailing conditions appear to be wholly unconnected.*"

Referring to the Commutation Clause of the Homestead Act, the following language was used:

"A careful examination of the districts where the Commutation Clause is put to the most use, shows that there has been a rapid increase in the use of this expedient for passing public land into *the hands of corporations or large land owners.* The object of the Homestead Law was primarily to give to each citizen, the head of a family, an amount of land up to 160 acres, *agricultural in character, so that homes could be created in the wilderness.* The Commutation Clause added at a later date was undoubtedly *intended* to assist the honest settler, but like many other *well intended acts,* its original intent has been gradually perverted, until now it is apparent that a *great part of all commuted homesteads remain uninhabited.* In other words, under the Commutation Clause the *number of patents* furnishes no index to the *number of new homes.*"

Further comment is made for the purpose of showing to what extent the administration of these laws had departed from the original intention.

Referring to grazing lands, the report proceeds:

"The great bulk of the vacant public lands throughout the West are *unsuitable for cultivation under the present known conditions of agriculture,* and so located that they cannot be reclaimed by irrigation. They are, and probably always must be, of chief value for grazing. There are, it is estimated, more than 300,000,000 acres of public grazing land, an area approximately equal to one-fifth the extent of the United States proper. * * * There are

also vast tracts of wooded or timbered lands in which grazing has much importance, and until a further classification of the public lands is made, it will be impossible to give with exactness the total acreage."

In the message to Congress under date of June 22, 1909, in connection with the report of the National Conservation Commission, President Roosevelt said:

"The remaining public lands should be classified and the *arable lands disposed of to homemakers.* In their interest the Timber & Stone Act and the Commutation Clause of the Homestead Act should be repealed, and the Desert Land Law should be modified in accordance with the recommendations of the Public Lands Commission."

Referring to the administration of the Timber & Stone Act, the Commission reports as follows:

"It is the opinion of Special Agent, Dixon, after several years' experience and close observation, that comparatively none of the land taken up under the Timber & Stone Act *is utilized for farming or agricultural purposes.* This would appear to be due to two essential causes: First, the Act *makes provision for the taking up of only such lands as are unfit for farming.* Second, where lands are *covered with an excessively heavy growth of timber,* farming *is precluded by reason of the great cost attending the putting of such lands in the state of cultivation.*"

Referring to the Homestead Act, the Commissioners say:

"From a careful study of this Act, it would appear that the primary idea and object of Congress in passing this free Homestead Act, was to give to each needy citizen who was the head of a family, 160 acres of land, *agricultural in character,* in order that industrious farmers would take the place of the beasts and wild animals inhabitating the plains, and agricultural lands owned by the public through the general Government; that farms would spring up among the hitherto deserted lands, once the home of the savage, and that thriving and industrious communities might be established where none then existed."

The report then refers to the Commutation Clause of the Homestead Act and gives in considerable detail the results of investigation, with the conclusion at which the Commission arrives, namely 90 per cent. of those making Commutation entries within the timber and mineral belts are from *walks in life where agriculture is not understood, nor desired,* and that entries are made for the purpose of immediate *transfer and speculation.* The result of the reports of this Commission was the enactment of the enlarged Homestead Law of 1909.

That Act provided that

"Any person who is a qualified entryman under the Homestead Laws of the United States, may enter by legal subdivisions under the provisions of this Act in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington and Wyoming, and the territories of Arizona and New Mexico, three hundred and twenty acres, or less, of non-mineral, non-irrigable, unreserved and unappropriated surveyed public lands, *which do not contain merchantable timber,* located in a reasonably compact body, and not over one and one-half miles in extreme length." (Laws of 1909, c. 160, 35 Stat. 639.)

By the fourth section of this statute it was provided that in making final proof in addition to the proofs required under the Homestead Law, it should be shown by two *credible* witnesses that at least *one-eighth* of the area embraced in the entry was *continuously cultivated in agricultural crops other than native grasses,* beginning with the second year of the entry, and that at least *one-fourth* of the area embraced was so continuously cultivated beginning with the *third year* of the entry. By an amendment adopted in 1913 (37 Stat. 666) the minimum acreage which was to be shown to be cultivated was reduced to *one-sixteenth* for the second year, and *one-eighth* for the third year.

By the Law of June 6, 1912, (37 Stat. 123) the original Homestead Law was amended by reducing the time at the expiration of which a patent could issue to three years,

and requiring proof of *cultivation of not less than one-sixteenth* of the area *beginning with the second year,* and *one-eighth* beginning with the *third year.* It was also provided that upon proof that the entrymen had failed to establish a residence six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the lands so entered shall revert to the Government. These statutes are of great importance as emphasizing the governmental policy under the Homestead Law as to the entries upon lands which were not naturally and proximately susceptible of cultivation.

Decisions of the Land Department:

The revised rules of the Land Department and the amended Homestead Law are to be read in connection with the decisions of the Courts of the Land Department in the administration of the Homestead Law and the Timber and Stone Act. In *Johnson* v. *Bridal Veil Lumber Company,* 24 Ore. 182, it was held that the fact that a tract of land might be acquired under the Timber and Stone Act, did not preclude the possibility of its being acquired under the Homestead Law. The Court said:

"It might be said that a Homestead claimant who desired such a tract for a home and agricultural purpose had not exercised very good judgment in his selection, but *if he could grow crops thereon,* he would be entitled under the law to make his final proof and receive his patent. His right to make final proof and obtain a patent *rests upon his cultivation of the soil,* and not upon *the exercise of his judgment in the selection of his homestead.*"

The result of this and similar rulings of the Land Department (*Patten* v. *Quackenbush,* 35 L. D. 56; *Raleigh* v. *Hayes,* 29 L. D. 506; *Porter* v. *Throupe,* 6 L. D. 691) tended in some instances to a lax enforcement of the Homestead Law, which was likely to continue so long as under

the Timber and Stone Act the timber lands could be acquired at the same price at which they could be acquired under the Commutation Clause of the Homestead Law. The Commissioners of the Land Department were not unconscious of the difficulty which attended the overlapping of the Timber and Stone Act and the Homestead Law, by permitting entries of timber land under the Homestead Law. An illustration is found in the case of *Finley* v. *Ness*, 38 L. D. 394. The Court said:

"Lands covered with valuable timber may nevertheless be entered under the Homestead Law where the character of the land is such that it would be suitable for agricultural use if the timber were removed. (See *Jones* v. *Aztec Land & Cattle Co.*, 34 L. D. 115; *Patton* v. *Quackenbush*, 35 L. D. 561); but land not adapted to any agricultural use, is not subject to homestead entries. (See *Davis* v. *Gibson*, 38 L. D. 265). The character of the land here involved, as shown in the record, is fairly stated in the opinion of the local office above given, to wit: At the hearing the contestant introduced the testimony of three witnesses of creditable appearance whose testimony is in no way impeached, to the effect that land which claimant now proposes to enter for agricultural purposes, and which her mother in her application has stated as unfit for cultivation and chiefly valuable for timber, is in fact of a steep, mountainous character and heavily timbered, and does not contain to exceed one-half an acre that could be considered as suitable for cultivation. And that even this small fraction could not be cultivated until cleared of timber and brush. One of these witnesses estimated that the land carries 9,000,000 feet of saw timber, while another says it contains 8,000,000 or 9,000,000 feet. One of these witnesses, an experienced farmer, says that the soil is thin, poor and absolutely unfit for cultivation, even if cleared of the timber. Claimant seeks to meet this showing by his own unsupported testimony to the effect that a considerable portion of the land could be prepared for grazing purposes without great expense or clearing, and that his intention is to establish his home upon the land and engage in the dairy business."

The Commissioner supported the ruling of the Register of the Land Office refusing the patent.

So it was held that if the land could not be adapted to any agricultural use, there could be no valid entry of it under the Homestead law (*Davis* v. *Gibson,* 38 L. D. 265), and that since the Homestead law requires *cultivation* of the land, that where land is so mountainous, rough, broken and heavily timbered and of such poor quality that it is impossible to cultivate it, it is not subject to Homestead entry (*Wilminghoff* v. *Ryan,* 40 L. D. 349).

The Timber and Stone Act and the Revised Rules of 1908 Define the Policy of the Government as to Timber Lands.

In order to give harmony and distinctness to the enforcement of the Homestead entries of timber lands and the Timber and Stone Act, the revised rules of the Land Department of 1908 were adopted and the enlarged Homestead law was passed.

But these were not departures from the original land policy which had dictated the Pre-emption and Homestead laws. They were the legislative declaration of the Governmental intention as expressed in those laws. They defined and emphasized that intention by relieving that policy from any misapprehensions which might arise from their construction and administration by the court or the Land Department. They placed it beyond doubt that the policy of the Pre-emption and Homestead laws extended only to lands susceptible of cultivation and residence; that they did not extend to heavily timbered lands chiefly valuable for timber, and which, even if the soil were susceptible of cultivation, could be availed of for agricultural purposes only when the lapse of time and industrial development had rendered the timber of a value greatly in excess of the value of the soil.

There could be no more convincing evidence that at the time the Act of 1869 was passed, the policy of the Government with regard to the disposition of the public lands was that agricultural lands only, that is, lands immediately

susceptible of cultivation, were to be donated to actual settlers upon the terms of settlement and cultivation, than the subsequent legislation of Congress upon this subject.

Subsequent Legislation May Be Considered in Construing the Proviso.

We are at liberty to refer to this subsequent legislation for the purpose of construing the proviso attached to the grant.

In Endlich on Construction of Statutes (Section 354, Am. Ed.), it is said:

"A legislative grant is indeed like any other legislative enactment to be construed, if possible, so as to effect the intent of the grantor; if that intent is doubtful under the statute making it, the rule of construction recognized as applicable, requires the doubt to be resolved against the grantee in favor of the public, *or, in analogy to another principle of statutory construction, is to be such as will make it accord with subsequent legislation.*"

In *Cope* v. *Cope* (137 U. S. 682), in construing certain statutes, the Supreme Court said:

"These several acts of Congress, dealing, as they do, with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones." Citing *U. S.* v. *Freeman,* 44 U. S. 3 How. 556; *Stockdale* v. *Atlantic Ins. Co.,* 87 U. S. 20 Wall. 323.

And in *Tiger* v. *Western Investment Co.,* 221 U. S. 286-308, the same Court said:

"When several acts of Congress are passed touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."

If, as we have formerly shown, sales to actual settlers are necessarily limited to lands susceptible of actual settlement, then it becomes necessary to define what is meant

by lands susceptible of actual settlement and cultivation. When applied to a particular quarter section, it is evident that the phrase does not necessarily define itself. There is room for a wide diversity of interpretation between a quarter section, the entire surface of which is barren rock, and a quarter section, the entire surface of which is alluvial soil. There are great difference between the present uses to which lands can be put and those to which they can be put under opportunities for scientific farming with a condensed and congested population. A quarter section of land which might be regarded as fit for actual settlement and cultivation in China, might not be regarded as fit for actual settlement and cultivation in the new, undeveloped forest lands of Oregon. A quarter section covered with dense timber, inaccessible to a sawmill, although many years after when the trees had been removed and the stumps extracted it is found to be susceptible of settlement and tillage, might not be so regarded in its original state, and before facilities to open it to husbandry were at hand. The words of the proviso are, therefore, open to interpretation, particularly in view of the varying decisions in the Land Office as to what constituted settlement and cultivation under the Homestead and Pre-emption laws, and in view of the reports of the Commissions to which we have referred and the Congressional legislation following.

This, as it seems to us, is precisely the instance in which we may look to subsequent legislation for the purpose of ascertaining the intention of Congress in enacting this proviso.

(5) If the scheme of the proviso of 1869 was that the granted lands were to be disposed of by the Railroad Company in analogy to the manner in which similar lands were disposed of by the Government, then timber lands were not with the purview of the proviso.

The Proviso Intended to Subordinate the Grant to General Public Land Policy.

The Government contends that the intent and purpose of the proviso was to subordinate the grant to the general public land policy of the United States (Govt. Brief, p. 159). The learned judge who wrote the opinion on the demurrer, devotes considerable space to the discussion of the early land laws, for the purpose of showing the policy of the Government to favor actual settlers in the disposition of the public lands. We concede that such was the policy of the Government, but we insist that that policy was from its very nature and character confined to lands which invited settlement and home-making, and that when it was found that this acknowledged policy was being perverted so that lands not attractive for settlement and home-making were being fraudulently acquired for purposes of speculation and for the sale of the merchantable timber upon them, Congress undertook to defeat this perversion of the Governmental policy, and to restrict the operation of the earlier statutes to the lands to which they were intended to apply. Counsel for the Government in their brief upon the demurrer, remark:

"Let us, therefore, observe whether Congress imposed similar restrictions as to the permanent disposition of the intervening lands of the Government. In other words, let us see if the restrictions placed upon the railroad company by the Act in question bear any resemblance to similar restrictions imposed upon the United States itself as to the disposition of the adjacent public lands, because it is manifest that Congress must have been just as serious in establishing laws as to the disposition of the odd numbered sections in Western Oregon, as with reference to

the disposition of the even numbered sections" (Mr. Townsend's brief, page 396).

A Practical Definition of "Actual Settlers" by the Government.

We have in this case a most forcible illustration of the mode in which the Government dealt with the reserved even sections within the grant. In the Act of 1870 (the West Side Grant), it is expressly provided that upon the withdrawal of the odd sections included in the grant from sale, "thereafter the remaining public lands subject to sale within the limits of said grant, *shall be disposed of only to actual settlers,* at double the minimum price for such lands." How did the Government in point of fact dispose of the timbered even sections within the grant? Did it dispose of them under the Homestead Law to actual settlers? A reference to the map offered in evidence by the defendants (Exhibits Nos. 263 and 264, pages 6704 and 6705), shows that the lands colored yellow on map No. 263 indicate the lands taken up under the Timber and Stone Act, or other non-settlement entries. It will be observed that the Government had no hesitation in disposing of the timbered lands in the even sections to persons other than actual settlers, although by the Act of 1870 there was the express direction that such lands should be sold to actual settlers only. The Government thus placed a construction upon these words which limited their application so as to exclude lands, chiefly valuable for timber, and unfit for cultivation, as defined under the Timber and Stone Act.

Following the Analogy of the Public Land Laws, Timber Lands Are Not Within the Proviso.

Following the analogy of the land laws, we must conclude that Congress never intended that timber land should be sold at not *more* than two dollars and a half per acre,

for the first expression of its policy (Timber and Stone Act) as to the disposition of such lands was that they were to be sold at *not less than* $2.50 an acre. What reason, then, is there to suppose that by the proviso of 1869 Congress meant to express any other intention? In the disposition of the public land Congress has never intended to make benefactions to favored persons. The settlement laws were intended as aids to home-makers, who, if they were such in good faith, made ample returns by their toil and privation in opening up new territory for any governmental benefit which they received. Not so, however, as regards timber lands. As soon as the timber acquired a merchantable value, governmental timber lands passing into the hands of individual owners carried with them not only the land itself but the immediate, convertible, cash value of the timber. Unless paid for at its value, the timber thus acquired would be a pure benefaction, for which the public received no return whatsoever.

The proviso in the Act of 1869, as we have said, referred only to lands susceptible of cultivation and not chiefly valuable for timber. This was the limit of restriction which Congress intended to place on the grant. In so doing it followed the governmental policy as it had been expressed up to that time and as it was subsequently expressed, grants in aid of public improvements having in no instance, as far as we know, previous to 1869 been restricted in the extent or mode of disposition of the lands granted. When in 1869 such a restriction was placed upon this grant and upon the grant to the State of Oregon for a wagon road from Roseberg to Coos Bay and in the extension of the grant to the State of Alabama, there was no indication of any intention to depart from the policy of the government in the disposition of timber lands.

(6) The construction placed upon the proviso by the Land Department and other officers of the Government for many years was that it did not apply to timber lands, or lands not susceptible of cultivation.

The Act of June 19, 1878.

In 1878 Congress passed an act approved June 19, 1878, to create an auditor of railroad accounts, whose duties were, among other things, subject to the direction of the Secretary of the Interior, to prescribe a system of reports to be rendered to him by the railroad companies whose roads are, in whole or in part, west, north or south of the Missouri River, and to which the United States has granted any loan of credit or subsidy in bonds or lands; *to examine the books and accounts of each of said railroad companies once in each fiscal year, and at such other times as may be deemed by him necessary to determine the correctness of any reports received from them. . . . To see that the laws relating to said companies are enforced; to furnish such information to the several departments of the Government in regard to tariffs* for freight and passengers and in regard to the accounts of said railroad companies, as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interests of the Government; and to *make an annual report to the Secretary of the Interior on the first day of November on the condition of each of said railroad companies, their road accounts and affairs for the fiscal year ending June* 30 *immediately preceding.* Said act also provided:

"Section 4. That each and every railroad company aforesaid, which has received from the United States any bonds of the said United States issued by way of loan to aid in constructing or furnishing its road, or which has received from the United States *any lands granted to it for a similar purpose,* shall make to the said Auditor *any and all such reports as he may require from time to time,* and shall submit *its books and records to the inspection of said Auditor or any person acting in his place and stead,* at

any time that the said Auditor may request, in the office where said books and records are usually kept, and the said Auditor or his authorized representative, shall make such transcripts from the said books and records as he may desire."

A failure or refusal to submit its books and records for such inspection was made enforcible by a forfeiture of a sum not less than $1,000 or more than $5,000, to be recovered for the use of the United States.

Examinations and Reports by Railroad Commissioners.

Pursuant to this act each year, from the time of its passage until June 30, 1902, when the office terminated, and the records and files of the office were transferred to the Secretary of the Interior, the Auditor of Railroad Accounts whose official designation was changed in a year or two to "Railroad Commissioner," visited the various bond and land aided railroad companies southwest and north of the Missouri River, *among them this defendant, Oregon and California Railroad Company,* charged with *the duty of examining into its accounts, including the administration and details of its land department,* and with the duty to see that the *laws relating to the said companies are enforced.* The office was held during the period between the passage of the act and its termination by law on the 30th day of June, 1912, by several distinguished gentlemen, including General Joseph E. Johnson and General Longstreet. The Auditor of Railroad Accounts required from the *defendant* company, as he did from other land grant companies, *semi-annually, a report for the year ending December* 31, 1879, *and semi-annually thereafter,* showing *inter alia* the maximum and minimum price per acre from sales, and also the maximum and minimum price per acre asked at the date of each report. The reports made by the railroad company to the Railroad Commissioner are set forth in the stipulation of facts, subdivision XXI, Item 8, Vol. IV pages 1594 to 1611.

These reports show that there were sales made in excess of $2.50 an acre continuously, and that the maximum price per acre asked at the dates of the several reports was in excess of $2.50 an acre. The average price per acre for all sales to date did not exceed $2.50 per acre previous to December 31, 1887, when it was $2.51; for December 31, 1888, it was $2.58; for June 30, 1889, it was $2.64; for June 30, 1890, it was $3.14; for June 30, 1891, it was $3.33; for June 30, 1892, it was $3.61; for June 30, 1893, it was $3.66; for June 30, 1894, it was $3.63; for June 30, 1895, it was $3.40; for June 30, 1896, it was $3.40; for June 30, 1897, it was $3.40; for June 30, 1898, it was $3.41; for June 30, 1899, it was $3.75; for June 30, 1900, it was $3.77; for June 30, 1901, it was $4.07; for June 30, 1902, it was $5.00; for June 30, 1903, it was $4.73.

The Bureau of the Interior Department made annual reports to the Secretary of the Interior, as required by the Act, which reports were embodied in the annual reports of the Secretary of the Interior, transmitted by him to the President of the United States, and by the latter to the two houses of Congress, and the Secretary's annual report was there referred to the appropriate committees and printed as executive documents (Stipulation, Subdivision XXI, Item 10, page 1612). A resume of these reports is set out in the stipulation of fact (subdivision XXI, item 11, p. 1612).

The Commissioner of Railroads appended to several of the reports a copy of the Acts of July 25, 1866; April 10, 1869, and May 4, 1870.

Mr. S. S. Mar, law examiner of the General Land Office since May 1, 1877, Railroad Division, and Chief of Division from 1897 to 1908, described in detail the method of keeping the books and records of the Department, and Mr. J. F. Casey, employed in Division F of the Land Office, testified as to the course of business in that office, the former particularly with reference to passing upon the list and selection of lands and the examination prior to the issuing of

the patents (1861-1884). He was permitted to testify that the Railroad Division did not consider or determine the question whether any of the conditions subsequent annexed to the grant had been violated. He said this was because they had already determined that the land passed under the grant. He says that after the company got its patent then this condition subsequent required it to do so. Now, that was a matter we did not pay any attention to. He says that along in the early eighties, when there was a question as to their looking to the forfeiture of this grant, we (the officers of the Land Department) were *directed then not to issue patents under railroad grant where the road had been constructed after the time prescribed in the law when it* should be constructed. That was afterward set aside, for anyhow, we were directed to go on and issue these patents for the reason that we had no right to do anything else. After the road was constructed, that was.

Contemporaneous and Continued Practical Construction.

We contend that these facts afford in the most concentrated form, the foundation upon which we are entitled to invoke the established doctrine of contemporaneous and long continued practical construction by the officials of the Government, whose duty it was to administer the grants, and settle the construction adversely to the contention of the Government in this suit.

In *Stuart* v. *Laird,* decided in 1803 by the Supreme Court, 1 Cranch 299, the rule was announced in reply to an objection:

"That the Judges of the Supreme Court had no right to sit as circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.

It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest and ought not now to be disturbed."

Of course this was a *strong* case, but it was a practical construction of the Act by the judges of the Supreme Court themselves.

In the *United States* v. *Healey,* 160 U. S. 141 the Court said, in construction of the "Desert Land Act":

"It is said that the administration of this Act by the Interior Department for many years succeeding its passage was upon the theory that 'desert lands' (unless they were timber and mineral lands) included all public lands in the states and territories named that required irrigation —even if they were alternate reserved sections along the lines of land-grant railroads. The object of this suggestion is to bring the present case within the rule, often announced, that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the Department charged with its execution, where that construction has, for many years, controlled the conduct of the public business."

The Court declined to apply the doctrine in that case for the reason that it was obvious that there had been a change in the statute as well as in the practice, but they say:

"If, prior to the passage of the Act of 1891, the Interior Department had *uniformly interpreted the Act of* 1877 *as reducing the price of alternate reserved sections of land along the lines of land-grant railroads, being desert lands, from* $2.50 *to* $1.25 *per acre, we should accept that interpretation as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure."* (Italics ours). "But as the practice of the Department has not been uniform, we deem it our duty to determine the true interpretation of the Act of 1877, without reference to the practice in the Department."

See also, *United States* v. *Moore,* 95 U. S. 760.

In *Fairbank* v. *United States,* 181 U. S. 311, the Court quotes from *United States* v. *Alger,* 152 U. S. 384-397, in

which Mr. Justice Gray, speaking for the Court, used this language:

"If the meaning of that Act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this Court to be perfectly clear, no practice inconsistent with that meaning can have any effect."

And also once more, Mr. Justice Harlan, in *Webster* v. *Luther,* 163 U. S. 331-342, stated the rule in these words:

"The practical construction given to an Act of Congress, fairly susceptible of different constructions, by one of the executive departments of the Government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1-34; *U. S.* v. *Healey,* 160 U. S. 136-141. But this court has often said that it will not permit the practice of an executive department to defeat the *obvious purpose* of a statute."

So also, in *United States v. The Alabama Great Southern R. Co.,* 142 U. S. 615, where the provision of the statute was that railroad companies whose railroad was constructed, in whole or in part, by a land grant made by Congress on condition that the mail should be transported over their road at such price as Congress should by law direct, should receive only 80 per cent. of the compensation authorized by the Act, and it appeared that a railroad company had constructed, partly in the State of Alabama and partly in the State of Tennessee, the portion constructed in Alabama was attended by a grant, but the other portion was not, construction of the statute by the Postmaster General awarding full compensation for transportation over that part of the road unaided, upon which basis payment should be made, was held to be decisive. The Court, by Mr. Justice Brown said:

"We think the contemporaneous construction thus given

by the executive department of the Government and continued for nine years, through six different administrations of that department—a construction which though inconsistent with the literalism of the Act certainly consorts with the activities of the case, should be considered as decisive in the case. It is a settled doctrine of this Court that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the face of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive and to require him to repayment of money to which he had supposed himself entitled, and upon the expectation of which he had made his contract with the Government."

The Railroad Commissioner had access to all the books and accounts of the railroad company and made personal visits of examination. It is conclusively presumed that he faithfully discharged his sworn duty. He was chargeable with knowledge of the facts which appeared in the reports of the company and from its books that some of the lands granted had been sold at a maximum price of $30 an acre. That timbered lands had been sold in large quantities to timber companies, and others, who were not and could not be actual settlers within the recognized construction of the Homestead Act.

The Union Trust Company Was Justified in Relying Upon This Construction.

The mortgage to the Union Trust Company was made in 1887, nine years after the Act appointing the Railroad Commissioner, and after the railroad company had begun to make its semi-annual reports, and had come under the operation of the Act. The Union Trust Company and the persons who purchased the $17,745,000 outstanding bonds secured by the mortgage of that company, were justified

in assuming that the Government acquiesced in and assented to a construction of the proviso of 1869 which authorized the railroad company in selling the lands in the way in which they had been sold.

The bill of complaint alleges that:

"Until the year 1894 there was substantially no demand for the said granted lands, except for the purpose of settlement by persons of limited means able to purchase said lands only in small quantities, and at reasonable prices, and nearly all sales were of that character. During a large part of said period the defendant, Oregon and California Railroad Company, maintained an immigration bureau engaged in inducing immigration and settlement upon said lands, and ostensibly was not otherwise engaged in soliciting or promoting sales. By reason of the premises the occasional violation of the terms and conditions of said land grant occurring during said period were concealed and were generally unknown until ascertained by your orator as hereinafter stated."

No evidence whatsoever was submitted upon the trial to substantiate the last sentence of this allegation. The rest of the statement is admitted by the answer. It is admitted that approximately 4,930 sales of land were made in quantities not exceeding 160 acres to one purchaser, aggregating 296,000 acres (Stipulation, subdivision VIII, Item 5, 1578), and that until about the year 1890 or 1891 there was substantially no demand for granted lands except for the purpose of settlement, or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding $2.50 per acre, and nearly all sales made prior to the year 1894 were of that character, and to such persons. But the reports show that after 1879 and previous to 1887 lands had been sold during each half year at a maximum price largely in excess of $2.50 an acre, running from $15 an acre to $5 an acre.

It may be said that the railroad company at no time made the claim that there was a distinction between agricultural lands and timbered lands, and that the proviso

was limited to the former and did not extend to the latter. But there is not now and never has been any complaint that the railroad company did not sell agricultural lands to actual sellers at not more than $2.50 an acre, and in quantities not exceeding 160 acres to a purchaser. No question arose between the railroad company and the Government respecting the propriety of its sales of such lands.

The railroad company claimed the right to sell the timber lands in the mode in which it had sold them, and while there was no differentiation of the lands chiefly valuable for timber from those which were chiefly valuable for agriculture, yet practically the demand for the land by purchasers resulted in such a distinction of which the Government had full notice and in which it acquiesced.

The railroad company constructed that part of its railroad extending from Ashland to the southern boundary of the State of Oregon (Stipulation, Subdivision VII, Item 24, Vol. IV, p. 1576), in 1887. Between 1878 and 1887, it had made seventeen semi-annual reports, each one of which showed that it had sold lands at a price in excess of $2.50 an acre, and it was a fact perfectly familiar and well known that the company was selling its timber lands not to actual settlers, and in quantities exceeding 160 acres to one purchaser.

With the aspect of the case which we are now considering, the Judge on the final hearing did not deal. He said:

"Of course, there are many other questions which have been discussed and which were discussed at the time of the previous hearing; but those questions are all subsidiary, perhaps, save and except that the railroad company claims that the government is estopped by standing by, knowing that these lands were being sold, and allowing them to be sold in this way, and therefore that the Government ought not to prosecute this proceeding. I have given the gist of the defense pleaded in that matter. But the Court determined that matter in the hearing upon the demurrer. The question as raised at that time was as to the matter of estoppel, and the Court then determined the legal question.

I do not think, so far as I have looked into the testimony, that the issues are changed in the least."

"Now, so far as it concerns the Union Trust Company and the mortgage that was given upon this property, it seems to the court that the grant to the railroad company carries upon its face notice of what it is. The grant is not only a grant—it is a law, and the people dealing with the grant must take notice of the terms thereof and of the law itself; and when the Union Trust Company took a mortgage upon this property, it took the mortgage with full notice of what the law required, and it must be considered to hold subordinate to any interest which the Government might acquire in the property by reason of an infraction of the law which would entail a forfeiture of the grant."

In the argument upon the decision of the demurrer to which the learned Judge refers in the citation just quoted, he dealt at considerable length with the claim of waiver and estoppel. But the evidence upon which we now rest, the contemporaneous Governmental and departmental construction of this provision, was not then before the Court, and the question which we are now raising could not then have been disposed of by him, nor, as we have seen, did he consider it after the evidence had been introduced upon the fianl hearing.

In the opinion upon the demurrer the learned Judge said that there was nothing "stated in the bill from which it can be inferred that the Government assented to them (the sales) in any way, and hence it cannot be considered to have waived the condition." This is quite true. The Court was then dealing with the facts stated in the bill and not with the facts stated in the answer or as proved upon the trial.

The Union Trust Company had a right to rely upon the construction which the railroad company had placed upon this provision, and in which the Government had acquiesced for so long a period. It is no answer, as it seems to us, that the trust company had notice of the terms of the Act. We may assume that it did. It by no means follows, however, that it should have known that the Government

would thereafter attempt to place upon the provision a construction which would forfeit the grant upon the sale by the railroad company of any portion of the land to any person other than an actual settler, when such lands were incapable of settlement and cultivation. It had a right to assume that the Government which had for so long a period acquiesced in the sale of such lands, and of lands chiefly valuable for timber, to persons other than actual settlers, and upon terms other than those mentioned in the proviso, would continue to act upon the construction which had been placed upon the Act.

Upon the strength of this construction $20,000,000 of bonds were issued under the mortgage to the Union Trust Company, which were used to retire the bonds then secured by the two outstanding mortgages upon the property of the railroad company and in completing the construction of the road; and of these bonds there are now outstanding and unpaid $17,745,000, almost all, if not all, of which are held in Germany and other countries. The trust company was required to release such bonds from the lien of the mortgage in order to enable the railroad company to make a good title to the purchaser. For every mile of railroad and telegraph constructed from Ashland in 1887, the company undertook to pay $100,000 in these mortgage bonds (Exhibit No. 10, Stipulation Vol. IV, 1697). The distance from Ashland to the southern boundary of California was 24.135 miles. The total of bonds issued for the construction of that part of the road amounted therefore to $2,413,500. It is in evidence that the cost of construction from Ashland south was very great. The road lay over the Siskiyou mountain range. The railroad has just emerged from the receivership and its past history was one of failure. (Koehler, Vol. IV, 1902-1908.)

It is utterly at variance with the dictates of prudence that the bondholders should have advanced these large sums of money if they had believed the proviso capable

of the construction for which the Government now contends. It is equally apparent that the bondholders, or their representatives, must have known, and they will be assumed to have known, the previous course of dealing between the railroad company and the government, in respect to the sale of the lands.

(7) This construction is consistent with the purposes of the grant.

Interpretation in the Light of Existing Conditions.

We accept and adopt the language of the Court when it said:

"Interpretation must be had in the light of the conditions prevailing at the time of the enactment, and thus by standing in the place of the legislative body its intendment may be gathered by looking through its vision at the things as they then existed, and the probable exigencies that give rise to the measure.

"In *Platt* v. *Union Pacific R. R. Co.*, 98 U. S. 48, 60, construing the Union Pacific Land Grant by Act of 1862, the Court says:

"'All will concede * * * we are to look at the state of things then existing, and in the light then appearing seek for the purposes and objects of Congress in using the language which it did. And we are to give such construction to that language, if possible, as will carry out the Congressional intentions.'

"As stated by Mr. Justice Jackson in *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 502:

"'Legislative contracts, especially, should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made, rather than at a later period, when different ideas and theories may prevail.'"

Speaking of the condition subsequent as to the time for the construction of the road, and construing this grant it

was said in *Bybee* v. *Oregon & California R. R. Co.*, 139 U. S. 663-667:

"A condition that would put it beyond the power of the company to build the last mile of its road by the aid of the granted lands is manifestly so harsh and unjust that the breach of such condition ought not to be treated as a forfeiture unless the language of the act be so clear and unambiguous as to admit of no other reasonable construction."

The Physical Characteristics of the Lands Granted.

We are to look then at the conditions in Oregon in 1866 and in 1869; at the purposes for which the land grant was made, and at the topography of the lands themselves, to ascertain whether the construction which the Government and the Court now place upon the proviso is the construction which Congress then intended should be placed upon it.

Oregon had been admitted into the Union in 1859. It was almost an uninhabited wilderness. Little was known of the great stretches of forest lands which covered the mountainsides of the valleys through which this road was to be built. The grant was made "for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line of said railroad." The only lands which had then been opened up or which could be opened up were agricultural in their character. Before the forests could become available for mercantile purposes, population must greatly increase and capital and enterprise must prepare the way for new industries. Then the timber was only an incumbrance upon the soil. The land could be used for agricultural purposes only by burning and extracting the roots of the trees at great expense. After this had been done, much of the soil was incapable of cultivation. It we assume that those Government witnesses are correct who say that on almost every quarter section, after the timber

should be cut, there were some acres that could be plowed, is it possible to believe that Congress meant that these timber lands should be held by the railroad company until actual settlers could be found who would go upon a quarter section and clear it for the sake of cultivating the few acres of plow land which might be found after the clearing had been effected? We know the history of the Government lands which lay alongside the lands granted to the railroad company. We know that whether sold under the Homestead Act or under the Timber and Stone Act, they were not sold except in rare instances to persons who became actual settlers.

The Necessity of the Power to Mortgage.

Such being the situation, how could this grant be made practically available for the purpose of aiding in the construction of the railroad and telegraph line? Surely, only if the railroad company had the power to sell the land in the mode in whch it was alone practical to make sales. This does not render the proviso meaningless; it limits its operation to the lands agricultural in their character, of which there was at the time the grant was made a very large body. And it permits the sale of the land chiefly valuable for timber or unsusceptible of cultivation in the only manner in which such lands could be sold, and in the manner in which the Government was in the habit of selling similar lands.

Moreover, we cannot but believe that Congress intended that the railroad company should have the power to mortgage the lands as an entirety. The grant was made in the language of the Act of 1866 "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line of said railroad"; and the Act provides that "the lands herein granted shall be applied to the building of said road within the states respectively wherein they are situated."

It cannot be doubted that the Act of 1866 authorized a mortgage of the property. The Act contemplated the granting of a fee subject to the conditions expressed. There was no restriction upon a mortgage or pledge of the property, and such mortgage or pledge was indispensable for the purposes for which the grant was made. What was true of the grant to the Union Pacific Railroad Company, as stated by Judge Strong, in *Platt* v. *Union Pacific Railroad Company,* 99 U. S. 48-60, was equally true of the Oregon Central:

"We are to give such construction to the language, if possible, as will carry out the Congressional intentions. For what particular purpose, then, was the grant of lands made? The statute itself answers—'for the purpose of aiding in the construction of the railroad and telegraph line,' and securing Governmental transportation, etc. The lands were granted to be used in furtherance of such construction. But Congress and the grantees must have known that when granted the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective—dependent upon the construction of the road. Purchasers could not have been reasonably expected, certainly few, for the immediate settlement. The obvious mode, therefore, of using the lands for the construction of the road (not for paying debts incurred in the construction, but for immediate need as the construction was progressing) was to hypothecate them as security for a loan. Many persons might be willing to advance money on the face of the prospective value of the lands, if the railroad was built, who would not be willing to buy them when it was doubtful whether the company would ever be able to raise the money necessary to build the road and thus render the lands salable. Congress must have been blind indeed, if it did not foresee this and intend to authorize the use of the lands to raise money by mortgage for the object it had so much at heart."

There is nothing to indicate that Congress intended by the Act of 1869 to take away from the railroad company the right which it had to mortgage the grant as an entirety.

A Construction of the Proviso as a Condition Subsequent Inconsistent with the Power to Mortgage.

But if we assume that Congress intended the right to mortgage to be subject to the proviso of 1869, and that that proviso should be construed as a condition, we submit that it would be in the highest degree unreasonable to give to the language of the proviso a construction which would practically defeat the power to mortgage, if any other possible construction can be found. But to construe the proviso so as to require the sale of the lands, whether susceptible to cultivation or not, whether so heavily timbered as to be practically unsuitable for cultivation or not—to actual settlers, when we remember that more than 80 per cent of the lands were not available for actual settlement, would be to nullify practically the power to mortgage, and thus practically defeat the very purpose for which the grant was made, nor, as we have shown, is such construction necessary; on the contrary, it is, as we have attempted to show, unnatural and inconsistent with the topographical features of the grant and the general policy of federal land legislation.

In order to raise moneys for the immediate construction of the road, the bill alleges that approximately $8,000,000 was procured during the year 1870 by negotiations or pledge or mortgage bonds (Bill, p. 33); and during 1871, $2,000,000 was thus raised by the West Side Company. With these funds, the work of constructing the lines of railroad was prosecuted. These facts are admitted by the answer of this defendant (p. 1178). Upon the heel of the Act of 1869 the railroad company assumed the right to mortgage the land grant. Since the Act of 1866 declared that "The lands herein granted shall be applied to the building of the said road within the states respectively wherein they are situated," and there was no other mode in which the lands could then be

applied to the construction of the road, by necessary implication the power to mortgage the lands in expectancy as they should be earned was granted. The mortgage then made was paid off by the proceeds of subsequent mortgages, and these in turn were paid off by the proceeds of the bonds secured by the mortgage to the Union Trust Company, which, by its terms, provides that if the railroad company contracts to sell any of its lands granted by the United States and covered by the mortgage, at prices assented to by the trust company, then the trust company shall execute releases, but the purchase price is to be received and applied upon the mortgage debt. The Government introduced evidence to the effect that the value of the railroad with the exception of the land grants, was, on June 1, 1887, about $50,000 a mile (Koehler, 1904). The mortgage of July 1, 1887, was restricted to a bond issue of $30,000 per mile, and the bonds were payable in forty years; that is, in 1923. At that time the railroad was in the hands of a receiver and its only record was one of failure (1905). The Southern division from Ashland was not constructed. When that connection was made, the expert called for the Government thought that the value of the road was less. He based his estimate of the value upon the traffic arrangement with the Southern Pacific System. This evidence, together with the admitted fact (Bill of Complaint, p. 49 of Record), that the bonds are guaranteed by the Southern Pacific Railroad Company, is submitted by the Government as leading to the inference that the bondholders will not be prejudiced by a forfeiture of the land grant.

Considerations of this kind would have been pertinent at the time the parties were in treaty respecting the security which should be given for the proposed loan of $20,000,000. But after the money had been obtained upon a pledge of the land grant as security for the loan, there can be no equitable justification for depriving

the lenders of the securities for which they stipulated. A deprivation of that security must, we submit, be justified by the strict terms of a legal right. This defendant, as trustee for the bondholders, in the performance of the duties which it has undertaken, must and does insist upon retaining for their benefit all of the securities for which it stipulated in procuring the loan. It will be time enough for the Government to present equitable considerations as justifying the forfeiture of the security when the debt shall have been fully paid. In the meantime, courts cannot be oblivious to the fact that railroad properties are becoming yearly more precarious security.

POINT II.

THE PROVISO IN THE ACT OF 1869 AS CONSTRUED BY THE COURT IS VOID, BECAUSE IN RESTRAINT OF ALIENATION.

(1) The Court held that the proviso was a condition subsequent and applied to all the lands granted.

The Court construed the proviso as a condition subsequent, and held that the title to the granted lands was held on the condition that the lands granted should be sold to actual settlers only in quantities not greater than one quarter section to one purchaser, and for a price not exceeding $2.50 per acre, and that this condition applied to all the lands included in the grant.

The Court declined to consider the evidence offered for the purpose of showing that the lands were incapable of settlement and cultivation. Its position was that whether the lands were capable of settlement and cultivation or not, the condition required that the railroad company should sell them to actual settlers upon the terms of the proviso. But a condition which requires that lands not capable of actual settlement shall be sold

to actual settlers, is impossible of performance and repugnant to the grant.

(2) A condition subsequent which is impossible of performance, or which is repugnant to the grant by which it is created, or to the estate to which it is annexed, is void, and performance is dispensed with, and the estate vests absolutely.

In considering the effect of impossible conditions Lord Coke classes them under these heads:

Firstly: When they were possible at the time of their creation, but afterward become impossible, either by the act of God or by the act of the party. Secondly: Where they are impossible at the time of their creation. Thirdly: When they are against law. Fourthly: When they are repugnant to the grant by which they are created, or to the estate to which they are annexed. (Coke Litt. 220.)

The rule laid down by Lord Coke as to the second class of impossible conditions, is supported by all the authorities, both ancient and modern.

VI Amer. & Eng. Enc., p. 506.
Elliott on Contracts, Sec. 3876.
Tiffany's Modern Law of Real Property, Sec. 70.
Burdis v. *Burdis,* 70 Amer. St. R. 825, and note p. 830.
Harrison v. *Harrison,* 105 Ga. 517.
Bain v. *Parker,* 77 Ark. 158.
Stockton v. *Turner,* 7 J. J. Marsh, 192.
Case v. *Dwire,* 60 Iowa 442.
Jones v. *Fort Huron, etc., Thresher Co.,* 171 Ill. 502.
Wead v. *Gray,* 78 Mo. 59.
Kelley v. *Meins,* 135 Mass. 231, 235.
Davis v. *Gray,* 16 Wall. 203, 231.
St. L., etc., R. R. Co. v. *Mathers,* 71 Ill. 592.
U. S. v. *Arredondo,* 31 U. S. 689.

It needs no argument to show that a condition attached to a grant that the lands conveyed shall be sold only to actual settlers is incapable of performance if the land is incapable of actual settlement.

It is equally apparent that a grant upon condition that the land shall be sold to a person or for a purpose to whom or for which it is impossible it shall be sold, amounts to a total restraint of alienation, and is repugnant to the grant. Hence, such a condition is also included in the fourth class of impossible conditions of Lord Coke. A condition in a grant which is in total restraint of alienation, is void.

Potter v. *Couch,* 141 U. S. 315.
Schermerhorn v. *Negus,* 1 Denio. 448.
Barnard's Lessee v. *Bailey,* 2 Har. 56.
McCullough's Heirs v. *Gilmore,* 11 Pa. St. 370, 374.
Anderson v. *Cary,* 36 Ohio St. 506.
Attwater v. *Attwater,* 18 Beav. 330.
Walker v. *Shepard,* 210 Ill. 100.

"A condition which is so vaguely expressed that it is impossible to determine exactly the contingency on which the estate is to arise or terminate is to be regarded as in effect an impossible condition and is equally inoperative." (Tiffany's Modern Law of Real Property, S. 70, p. 168, citing Shepard's Touchstone, 128, 1 Leake 237, *Wyndham* v. *Careau* 2 Q. B. 317.)

A restraint of alienation, except to a particular person, is bad. Whether a restraint of alienation to a particular class would be such a restraint of alienation as to be void, may depend upon a variety of circumstances (15 Halesbury's Laws of England, Vol. 15, p. 422; *Muschamp* v. *Bluet,* 1617, J. Bridg. 132; *Attwater* v. *Attwater,* 1853, 18 Beav. 330 Sir J. Romilly). If a restriction on the price is added, the restraint has been held to be void (*Crofts* v. *Beamish,* 1905, 2 Ir. 349, CA).

But the objection here is not merely that the restraint is to the sale to a class, but that sale to the designated class of a large proportion of the land is impossible. Suppose there are 1,000 quarter sections which no actual settler will purchase in good faith because the land cannot be cultivated. What is the railroad company to do with this land? According to the construction of the Court below, it cannot sell it to anyone. It is, therefore, deprived of the power of alienation. This is a much stronger case than *In re Rosher,* 26 Chancery Division, 891, where a devise was made to a testator's son in fee with a proviso that if the son should desire to sell in the lifetime of the testator's wife, she should have the option to purchase at 3,000 pounds for the whole, and a proportionate price for any part, Three thousand pounds was much less than the value of the estate, and it was held that the proviso resulted in an absolute restraint of alienation, and was therefore void. Similarly a provision that lands shall be sold only to the members of the testator's family, amounts to a restraint of alienation, for suppose no member of the testator's family should be willing to purchase —the owner of the fee could never dispose of the property (*Attwater* v. *Attwater,* 18 Beav. 330.)

But if the construction of the proviso for which we contend should be adopted, then, even though it be regarded as a condition, it would attach as such condition only to the grant so far as it applied to lands susceptible of settlement and cultivation. A breach of such a condition would arise only in case of a sale of such lands in violation of the terms of the proviso, and the forfeiture would apply only to the lands to which the condition attached.

(3) The words actual settler cannot be ignored in order to work a forfeiture.

Counsel for the Government seek to meet the force of this contention by asserting that though it be assumed that the lands are incapable of cultivation and therefore

cannot be sold to actual settlers, still, the other restrictions of the proviso, namely, those with regard to the quantity that may be sold to one person at a sum not exceeding $2.50 per acre, are possible of performance, and, therefore, that the whole proviso is not to be disregarded. But this claim wholly ignores the construction of the proviso which this defendant regards as the plain and necessary construction. Our position is that Congress intended that the lands susceptible of cultivation should be sold to actual settlers in quantities not exceeding 160 acres and at a price not exceeding $2.50 an acre, but as to other lands in the grant, there was no restriction respecting the terms of sale. To attempt to sustain the proviso as a condition subsequent by eliminating the portion of the proviso relating to actual settlers, and so to impute to Congress the intention that all the lands, whatever their character, should be sold only in quantities of 160 acres to one person, and at a price not exceeding $2.50, is to remake the language of the proviso for the purpose of enabling the Court to construe it into a condition subsequent. Nothing is better settled than that in a Court of Equity a condition will not be extended beyond its express terms to entitle the grantor to a forfeiture. (Jones on Real Property, Secs. 678, 679. *Rice* v. *Railroad Co.*, 1 Black. 358-378.)

Not only the spirit but the language of the proviso looks wholly to the actual settler. It is to the actual settler that the lands are to be sold in the quantities named and at the prices designated.

As printed there is a comma after the word "actual" in the second proviso of the Act of 1869, but no comma is found after that word where it is used in the Act of 1870.

Punctuation is no part of a statute (Harlan, J., in *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77-84). Courts, in the construction of statutes for the purpose of arriving at or maintaining the real meaning and intention of the lawmakers, will disregard the punctuation or transpose

the same or substitute one mark for another or repunctuate (Sutherland on Construction of Statutes, 2nd Ed., Sec. 361; Hardcastle on Construction of Statutes, 4th Ed. 183). So little is punctuation a part of statutes, that Courts will read them with such stops as will give effect to the whole (*United States* v. *Oregon R. R. Co.*, 164 U. S. 541). If we disregard the comma after "only" in the proviso of the Act of 1869, it will be plain that it is only to actual settlers that the lands are to be sold in tracts of 160 acres and at $2.50 per acre. This gives the proper emphasis and consistent meaning to the statute. It was the "actual settler" whom Congress meant to benefit, and it was to him that it meant the Railroad Company should sell the land in such a way as to divide it up into reasonably large farms to be purchased at a small price. Except in the interests of such actual settlers, there was no call or occasion for a modification of the governmental policy which up to that time had permitted railroad companies to dispose of lands granted in their discretion as to amount and price, and in such a manner as would best aid in carrying out the enterprise.

POINT III.

THE LAST PROVISO OF THE ACT OF 1869 WAS NOT INTENDED TO CREATE AND DID NOT CREATE, A CONDITION SUBSEQUENT.

The Court below held that the proviso created a condition subsequent, and it adjudged a forfeiture. The reasons given by the learned Judge, who wrote the opinion upon the demurrer for this conclusion, were in substance:

(1st) That the word "provided" is an apt word to create a condition subsequent.

(2nd) If there be any doubt as to the intention, a construction must be adopted favorable to the Government, and that a limitation of the grant by a condition

subsequent would be more favorable to the Government than a limitation by a restrictive covenant.

(3rd) That the construction urged by the railroad company that the proviso creates a mere directive, regulative covenant, unenforcible by legal proceedings, in effect nullifies the proviso.

(4th) That the construction of the proviso as constituting a condition subsequent is in harmony with the policy of the land laws, and the opinions expressed by Congress at or about the time of the enactment of the Act of 1869.

(5th) That this construction finds support in the opinions in *Nichols* v. *Southern Oregon Co.*, 135 Fed. 232, and *Warrior River C. & L. Co.* v. *Alabama State Land Company*, 154 Ala. 155.

In opposition this defendant replies:

(First) While the word "provided" may import a condition subsequent, it does not necessarily do so. The intent of Congress is to be gathered from the Acts of 1866 and 1869, read together in the light of the surrounding circumstances.

(Second) If there be uncertainty as to the intention, the proviso is to be construed as a restrictive covenant, and not as a condition subsequent, because such an intent is to be gathered from the Act of 1869 in connection with the Act of 1866, read in the light of the surrounding circumstances.

(Third) That a construction of the proviso as a condition subsequent is not more favorable to the Government than a construction that it creates a restrictive covenant; but if it were, there is no rule of construction which, under the circumstances of this case, requires the Court so to construe the proviso.

(Fourth) The proviso construed as a restrictive covenant is enforcible, and such a construction is in harmony with the public land policy of the United States, and with the objects and spirit of the Act of 1866.

(Fifth) That *Nichols* v. *Southern Oregon Co., supra,* and *Warrior River C. & L. Co.* v. *Alabama State Land Co., supra,* referred to, decided nothing respecting the questions involved in this case, and shed no light upon it.

(1) While the word "provided" may import a condition subsequent, it does not necessarily do so. The intent of Congress is to be gathered from the language of the Acts of 1866 and 1869 read together in the light of all the circumstances properly to be taken into consideration.

In support of our contention we cite the following authorities:

Green County v. *Quinlan,* 211 U. S. 594.
Clapp v. *Wilder,* 176 Mass. 332.
Post v. *Weil,* 115 N. Y. 361, 5 L. R. A. 422 *Note.*
Stanley v. *Colt,* 5 Wall. 119.
Parker v. *Nightingale,* 6 Allen 341.
Georgia B'k'g Co. v. *Smith,* 128 U. S. 181.
Halley v. *Kafitz,* 148 Cal. 393.
Sohier v. *Trinity Church,* 109 Mass. 1.
MacKenzie v. *The Trustees of Presbytery of J. C.,* 67 N. J. Eq. 652, 3 L. R. A., N. S. 227.
Scovill v. *McMahon,* 62 Conn. 378.
Avery v. *N. Y. C. R. R. Co.,* 106 N. Y. 142.
Ball v. *Millikin,* 31 R. I. 36-41.
Druecker v. *McLaughlin,* 225 Ill. 367.
City of Portland v. *Terwilliger,* 16 Ore. 465, 469.
Elliott on Contracts, Sections 1528-1529.

Green County v. *Quinlan,* 211 U. S. 594, was an action to recover upon certain bonds issued by the defendant county. Among other things the defense set up was that the bonds were issued in payment of a subscription to the

stock of the Cumberland & Ohio Railroad Company upon two *conditions,* namely: that the railroad could be constructed in a designated manner, and that the county first should be exonerated from a prior subscription to the bonds of another railroad company. As to the latter of these conditions, it was held that the condition had been performed and was not available as a defense. As to the former condition, the Court, speaking through Mr. Justice Moody, said:

"It is not conclusive that the obligation thus imposed upon the railroad company is *called a condition.* It frequently has been the case that the word 'condition' has been used in written instruments in a looser and broader sense than the law attaches to it. In ascertaining the true meaning of instruments in writing, courts do not confine their attention to single words, phrases or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals. This general rule of the interpretation often makes it manifest, that that which is called a condition, is really but a covenant or agreement to be performed independently of the counter-obligation with which it is associated. When such an intent is discovered, the courts have no difficulty in giving it effect, *though the result be to disregard the technical meaning of the word 'condition.'*" (Citing many cases.) (Italics ours.)

The same idea is tersely expressed in *Morse* v. *Hayden* (81 Me. 230), where it is said "conditions have no idiom."

The same rule of construction is stated at greater length by Morton, J., in *Clapp* v. *Wilder,* 176 Mass. 322, thus:

"There never has been any hard and fast rule that words, express and apt, to create a condition at common law in a deed should always be so construed. From the time of Lord Coke, if not before, such words have received a different construction when required in order to *promote the obvious intent and purpose of the parties.* Co. Lit. 203a. Lord Cromwell's case 2 Co. 70. Shep. Touch 122. 1 Bl. Com. (Bk. 2, Sharswood's ed.), 151 N. 1.

"The converse has been equally true. Words not apt to create a condition in deed at common law have been

construed as creating one when such appeared to be
intention of the parties and the language admitted of s
a construction. Shep. Touch. 123.

"Neither does the law look with especial favor u
estate on condition. 'Conditions subsequent,' it is said
Chancellor Kent, 'are not favored in law.' 4 Kent C
129. They are strictly construed against parties seekin
enforce them, and equity affords relief in various c
from forfeiture for a breach of them. *Bradstreet* v. *Cl*
21 Pick. 389. *Merrifield* v. *Cobleigh*, 4 Cush. 178. *Li*
v. *Fifty Associates*, 101 Mass. 432. *Lundin* v. *Schoe*
167 Mass. 465, 470, and cases cited.

"These doctrines have been long and well settled,
they have led this court and other courts frequently
construe so-called conditions, not according to the st
meaning of the words used, but in such a manner a
carry out the intentions of the parties as manifested
fair interpretation of the language, when viewed in
light of the attendant circumstances. If it appeared
the parties intended to create an estate upon condi
effect has been given to the intention. If it appeared
some other right or obligation was intended to be cre
the language has been construed accordingly. The ma
has been regarded as one of *substance*, rather than of f
and the cardinal rule of construction has been not to a
tain the *effect* in regard to *estates* upon condition, bu
ascertain and enforce the *intention of the parties* so fa
it could be done consistently with established rules.
numerous cases, for one reason or another, words ap
create a condition at common law in a deed, have
interpreted as meaning something else—limitations,
nants, restrictions, easements, servitudes, and trusts—
cause it was thought that such a construction would
conform to and carry out the intention of the par
Parker v. *Nightingale*, 6 Allen 341. *Chapin* v. *Harr*
Allen 594. *Schier* v. *Trinity Church*, 109 Mass. 119.
fries v. *Jeffries*, 117 Mass. 184. *Episcopal City Missi*
Appleton, 117 Mass. 326. *Skinner* v. *Shepard*, 130 M
180. *Ayling* v. *Kramer*, 133 Mass. 12. *Hopkins* v. *Sr*
162 Mass. 444. *Cassidy* v. *Mason*, 171 Mass. 507. *Ave*
New York Central & Hudson River Railroad Co., 106 N
142. *Post* v. *Weil*, 115 N. Y. 361. *Clark* v. *Martin*
Penn. St. 289. *Watrous* v. *Allen*, 57 Mich. 362. *Lake*
& Western Railroad v. *Priest*, 131 Ind. 413. *Wier* v.

mons, 55 Wis. 637. *Fuller* v. *Arms,* 45 Vt. 400. *Mills* v. *Davison,* 9 Dick. 659. *Neely* v. *Hoskins,* 84 Maine 386.

"The decisions in which this has been done have not been confined to any particular class of cases, such as, for instance, building schemes and plans of general improvement, but the rule has been applied in other cases, and has been recognized in cases where it was not applied. It is an application to conditions in deeds, of the rule adopted in regard to other written instruments, namely: to so construe them as best to promote the obvious intent and purpose of the *parties. Merrifield* v. *Cobleigh,* 4 Cush. 178. It is the same principle which has led to the construction of a deed intended to take effect *in futuro,* as a covenant to stand seized (*Trafton* v. *Hawes,* 102 Mass. 533, 541), and is, I think, a sound and sensible rule, and one calculated to do justice between parties." (Italics ours.)

In *MacKenzie* v. *Trustees of Presbytery of J. C.,* 67 N. J. Eq. 652, Judge Green said:

"Words seemingly appropriate to a condition only, may introduce a covenant, a condition or a declaration of trust, and the whole of the clause submitted to investigation must, in form and scope, be considered in order to determine within which class it should fall."

"Provided, always," which Blackstone, in his Commentaries, Book 2, 299, mentions as typical words of condition, may either alone or with other words be found in introducing reciprocal covenants in agreements (quoting illustrations). The words employed by the draughtsman of the deeds of conveyance under examination are 'on condition,' 'on further condition,' and although these also are words appropriate to conditions in deeds (Litt. Ten., Sec. 238), there are not wanting in our own reports illustrations of a wider use." (Citing cases.)

The Court then proceeds:

"All of the words used in the clause in question being considered and the absence of words of determination or reverter being noted, the intent of the parties to be exercised as permitted by the principles of law will be best subserved by holding the clause to be a declaration of trust."

Of course the absence of words of "determination or reverter" are not necessary where the situation of the parties and the object to be accomplished, make their intention clear.

So in *Post* v. *Weil*, 115 N. Y. 367, 374, where the words of the deed were "upon especial condition that no part of the land or buildings thereon shall ever be used or occupied as a tavern," it was held that this was a restrictive covenant. The Court, speaking through Gray, J., said:

"The words 'provided always and these presents are upon this express condition,' seem to me to serve the purpose of restricting that use of the premises which was, of course, general and unrestricted under the grant. They do not import any new and separate idea, and I think the rule is a safe one that words alone should not be deemed to create a condition subsequent and to be capable of importing possibly future forfeiture of estate, except where they do introduce some new clause, the sense of which is not referable to and in qualification of some preceding clause and evidences some part of the consideration for the grant of the property by the imposition of an obligation upon the grantee.

"Looking at these words may we say as they stand in the deed, that they are conditional in sense, when they in reality serve to qualify the generality of the grant in the language which precedes them. I think we cannot in reason."

In *Kilpatrick* v. *Baltimore*, 27 L. R. A., p. 645, the Court stated the rule as follows:

"Conditions subsequent are not favored in law 'because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures.' 4 Kent. Com. 130; *Stanley* v. *Colt*, 72 U. S. 5 Wall. 119, 18 L. ed 502.

"Therefore it is that a condition will not be raised by implication, from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such a condition. *Packard* v. *Ames*, 16 Gray, 327; *Bigelow* v. *Barr*, 4 Ohio, 358.

"And as a further consequence of this rule, it has always been held that 'in doubtful cases the disposition of

the courts is, to construe language as creating a trust or covenant, rather than a condition. See Mr. Brantley's note to the case of *Earle* v. *James,* 3 Md. Ch. 230, and authorities there cited. *Scovill* v. *McMahon,* 62 Conn. 378, 21 L. R. A. 58; *Greene* v. *O'Connor,* 18 R. I. 49, 19 L. R. A. 262; *Rawson* v. *Uxbridge School Dist. No. 5,* 7 Allen, 128, 129, 83 Am. Dec. 670.

"In the elaborate and able opinion delivered in the last cited case by Bigelow, Ch. J., the court said: 'If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction. Conditions are not to be raised readily by inference or argument * * * We believe there is no authoritative sanction for the doctrine that a deed is to be construed a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled.'"

In *Scovill* v. *McMahon,* 62 Conn. 378, the Court said:

"The law is well established that such conditions are not favored and are created only by express terms or by clear implication; the courts will always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so; that if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted; and though apt words for the creation of a condition are employed, yet, in the absence of all express provision for re-entry or forfeiture, the Court from the nature of the acts to be performed or prohibited by the language of the deed, from the relation or situation of the parties, and from the entire instrument will determine the real intention of the parties."

So in *Ball* v. *Millikin,* 31 R. I. 36-41, it was held:

"Conditions are not favored in law as they tend to destroy estates, but conditions may be created if such an intention appears from an examination of the whole deed. There are certain words which are considered appropriate

to create a condition, but when these apt words are used, the provision is not always construed as a condition, and without these words conditions have been found to exist when such appears to have been the intention of the parties." *Clapp* v. *Wilder,* 176 Mass. 332. Whether words amount to a condition or a limitation or a covenant, may be a matter of construction, depending on the contract. Kent's Com., Vol. 4, 132.

The rule is well stated in Halsbury's Laws of England, at Vol. 10, p. 478:

"A grant or a covenant may be followed by words contemplating that one of the parties is to do or abstain from doing some act. Such words are commonly introduced by 'provided that' or 'to be' or they are contained in a participial clause, and they may operate as a condition or qualification of the preceding covenant, or as a separate covenant. For them to operate as a covenant, it must appear that the act or abstention is intended to be obligatory."

In the following Massachusetts cases, although the word "condition" was used, the Court held that the words were not intended by the parties to be a technical condition, a breach of which would work a forfeiture of the estate. They were intended to regulate the mode in which the grantee might use and enjoy the land and are to be construed as restrictions.

Ayling v. *Kramer,* 133 Mass. 12.
Cassidy v. *Mason,* 171 Mass. 507.
Episcopal City Mission v. *Appleton,* 117 Mass. 336.

Whether particular words are to be construed as a condition or as a covenant, depends upon whether the intent to be gathered from the instrument is that the parties sought to provide for a forfeiture or merely for an enforcible obligation.

Where the purpose of the grant is in its nature general and public and not primarily for the benefit of the grantor,

the courts lean strongly to a construction of a restriction which will support the grant rather than defeat it.

Green v. *O'Connor,* 18 R. I. 56.
Neely v. *Hoskins,* 64 Me. 386.
Episcopal City Mission v. *Appleton,* 117 Mass. 326.
Post v. *Weil,* 115 N. Y. 361.
Avery v. *Railroad Co.,* 106 N. Y. 142.
Carroll County Academy v. *Gallatin Academy Co.,* 104 Ky. 621.

While it seems to be conceded by the Government that in controversies between private persons conditions subsequent are not favored, and that words will not be construed as creating such a condition where they are susceptible of a different interpretation, it is claimed that this rule is not applicable to grants made by the Government. We shall treat of this subject more fully under the third subdivision of this heading, but in this connection we call the attention of the Court to the rule which we think is fully established—that when a sovereign submits itself to a Court of Equity to maintain or enforce its equitable rights, and prays its aid, its claims and rights are and ought to be judiciable by the general principles and rules of equity applicable to the claims and rights of private parties under like circumstances. (*U. S.* v. *International Harvester Co.,* 214 Fed. Rep. 987-1010; *Davis* v. *Gray,* 16 Wall. 203-232; *Iowa* v. *Carr,* 191 Fed. 257-266; See cases collected in the brief of the Railroad Company, pp. 655-680).

(2) The proviso is to be construed as a restrictive covenant and not as a condition subsequent, because such an intent is to be gathered from the Act of 1869 read in connection with the Act of 1866 and the Act of 1870, in the light of all the circumstances properly to be considered.

(a) The Act of 1866.

As bearing upon the construction of the words in question, great significance is to be attached to the phraseology of the Act of 1866, of which the Act of 1869 was an amendment, and the Act approved May 4, 1870, of which the Oregon Central Railroad Company of Portland was the grantee, to "Aid in the construction of a railroad from Portland by way of Forest Grove to Astoria and McMinnville."

The Act of 1866 expressly provided, with regard to the filing of the assent required by Section 6 and the completion of the railroad within the time named, that:

"In case the said companies shall fail to comply with the terms and conditions required, namely; by not filing their assent thereto as provided in Section 6 of this Act, or by not completing the same as provided in said Section, this Act shall be *null and void* and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, *shall revert* to the United States."

But as we have already stated, Section 5, which required that the railroad company should keep its railroad and telegraph in repair and render the services heretofore set forth, is also stated to be upon *"condition,"* but there are no words of reverter or defeasance in the Act respecting or referring to the non-performance of any of the acts required by Section 5, and it is perfectly manifest that the use of the word "condition" in Section 5 does not import a condition subsequent, but a covenant.

In this view, when, by the Act of 1869, an amendment was made to the Act of 1866 and the last proviso was introduced with the words "provided further" *without*

words of reverter or defeasance attached thereto, the conclusion that Congress intended thereby to create a covenant and not a condition is almost irresistible.

But a still stronger and even more persuasive argument appears when one remembers that the grant of 1866 was in aid of *one* railway, *part of it* in California and the other *part of it* in Oregon. The Court will observe that the evidence of this is found first in the title "An Act granting lands to aid in the construction of *a railroad and* telegraph line from the Central Pacific Railroad in California to Portland, in Oregon." The pertinent language of the first section is as follows:

"That the California and Oregon Railroad Company, 'organized under an Act of the State of California to protect certain parties in and to a railroad survey' to connect Portland, in Oregon, with Marysville, in California, approved April 6, 1863, and such company organized under the laws of Oregon as the Legislature of said State shall hereafter designate, be and they are hereby authorized and empowered to lay out, locate, construct, finish and maintain a *railroad* and telegraph line between the City of Portland, in Oregon, and the Central Pacific Railroad in California, in the manner following, to-wit: The said California and Oregon Railroad Company to construct that *part of said railroad* and telegraph within the State of California beginning at some point to be selected by said company on the Central Pacific Railroad in the Sacramento Valley in the State of California, and running thence northerly through the Sacramento and Shasta Valleys to the northern boundary of the State of California; and the said Oregon company to *construct that part of the said railroad,* etc., within the State of Oregon beginning at the City of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua and Rogue River Valleys to the southern boundary of Oregon, where the same shall connect with the part aforesaid, to be made by the first-named company. Provided, that the company completing its *respective part of said railroad* and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right and the said company is hereby authorized to

continue in constructing the same beyond the line aforesaid with the consent of the state in which the unfinished part may lie *upon terms mentioned in this act,* until *the said parts* shall meet and connect and the *whole line of said railroad* and telegraph shall be completed."

It is apparent that so far as the record shows the California and Oregon Railroad Company was never in default in respect to filing its assent to the terms of the Act of July 25, 1866, and acquired not only the right to build a railroad and telegraph line from the Central Pacific to the southwestern boundary of Oregon, but it acquired also the right, if, when it reached the Oregon boundary, the part of the road which was to be constructed in Oregon by the Oregon company had not been constructed to the boundary line, to proceed, with the consent of the State of Oregon, in constructing the road and telegraph line until it met and connected with so much of the road as had been constructed by the Oregon company. It seems clear from the Act, keeping in mind the national purpose of the grant, which is clearly expressed in the second section, that if the Oregon company had constructed no part of the road, the California company could have proceeded with the construction, Oregon consenting, of the road through to Portland, and would thereby have earned the grant both in California and Oregon appurtenant under the Act of 1866 to the construction of the entire road. A reciprocal right was given to the Oregon company by which, if, when its constructed road reached the southern boundary of Oregon, there to connect with the California part of the road, the California company had not constructed its part of the road to the boundary line, either in whole or in part, to proceed with the construction to a meeting point or, if there were no meeting point, to the Central Pacific, earning thereby the entire grant. If the California company, therefore, in the exercise of this right, had built, with the consent of Oregon, through to Portland, it would have earned the entire grant without any restriction upon its power of

alienation, while, if the California company defaulted in performing the subsequent condition of constructing the railroad and the Oregon company had performed and had built through to a connection with the Central Pacific, it would have earned the entire grant appurtenant to the road built in Oregon and also that appurtenant to the road built in California, but it would have held the entire grant subject to the restriction now contended for by the Government. Can the intent possibly be imputed to the Congress that if the Oregon company had built its road, after assenting to the Act of 1869, to the southern boundary of Oregon and had there connected with the California part of the road, having thereby acquired by the construction of the road the appurtenant grant in each state, that by the Act of April 10, 1869, the California company was to be perfectly free of restriction in the sale of its lands, while the Oregon company, after constructing a part of the same road and earning a part of the same grant should be prohibited from selling any of its lands except to actual settlers in tracts of not more than 160 acres to one person and at a price not exceeding $2.50 an acre? Upon what theory of public policy or fair dealing can an intention to so discriminate in favor of the one and against the other be imputed to the Congress in an attempt to secure a permanent work of great national importance, the early construction of which it was eager to bring about? Such an intent is not to be imputed, unless the language employed by Congress leaves no alternative. The policy of the government in respect to the construction of the Union and Central Pacific Railroads, so that the Atlantic and Pacific might be connected by rail, was set forth in a delineating and undoubtedly accurate way by Mr. Justice Davis in delivering the opinion in the *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72-79, as follows:

"Many of the provisions in the original Act of 1862 are outside of the usual course of Legislative action concerning grants to railroads, and cannot be properly construed

without reference to the circumstances which existed when it was passed. The War of the Rebellion was in progress and owing to complications with England the country became alarmed for the safety of her Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the Continent. Such a road would bind together the widely separated parts of our common country and furnish a cheap and expeditious mode of transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the Government in the performance of an imperative duty could not justly withhold the aid necessary to build it, and so strongly pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement and charged the Government itself with the direct execution of the enterprise. *This enterprise was viewed as a national undertaking for national purposes* and the public mind was directed to the end in view rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento rivers which was practically worthless without the facilities afforded by a railroad for transportation of persons and property. With its construction the agricultural and mineral resources of this territory could be developed, *settlements made where settlements were possible,* and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails and of supplies for the army and the Indians. It was in the presence of these facts that Congress undertook to deal with the subject of

this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable. * * * It is true, the scheme contemplated profit for individuals; for without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the Government had incorporated the company to advance private interests and agreed to aid it on account of the supposed incidental advantages that the public would derive from the completion of the projected railway. But the primary object of the Government was to advance its own interests and it endeavored to engage individual co-operation as a means to an end—the securing of a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself viewed in the light of contemporaneous history * * *. That there should, however, be no doubt of the national character of the contemplated work, the body of the Act contains these significant words: 'And the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the Government at all times, (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time having due regard for the rights of said companies named therein, add to, alter, amend or repeal this Act.' "

The first Union Pacific Act was in 1862, four years before the grant of July 25, 1866. Neither the Union Pacific nor the Central Pacific Railroads had been constructed to Ogden, when the Act of July 25, 1866, was passed. Indeed, they were not finished to a point of connection until 1869.

It is perfectly obvious that the policy which led the Congress to aid with land and with money and with subsidy bonds the construction of the Union and Central Pacific would be quite incomplete unless a branch road

(it was many times so referred to in Congress) was constructed from some point on the Central Pacific to Portland.

(b) The Act of 1870.

Equally important and persuasive as bearing upon the construction of the words in question is the language of the Act of 1870. By that Act a grant was made "for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove, to the Yamhill River, near McMinnville, in the State of Oregon," to the Oregon Central Railroad Company. It was provided that the lands so granted "excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground and other needful uses in operating the road, *shall be sold by the company only to actual settlers* in quantities not exceeding 160 acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre," and it was provided that the company should, by mortgage or deed of trust, *set apart the net proceeds* of the lands granted as a sinking fund for the purchase and redemption of the bonds of the company, issued for the purpose of constructing the road, and it was further enacted, "That the said company shall file with the Secretary of the Interior its assent to this Act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph lines within two years and the entire railroad and telegraph within six years from the same date." The fact that no words of condition, reverter, or defeasance, were connected with the provision for the sale of the lands to actual settlers, whereas it was expressly provided that the grant was made upon condition that the company should complete the road within the time named, indicates in the strongest possible manner, that with regard

to the West Side Grant, Congress had no intention that a failure to sell the lands to actual settlers should be attended with a forfeiture of the grant, and no reason can be suggested why it was intended that a different rule should be applied to the East Side Grant.

The only section in the Act in which words apt to create a condition are used is the last section, which makes it a *"condition"* of the grant *that the road shall be constructed within the time limited.*

This land now belongs to the Oregon and California Railroad Company and the Bill herein asks the Court to decree a forfeiture of it for breach of *condition subsequent*, treating Section 4 precisely as the Court is asked to treat the proviso to the Act of April 10, 1869, as a condition subsequent for breach of which the grant is subject to forfeiture.

It has repeatedly been held that a condition subsequent will not be implied from the words used in a grant merely expressing the purpose for which the lands were to be used or employed. (*Wright* v. *Morgan*, 191 U. S. 55.)

The method which the Congress saw fit to adopt to secure the performance of Section 4 of the Act of May 4, 1870, is utterly inconsistent with the notion that there is any condition subsequent in that section, and comports simply with the proposition, that it was a promissory obligation or restrictive covenant to be enforced in the manner pointed out by the Act of Congress. In other words, Congress instead of inserting a condition providing a remedy by forfeiture, adopted a method of its own which was embodied in the Act to secure an observance of the requirements of the provisions. No legislation of Congress, so far as we are aware, has changed that Act or added to that remedy. Indeed, the obligation imposed by Section 4 of the Act of 1870 is an enforceable one in equity and that is the remedy, rather than by forfeiture. It is a part of the grant and a part of the contract inserted by the Congress and accepted by the company, and the remedy provided is exclusive. We are unable to see any

warrant by which the Government seeks to forfeit the West Side grant for breach of condition subsequent, and this leads us to inquire also why should an intent be imputed to Congress by the Act of April 10, 1869, to annex a condition subsequent to the lands granted by Congress in Oregon to secure the construction of the Oregon part of the road provided for by the Act of 1866, which would give Portland and the intervening region, by way of the Central and Union Pacific Railroads, when constructed, connections westward and eastward, and to have made no such condition in the Act of May 4, 1870, which was designed to connect Portland with the ocean at Astoria.

(c) Construing the proviso as a condition subsequent would defeat the purpose of the grant.

The Congress cannot be held to have intended by the last proviso in the Act of April 10, 1869, to fasten upon the grant made by the Act of 1866 a condition as the price for one year extension of time to the company to file assent that the lands when acquired should never be sold by the company except to actual settlers, in tracts not exceeding 160 acres to one settler and at a price not exceeding $2.50 an acre for several reasons: It would have inevitably destroyed the value of the grant as a basis of raising money by way of mortgages thereon with which to construct the road and otherwise to perform the condition which by an acceptance the railway company would have agreed to do; As accurately stated by this Court in the opinion overruling the demurrer to the bill, the holders of bonds secured by mortgage on the road and land grant would be chargeable with notice of whatever restrictions the law imposed upon the power of sale of the lands when earned; It must be remembered, too, that the Oregon of that day was not the Oregon of this day; it was remote and inaccessible. It goes without saying that in that day the mortgage of lands not yet earned to raise money for the construction of a road not yet built, in that region as it

then was, would not be peculiarly attractive to investors, who would be obliged to take the chances of misapplication of the proceeds of the bonds as well as other unattractive chances, and certainly if the world had been notified that annexed to the land grant was a condition that when earned none of the lands ever could be sold by the company except to actual settlers, in tracts not exceeding 160 acres to any one settler, and at prices not exceeding $2.50 an acre, under penalty of forfeiture of the entire grant, it would have destroyed the land grant as a basis of credit, and especially as a large part of the land, as could be ascertained from the map, must necessarily lie in a mountainous region. The timber with which it was covered, if known to investors in this country and abroad, would not have added much, if anything, to its value as a basis of credit in any event, and little, if any indeed, if it had been generally known that the power of the company to sell the grant when earned was burdened by such a restriction, for states far east of the Rocky Mountains contained what was then supposed to be an inexhaustible supply of timber, vastly nearer a market for lumber, and the Congress must be presumed to have known that the proviso construed as a condition subsequent would be impractical of execution and fatal to the utilization of the grant as a basis of credit.

A bare statement of this obvious fact would seem to be sufficient. Such a restriction upon the Oregon grant alone would tend to defeat the construction of the road in Oregon by an Oregon company and to force its construction from the Central Pacific to Portland by the California company, which would take it, with the consent of Oregon, free from any such restriction, securing bonds which would be marketable. It is inconceivable that the Congress in 1869 intended to so discriminate in favor of California and against Oregon.

Undoubtedly by the general laws of Oregon under which the Oregon companies were organized power was conferred

to borrow money and to secure the same by way of mortgage upon its property in possession and in expectancy. As between the corporation and the United States the right to mortgage the grant in expectancy would seem to be necessarily implied from the language of the granting Act. At the time the grant was made no railroad had been constructed between Portland and the point of connection with the Central Pacific. The Act of Congress limited the time within which the road should be completed. Oregon had designated, in compliance with the Act of Congress, twice the grantee, which evidenced her assent to the terms of the Act of Congress of July 25, 1866. That Act provided that,

"All lands herein granted shall be applied to the building of said road within the States respectively wherein they are situated."

There were but two ways in which the lands, none of which had been earned by the construction of the road, could be applied to the construction thereof: One was by raising the money to build twenty consecutive miles of road, thereby earning the lands coterminus and appurtenant to the road thus constructed; it could then mortgage the lands in expectancy and the piece of road, or it could otherwise dispose of the lands for the purpose of raising the money to build the next section of twenty miles and to repay those who had furnished the money for the construction of the first section of twenty consecutive miles. That would be an impossible course and one not known to the writer hereof to have ever been pursued. If the company had been obliged to proceed in this way there was every probability that it could not have built the road by 1880 it lying in a mountainous country requiring much expensive tunnelling. Practically the lands could not be pledged except by way of mortgage in expectancy upon a road not yet built but expected to be built, largely through the credit afforded by the land grant to be earned by its construction. The lien would attach as rapidly as the road was built and upon the lands as rapidly as

they were earned, and it was on the faith of the grant and the building of the road, that money could be raised and was raised to secure the construction of the road. It requires no argument to show that if it had been understood by the bondholders who purchased the bonds upon the faith in part of the land grant, that it was a part and one of the conditions of the grant a violation of which would subject it to entire forfeiture, that no land should be sold except in tracts of not exceeding 160 acres to an actual settler at two dollars and a half an acre, and that if the railroad companies sold two hundred and sixty acres to any one person at three dollars an acre the whole grant would be forfeitable, the value of the grant as a basis of credit would have immediately vanished.

(3) A construction of the proviso as a condition subsequent would not be more favorable to the Government than a construction that it creates a restrictive covenant, but if it would, there is no rule of construction which, under the circumstances of this case, requires the Court so to construe the proviso.

We are constantly to bear in mind that we are seeking to ascertain the intention of Congress in 1869 when it passed this Act, nor should we be forgetful of the admonition of Mr. Justice Strong in *Platt* v. *The Union Pacific Railroad Company*, 99 U. S. at pages 48-60, where he says:

"There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we have seen the results of experiment. * * * The unforeseen success of the enterprise and the unprecedented rush of immigration along the line of the railroad, have shed some light upon the value of the grants made to the company. But in endeavoring to ascertain what the Congress of 1860 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

(a) The Court below attached great importance to the rule that in construing public grants in doubtful cases the construction should be adopted which is most favorable to the Government, and it assumed that a construction which would work a forfeiture would be more favorable to the Government than that which would create merely a restrictive covenant. We challenge the correctness of this assumption. All the parties, as well as the Court below, are agreed that the purpose of the Act was, primarily, to aid in the construction of the proposed railroad and thus to secure the direct and incidental benefits of rapid intercommunication, for governmental as well as commercial uses. It may be conceded also that by the Act of 1869 Congress expressed the intent that lands available for purposes of settlement and cultivation should be sold only upon the terms of the proviso. In 1869 Congress looked to the completion of the road by the 1st day of July, 1875. By the Act of 1868 the time was extended to July 1st, 1880. No one can doubt, we think, that during the time the road was in process of construction—from 1869 to 1887, a period of eighteen years—it would have been more favorable to the Government to have the power to compel the performance of the covenant respecting the sale and disposition of the land, than to have the power to forfeit the grant.

Suppose that any time before the completion of the road Congress had had the power to forfeit the grant and had exercised that power. What would have been the inevitable result? The railroad company had been unable to complete and maintain the road previous to 1887. It was then a bankrupt. Its rehabilitation without the land grant would have been impossible. No other railroad company could have taken up the task of completing the road with a grant containing such a condition, as is perfectly apparent to any one familiar with the character of the land. A failure of the entire enterprise would have been inevitable. But if the proviso be regarded as a covenant applicable only to agricultural land, it would not have prejudiced the building of the road and could have been

enforced if the company had shown, as it had not, any disposition not to conform to it.

Since it was in the interest of the Government that the road should be built and operated, this being the primary purpose of the grant, a construction which would subserve that purpose was the one most favorable to the Government.

It is true that after the road was completed it became more profitable for the Government to retake the land which had then acquired a great value, and still to hold the railroad to its obligation to carry freight for the Government free of charge. But no one can seriously contend that the provisions of a statute or of a contract are to be construed according to the shifting exigencies which may arise and vary with the varying profits or losses which the Government might derive from the construction which from time to time it might insist was most favorable to it.

(b) In the next place it is to be observed that the words we are considering are introduced as a proviso, while in every instance in the Act of 1866, in which a forfeiture of the grant was contemplated, the word "condition" is employed, and there is attached an express direction of reverter. There is, therefore, significance in the change from the word "condition" to the word "provided"; for, while the word "provided," as we have seen, may indicate a condition, it does not uniformly do so; and when the Legislature in the Act of 1869 made use of the word "provided" as distinguished from the instances in which a forfeiture was contemplated under the Act of 1866, we must assume that there was a change of intention.

The word "provided" may, indeed, be used in a statute merely for the purpose of noting an exception to the generality of former provisions; and in such instances the rules of construction require that the matter embraced in the proviso should be strictly construed.

In *United States* v. *Dixon*, 15 Peters 165, Justice Story says:

"The general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes that where the enacting clause is general in its language and objects, and a proviso is afterward introduced, that proviso is strictly construed and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

So in *White* v. *United States*, 191 U. S. 545, it is said:

"If possible, the act is to be given such construction as to permit both the enacting clause and the proviso to stand and be construed together with a view to carrying into effect the whole purpose of the law. (Kents Com. 463). The purview of the act and the words of the proviso must be reconciled, if may be, and the operation of the proviso may be limited by the scope of the enacting clause."

(c) But this grant is taken out of the operation of the rule that public grants, in case of doubt, are to be construed most favorably to the Government, by the fact that the Government received and is to receive a full and adequate consideration for the lands granted. Not only was the railroad to be constructed and equipped, which was the purpose and controlling consideration exacted by the Government, but the Act of 1866 expressly provided that the grants were made "upon the condition that the said companies *shall keep said railroad and telegraph in repair and use,* and *shall at all times transport the mails upon said railroad and transmit dispatches by said telegraph line for the Government of the United States when required so to do by any department thereof,* and *that the Government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service.* And said *railroad shall be* and *remain a public highway for the use*

of the Government of the United States free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge and expense of the corporations or companies owning or operating the same when so required by the Government of the United States." Under such circumstances the railroad company occupies the position of a purchaser for a full and valuable consideration.

"Where a grant is made by the state in aid of the construction of some work of a public or quasi public character, the construction of the work is the consideration of the grant, and when that is accomplished the consideration is received and retained by the Government."

Lake Superior Ship Canal R. & I. Co. v. *Cunningham,* 155 U. S. 354.

In this case not only has the railroad company constructed and equipped its road in payment for the grant, but it has expended its money and performed valuable services for the Government extending through a period beginning with the completion of the road to the present time, and is under a perpetual requirement (either by way of condition or covenant) to make similar expenditures and to render similar services for the Government upon its demand for all time to come. This is the price which it was to pay, has paid, and is to pay for the grant of July 25, 1866. It may fairly be assumed that what it has paid and must pay will constitute a sum largely in excess of any amount which the Government could have realized by any other disposition of the property, to say nothing of the incidental benefits derived by the country from connecting Oregon by rail with the rest of the United States and facilitating its settlement and upbuilding.

In A. & E. Enc. Vol. 17, p. 14, after referring to the rule that language will be construed most strongly against the person using it, it is said:

"In case of public grants, however, the contrary rule prevails, and the construction is in favor of the state unless the grant is based on a consideration moving from the grantee, in which case the grant is, it appears, construed as is a private grant—in favor of the grantee."

In *United States* v. *Denver & R. G. Ry. Co.,* 150 U. S. 1, 14, it is said:

"When an act operating as a general law and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense undeveloped public domain, such legislation stands upon a somewhat different footing from merely a *private* grant and should receive at the hands of the Court a more liberal construction in favor of the purposes for which it was enacted."

This subject is treated at length by Mr. Justice Earle in *Langdon* v. *Mayor,* etc., 93 N. Y. 129-145 where, speaking of the rule of construction of public grants most favorable to the Government, he says:

"But so far as I have discovered, this rule has never been applied—certainly not in its full extent, to grants made for the benefit of the sovereign upon adequate valuable consideration paid to the sovereign for the thing granted. In 2 Blackstone's Com. 347, it is said, 'A grant made by the King at *a suit of the grantee,* shall be taken most beneficially *for* the King as *against* the party; whereas the grant of a subject is construed most strongly *against the grantor.* Wherefore it it usual to insert in the King's grants that they are made not at the suit of the grantee but *ex speciali gratia certi scientia et merio motu regis:* and then they have a more liberal construction.' The reason generally given for the rule is that in a grant proceeding from the application of the subject, the grantee

ought to know what he asks, and if that does not appear, nothing shall pass from the King by reason of the uncertainty."

The learned Judge then quotes from the opinion in *Charles River Bridge* v. *Warren Bridge,* 7 Pick. 344-469, among other things, as follows:

"There are some legislative grants, no doubt, that may admit a different rule of construction, such as grants of lands on valuable consideration and the like. It is that, when the King's grants are upon a valuable consideration, they shall be construed favorably to the patentee for the honor of the King."

And from the opinion of McLean, J., in the same case in the Supreme Court of the United States (11 Peters 557):

"The general rule is that 'a grant of the King at the suit of the grantee is to be construed most beneficially for the King and most strictly against the grantee,' but grants obtained as matter of special favor of the King or on consideration, are more liberally construed."

And to the same effect are the observations of Story, J., page 589, where he says that the rule never did apply to grants made by the sovereign for a valuable consideration.

In 3 Washburn on Real Property, 3rd Ed. 172, the learned author says:

"This strictness of construction in favor of the sovereign and against the subject, applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant. Nor as it seems, is the rule applicable where the grant is for a valuable consideration. In such cases the rule of construction between the Government and the subject is the same as between private grantors and grantees."

In *Moon* v. *Salt Lake County,* 27 Utah, 436-443, where

the construction of a railroad grant was under consideration, the Court said:

"That all such legislation by Congress was designed to enhance the interest of the Government as well as to aid such enterprises is apparent from the terms of the various grants for railroad purposes. At the times when the several acts in aid of intermountain and transcontinental railroads were passed there were yet immense tracts of public lands unsettled and uncultivated—doubtless recognizing the fact that railroads are most powerful instruments to promote civilization and upbuild a country Congress intended to adopt a policy of liberality in enactments of the kind under consideration to induce capital to engage in the building of such roads over the public domain and thereby reclaim and render habitable and productive a section of country hitherto almost valueless—little more than a barren waste. That the policy of the Government has been productive of great public benefit can scarcely be doubted when it is considered that acres of the public domain have been rendered accessible by the railroads which obtained the grant and constitute the homes of multitudes of citizens who add materially to the public revenues, and that postal, military and other Government service may now be carried on in this intermountain region with the same facility as in other parts of the country. In construing acts making grants of such character offering inducements to individuals and corporations to engage in such expensive quasi public enterprises, the Courts will, without hesitation, look into the condition of the country, the circumstances existing at the time of their passage and the purposes to be accomplished, and will give such construction as will carry out the designs of the law-making power."

In the case from which this citation is taken, the question was whether the grant of a right of way to Salt Lake City included the right of entry into the city and upon public lands within its limits, and the Court gave the statute a liberal construction. These views find support in the following cases:

Wis. Cent. v. *Forsythe,* 159 U. S. 55.
Winona & St. P. R. v. *Barney,* 113 U. S. 618.

St. Joseph & D. Railroad Co. v. *Baldwin,* 103 U. S. 426.
United States v. *Choctau,* 3 Okla. 479.
U. S. Trust Co. v. *Atlantic,* 8 N. Mex. 690.

It is a circumstance of striking significance in this case that the grant made by the Act of 1866 was upon a consideration of services to be rendered for an indefinite period of time and of a value which must ultimately vastly exceed the value of the lands granted, however largely the lands might increase in value; that this land grant, with two other small grants in the State of California (since forfeited) were the only ones made by Congress upon such consideration, or in consideration of any services to be gratuitously rendered to the Government.

It appears that there have been eight land grants made directly to corporations in aid of railroad construction, including the grants in question.

The Union Pacific grant (12 Stat. 489) required the railroad company to transport mails, troops, munitions of war and Governmental supplies *at fair and reasonable rates of compensation.*

The Northern Pacific grant (13 Stat. 365) contained a provision that the road should be a post route and a military road subject to the use of the United States for postal, military, naval and all other Governmental service, and also *subject to such regulations* as Congress may impose *restricting the charges for such Governmental transportation.*

In the grant to the Placerville & Sacramento Valley R. R. Co. (14 Stat. 94) it was provided that the company should *not charge higher rates to the Government than to individuals* for telegraphic service. Then follows a clause identical with that in the Oregon grant.

In the grant to the Atlantic & Pacific R. R. Co. (14 Stat. 292) it was provided that the railroad should be a

post route and military route subject to the use of the United States for postal, military, naval and other Government service, and also *subject to such regulations as Congress may impose restricting the charges* for such *Government* transportation.

The grant to the Stockton & Copperopolis R. R. Co. (14 Stat. 548) was upon the same conditions of service as that to the Placerville & Sacramento Valley R. R. Co.

The grant to the Texas Pacific R. R. was subject to the use of the United States for postal, military and other Governmental services, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service.

It is further to be remarked that in none of the cases cited by the Government's counsel in which the rule of most favorable construction was adopted, was the question of the effect of an adequate and valuable consideration discussed.

Considerable importance was attached by the Court to the rule that legislative land grants are to be regarded not merely as contracts, but also as laws, and a number of cases are cited in support of this rule. (*Schulenberg* v. *Harriman,* 21 Wall. 44-62; *Missouri,* etc., *Ry. Co.* v. *Kan. Pacific,* 97 U. S. 491-497; *St. P. N. & M. R. Co.* v. *Greenhalgh,* 26 Fed. 563-568). But that rule means only that, as in the construction of the statute, we are to look to the intention of the lawgiver, so in grants, which are also statutes, we are confined in construction to the ascertainment of the intention of the legislature. But how does that rule help in determining whether this proviso should be construed as a condition or as a covenant? That intent, as we have heretofore undertaken to show, is to be gathered from the entire legislation read in the light of its purpose and the circumstances attending it.

(4) Neither previous nor subsequent legislation nor the proceedings in Congress indicate an intention that the proviso should constitute a condition.

It is argued by the counsel for the Government that the construction of the proviso of the Act of 1869 and the provisions of the Act of 1870 as conditions subsequent, is supported by the history of previous and subsequent legislation, and the proceedings in Congress, and in this connection they cite at considerable length the views of members of Congress as expressed in debate.

While we agree with them that what may fairly be construed as a history of legislation showing the conditions which induced the legislation and the acts of Congress upon the same subject preceding and following the legislation are properly to be considered in the interpretation of the language of the statutes under consideration, we think it equally well settled that the opinions expressed by members of Congress in debate cannot properly be considered, especially when the measures advocated by such members were not finally enacted.

In *U. S.* v. *Union Pacific R. R. Co.*, 91 U. S. 79, the Court said:

"In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against the passage."

In *U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290-318, the Court said:

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of the statute passed by that body (citing authorities). The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it in resorting to the speeches of individual members thereof.

Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and upon occasions by resort to the history of the times when it was passed." (Cases cited, supra.)

And in the recent case of *Lapina* v. *Williams*, 132 U. S. 78-90, the Court said:

"Counsel for petitioner cites the debates in Congress as indicating that the act was not understood to refer to any others than immigrants. But the unreliability of such debates as a source from which to discover the meaning of the language employed in an act in Congress has been frequently pointed out (*U. S.* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290-318, and cases cited) and we are not disposed to go beyond the reports of the committee." (*Holy Trinity Church* v. *U. S.*, 143 U. S. 447-463; *Binns* v. *U. S.*, 194 U. S. 486-495; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1-19.)

We shall first (a) enumerate the statutes in *pari materia* which were enacted before and after the statutes under consideration; (b) we shall then refer to some of the measures proposed in Congress which were not enacted; and (c) we shall then present somewhat more fully some of the proceedings in Congress to which reference is made in the brief of counsel for the Government.

(a) Previous to 1869 no limitation was placed upon the sale of lands in any land grant made for internal improvement or for railroad construction, except in the single instance of the grant to the Union Pacific Railroad Company to which reference has already been made (ante p. 111).

In the years 1869, 1870 and 1871 there were instances in which restrictions were made upon grants other than those here under discussion. Those instances were as follow:

March 3, 1869. A grant to the State of Oregon to aid

in the construction of a wagon road from Coos Bay to Roseburg (15 Stat. 340).

April 10, 1869. A renewal of a grant to the State of Alabama to assist in the building of certain railroads in that State (16 Stat. 45-480).

April 10, 1869. An act extending the time for the construction of the Little Rock & Fort Smith Railroad Company under a grant to the States of Arkansas and Missouri (16 Stat. 46). This latter act was repealed March 8, 1879 (16 Stat. 76).

March 31, 1870. A grant to the Northern Pacific Railroad Company (16 Stat. 378).

March 31, 1871. A grant to the Texas Pacific Railroad Company (16 Stat. 573).

In the Coos Bay Wagon Grant, there was inserted the following proviso:

"Provided further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding $2.50 per acre."

In the grants to the State of Alabama and to the States of Arkansas and Missouri, the provision was substantially the same as that in the Oregon grant in the Act of April 10, 1869.

The grant to the Northern Pacific Railroad Company and to the Texas Pacific Railroad Company contained provisions similar to those in the grant to the Union Pacific Railroad Company, providing that the lands remaining unsold or undisposed of at the expiration of five years (in the case of the Union Pacific Company it was three years) should be subject to entry under the Pre-emption and Homestead Laws, the proceeds of the lands so sold to be paid to the railroad companies. (These provisions are cited ante p. 112).

(b) In some instances grants were made or extended without restriction as to the sale or disposition of the land.

May 20, 1868. The time for the completion of certain railroads under land grants to the States of Michigan and Wisconsin was extended without condition (15 Stat. 252).

March 3, 1869. The time for the extension of the construction of a military road from Eugene City under the grant to the State of Oregon was made without restriction (15 Stat. 338), although an attempt was made to amend the act extending the time by incorporating therein a provision similar to the proviso of the Act of 1869.

April 10, 1869. The time for the completion of the Portage Land & Lake Superior Ship Canal was extended without condition (16 Stat. 55).

May 6, 1870. The time for the completion of the military road from Fort Wilkins, Michigan, was extended without condition (16 Stat. 121).

March 3, 1871. The time for the completion of the railroad from Pere Marquette to Flint under a grant of land to the State of Michigan was extended without condition (16 Stat. 582).

The bill to revive the grant to the Denver Pacific Railroad Company, the debate upon which is referred to at length in the brief of counsel for the Government (pages 160-162) was not enacted. It is said in the brief of the Government that there were more than "ninety measures of this kind (land grants or extensions of land grants) that failed to pass during this period (1869-1871), and as to most of these the amendment (the Julian amendment) was offered and accepted." But these ninety bills introduced in whatever form they may have been, were not enacted into law, and it surely cannot be seriously contended that bills introduced into Congress containing amendments which were not adopted are to be considered

in the construction of the language of laws which were enacted so as to give them a meaning sought to be derived from such unenacted measures.

If we examine the statutes to which we have referred, what conclusion, if any, can fairly be derived from them as to any uniform policy of Congress that land grants should be made upon condition that no part of them should be sold except to actual settlers, and in quantities not exceeding one hundred and sixty acres and at a price not exceeding $2.50 an acre, and that any violation of such provision should work a forfeiture of the grant?

Observe that as to the three large grants—those to the Union Pacific Railroad, to the Northern Pacific Railroad and to the Texas Pacific Railroad—there was no restriction whatsoever upon the sale or disposition of the lands granted for a period of years, and after the expiration of that period, the lands were not forfeited. Counsel for the Government have attacked some of these measures as having created a great scandal and having incited charges of corruption, but this attempt to belittle the effect of the statutes as indicating the mind of Congress, is, we submit, entirely out of place. In Courts of the United States it will be presumed that Congress acted from honorable motives (*Milner* v. *Pensacola*, 17 Fed. Cas. 9,619; 2 Woods, 232).

In the several instances named, grants were extended without any restriction upon the mode of sale whatsoever, and in some of the instances referred to by counsel for the Government where an attempt at restriction was made in Congress, either the restriction was not adopted or the bills were not enacted.

In three instances a provision similar to that in the statutes in question was adopted.

Assuming, for the purpose of this argument, that the repetition of this provision in these cases tends to show a general Congressional policy that lands granted for public improvements should be sold so far as possible to actual settlers in limited amounts and at limited prices,

stated that the act as originally introduced simply extended the time for the filing of the assent, and in this form passed the senate. When it

"came before the House for consideration, Mr. Julian moved his amendment in the usual form, and it was agreed to by the House and concurred in by the Senate without objection and without explanation." (Brief for Government on Demurrer, p. 478.)

When the Act of 1870 was before the Senate, Senator Vickers moved an amendment to insert at the end of the fourth section the following:

"And that no mortgage that may be given by the said company shall operate to prevent the sale of any lands affected by this act to actual settlers, *and any violation of this condition shall work a forfeiture of all lands which shall remain unsold to actual settlers.*"

That was proposed as the amendment to the actual settler clause which is contained in the fourth section of the Act which reads as follows:

"Sec. 4. And be it further enacted that the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, sidetracks, woodyards, standing ground and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding 160 acres or a quarter section to any one settler, and at prices not exceeding $2.50 per acre."

It was in connection with this amendment that Senator Vickers made use of the language which is quoted in the brief of counsel for the Government as follows:

"As I understand the bill, the company has no right to sell the lands to anybody but an actual settler. If the lands are sold to actual settlers there is no forfeiture. If a portion of the land is sold to actual settlers, the portion unsold will be forfeited to the Government if that condition is violated."

This is quoted as evidence of the understanding of the

it does not explain how that policy was to be enforced. It does not reach to the inquiry here, which is, whether, if we assume that the Government intended to secure to actual settlers the right to acquire lands granted for public improvement, it intended to require the sale of all such lands whether susceptible of settlement or not to so-called actual settlers, and whether it intended that a sale of the lands so granted, even though *not susceptible of actual settlement,* to persons other than actual settlers in quantities and prices in excess of those prescribed, should work a forfeiture of the grant.

We submit with confidence that the history of the legislation referred to sheds no light whatsoever upon these inquiries.

As was held in a recent case in this Court "the policy of the Government passing legislation is often an uncertain thing, as to which varying opinions may be formed and may, as is the fact in this case, afford an unstable ground of statutory interpretation." (*United States* v. *First National Bank,* 234 U. S. 245-260). We are not here taking the position that the provisions of the Acts of 1869 and 1870 under discussion were inoperative; we are inquiring whether they are to be construed as conditions or as covenants—conditions enforcible by forfeiture, or covenants enforcible by equitable injunction and restraint —and we ask how does the legislation prior or subsequent to the enactment of these laws assist in aiding the Court to determine whether the provisions should be construed one way or the other.

We pass now to a consideration of what occurred in Congress at the time the acts in question, to-wit: The Act of April 10, 1869, and the Act of May 4, 1870, were pending.

The Act of April 10, 1869, was passed without debate. Counsel for the Government in their brief on demurrer

intention to make a breach of the provision of the statute a ground of forfeiture. Senator Cassidy inquired:

"What security has the Government that this important provision in the bill will be complied with? I respectfully ask the Senator from Oregon (Williams), who I know will understand my query proceeds from a desire to carry out what is the distinct feature of this bill—to state in what way that clause of the bill is to be enforced which provides for confining the sales by the company of this land to settlers. Suppose that they do not sell to settlers?"

To which Mr. Williams replied:

"I suppose this law has as much effect as any other law in reference to public lands. There is no law in reference to public lands which may not be violated and the remedy is in the hands of the Department."

Mr. Vickers then modified his amendment so as to read as follows:

"And no mortgage that may be given by the said company shall operate to prevent the sale of any lands affected by the Act to actual settlers; and any violation of this condition shall work a forfeiture of all the lands which may remain unsold."

Senator Williams then said:

"I hope that will not be adopted. The object seems, notwithstanding it is proposed to grant this land to the company, to make it as worthless as possible in the hands of the company so as to prevent the construction of the road. The object of these provisions of the bill are to expedite and facilitate the construction of the road and make these lands valuable for that purpose; but if these amendments are put in, doubts are thrown upon the effect of the different provisions of the Act, and when the company comes to seek to negotiate its bonds, various questions of construction will arise. I hope, as this section is wholly unobjectionable and is drawn in the interests of the public and against the company, these amendments will not prevail." (Congressional Globe, 1430, February 19, 1870).

Thereupon Senator Vickers' proposed amendment was rejected and the bill passed. This legislation, we think, *necessarily carries with it the conviction that it was not the intention of Congress that the lands should be forfeited by a failure to comply with the provisions of the fourth section of the act.* This is emphasized by the remarks which were made by Mr. Smith of Oregon when the bill was pending before the House of Representatives. He said:

"For twenty-five years, Mr. Speaker, this land has been open to settlement. First, under the Donation Law, and now under the Homestead Law, and yet no man has gone there to settle. No white man ever went there until they went to find this pass for a railroad to the sea. The red man never lived there. It is a forest, an Oregon forest, such as is found nowhere else perhaps in the world, and no settler will ever go there unless there is a railroad through the pass connecting Willamette Valley with the sea. In that event, some of these smaller valleys will be open to settlement. The lands are rich. The timber is abundant—it is valuable. But the land and the timber will remain in the condition they are now in for a hundred years to come if this railroad is not built." (Globe, 1870, p. 3809.)

In this connection we refer to the Coos Bay Wagon Grant. When that grant was before the House of Representatives, Mr. Julian moved an amendment in the language of the second proviso of the Act of 1869, but the proviso as finally adopted was in the language which we have quoted above. In the House, Mr. Mallory of Oregon said:

"A large portion of the land proposed to be granted is not worth anything. Most of it lies on this range of mountains and could not be sold for one cent an acre. Some of it may be valuable in the construction of the road." (Globe, 1869, p. 1820.)

(5) The cases of Nichols v. The Southern Oregon Co. and Warrior River C. & L. Co. v. Alabama State Land Co., decide nothing respecting the matters involved in this case, and shed no light upon it.

The first of these cases relates to the Coos Bay Wagon Road Grant. There was a provision in that grant, as we have seen, which provided that "the grant of land hereby made shall be sold to any one person only in quantities not greater than a quarter section, and at a price not exceeding $2.50 an acre." The defendant in the case referred to had succeeded to a large part of the land covered by the grant by conveyance from the Coos Bay Wagon Road Company. The complainant claimed the right to purchase 160 acres, and made a tender to the defendant of $400, demanded a deed and brought suit to compel the conveyance. The complainant occupied a position analogous to that of the intervenors in this case. The Court there held, as it was held in this case, that the plaintiff could not avail himself of the provision which was not intended to create a trust or a beneficial interest enforcible by any specific claimant. The issue in that case did not involve a determination that the provision in question was a condition subsequent. The language used by the learned Judge who rendered the decision in that case that "the plaintiff had no standing to complain that the State had violated the conditions of the grant," was in no sense an expression of opinion that the provision referred constituted a condition subsequent; much less does it constitute a precedent or authority for a construction of the proviso in the present case.

In the second case cited the grant was to the State of Alabama. That State appears to have vested the title in certain persons as trustees through whom it passed to the Alabama State Land Company, the defendant. The plaintiff brought ejectment. The act renewing the grant (April 10, 1868, 16 Stat. 145) enacted a proviso in language similar to that employed in the Act of 1869. The Court said: "The limitation quoted from the Act was *at most*

a condition subsequent a violation of which rendered the estate amenable to forfeiture." The Court decided that there had been no forfeiture. There was no adjudication that the clause cited was a condition subsequent.

POINT IV.

THE PROVISION OF THE ACT OF 1870 RESPECTING ACTUAL SETTLERS WAS NOT A CONDITION SUBSEQUENT.

The Act of 1870 was passed for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria and from a suitable point of junction near Forrest Grove to Yamhill River near McMinnville, and it granted to the Oregon Central Railroad Company "now engaged in constructing the said road," a right of way one hundred feet on each side of the road, and also each alternate section of the public land, not mineral, designated by odd numbers, reserving the Pre-emption and Homestead rights, and providing for indemnity lands. By the fourth section of the act it is provided as follows:

"That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to reserve for depots, etc., shall be sold by the company only to actual settlers, in quantities not exceeding 160 acres, or a quarter section, to any one settler, and at prices not exceeding $2.50 per acre."

The fifth section of the Act provided that the company should not, by a mortgage, appropriate and set apart all the net proceeds of the sales as a sinking fund to be invested in United States Bonds, or other safe and more productive securities, for the purchase from time to time and redemption at maturity of the first mortgages construction bonds of the company on the road, depots, stations, side tracks and wood yards, not exceeding $30,000 per mile, and no part of the principal or interest was to be

applied to any other use until the bonds had been purchased or redeemed. The District Court was given concurrent jurisdiction with the State Court to enforce the provisions of the section.

Section six provided that the company should file its assent within one year from the passage of the Act, and provided

"that the foregoing grant is *upon condition* that the said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years from the same date."

Attention has already been called to the fact that the only condition in this Act is contained in the sixth paragraph and relates to the completion of the road.

The authorities are numerous and uniform to the effect that a condition subsequent is not created by a mere direction as to the use which shall be made of lands conveyed, where no apt words of condition are employed and there is no provision for reverter. This conclusion rests upon the general principle that conditions are not favored and are to be strictly construed. This rule of construction is so well established that it seems to be unnecessary to do more than refer to general treatises where the authorities are collected (2 A. & E. Enc. 2nd Ed. Vol. 6, p, 502). The learned judge who wrote the opinion in the Court below, referring to this grant, says:

"That while the provision relating to actual settlers does not contain the same words indicative of a condition subsequent as the amendment to the East Side Grant, the provisions of Section 5 show very clearly the purpose of Congress."

He bases his conclusion that the fourth clause is a condition subsequent upon considerations drawn from the provisions of the fifth section. That section, he says, does not authorize a mortgage of the land grant, but simply of the right of way, depots, etc., and attempts to provide for

the application of the proceeds of the land grant for the redemption and retirement of the bonds secured by such mortgage; this indicates, he thinks, that the company was not to be at liberty to sell the lands on its own terms, and he proceeds to the conclusion that because the counsel for the railroad company urged that the settlers' clause "was a mere directive covenant," which he thinks to be unsound, and because it was the intention that the legislation should be effective, therefore, he reaches the conclusion that the purpose of Congress was to create a condition subsequent. An analysis of this opinion shows that the reasoning is simply this—that the clause must be construed to be a condition subsequent, because otherwise it could not be made effective. But, as we have shown above, if this clause be regarded, as we think it should be, as a restrictive covenant applicable only to agricultural lands, there can be no doubt of the power of the Government to enforce such a restriction, nor can there be any doubt that the remedies available therefor in a Court of Equity are entirely adequate. The argument upon which the learned judge based his conclusion is plainly untenable. Under ordinary rules of construction the absence of words of condition in the fourth section and the presence of such words in the sixth section, must be held as indicative of an intention on the part of Congress to distinguish in the character of the two provisions making a breach of the latter a ground for forfeiture but not of the former—*expressio unius, est exclusio alterius*—and since both provisions can be given legitimate effect while having regard to this distinction, there is no reason why it should not be observed.

POINT V.

THE PROVISIONS OF THE ACT OF 1869 AND OF THE ACT OF 1870 RESPECTING ACTUAL SETTLERS ARE RESTRICTIVE COVENANTS AND IF ENFORCIBLE AT ALL ARE ENFORCIBLE IN A COURT OF EQUITY AS TO LANDS SUSCEPTIBLE OF SETTLEMENT AND CULTIVATION ONLY.

The bill of complaint is framed with a double aspect. It seeks relief either by forfeiture, or by adjudication that the unsold lands are subject to sale to actual settlers upon the terms prescribed, and for the enforcement thereof by receivership or injunction. The former relief can be afforded only upon a finding that the words of the Act relating to actual settlers constitute a condition. The latter relief can be afforded only upon a finding that the provisions referred to constitute a covenant.

We proceed to a consideration of the question whether regarding the provisions of the Statutes of 1869 and 1870, relating to actual settlers as covenants, and assuming that a breach or threatened breach of these covenants has been shown by the evidence, a Court of Equity has jurisdiction to enjoin the breach.

The language employed in each of the Acts, with the exception of the word "provided" in the Act of 1869, is substantially similar. Counsel for the Government, referring to the proviso in the Act of 1869, say:

"The terms of this provision are prohibitive and not compulsory, that is, it prohibits sales except with the maximum limitations imposed. Each of the limitations is in the negative form—'actual settlers,' 'quantities not greater,' 'prices not exceeding.'" (Brief p. 154.)

In this characterization of the provision, we agree with the counsel for the Government. The stipulation is unquestionably negative. It would not be reasonable to suppose that the Government imposed an affirmative duty upon the railroad that it intended to compel it to find

actual settlers and to sell the lands to them. It did not intend that the railroad company should be placed under an affirmative obligation to people the country. It meant to leave that to natural processes, prohibiting the railroad from selling agricultural lands to persons other than actual settlers upon terms other than those prescribed.

Under such circumstances, the jurisdiction of a Court of Equity upon a breach or threatened breach of the covenant to enforce performance by enjoining a violation of the covenant, cannot be doubted.

Chicago & A. Ry. v. *N. Y. L. E. & W. R. Co.* 24 Fed. 516.
Lumley v. *Wagner,* 1 DeG. M. & G. 604.
Andrews v. *Kingsbury,* 212 Ill. 97.
Singer Sewing Machine Co. v. *Union Buttonhole Embroidery Co.* 22 Fed. Cas. 12,904.
Wolverhampton & Walsall Co. v. *London & N. W. R. Co. L. R.* 16 Eq. 433.
Doherty v. *Allman,* 3 App. Cas. 709.
Waskey v. *M'Naught,* 163 Fed. 929.
Newbold v. *Peabody Heights Co.* 3 L. R. A. 579 note.

The jurisdiction of Courts of Equity to restrain the violation of negative covenants is not dependent upon the form of the covenant or the phraseology employed, but wherever the covenant is of such a character that an injunction restraining its breach will enforce the right of the parties, then a Court of Equity has jurisdiction. Judge Lowell stated the underlying principle in *Singer Sewing Machine Co.* v. *Union Buttonhole Embroidery Co., supra,* as follows:

"I think the fair result of the later cases may be thus expressed. If the case is one in which the negative remedy of injunction will do substantial justice between the parties by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy

against it, the Court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."

The same doctrine was stated in *Wolverhampton & Walsall Co.* v. *London & N. W. R. Co., supra.* In that case, by agreement confirmed by Act of Parliament, the plaintiff agreed to construct a line of railway, and the defendant company agreed to work it and during the continuance of the agreement to develop and accommodate local and through traffic. The defendant company diverted a large part of its traffic over other lines. It was held that the Court could interfere by injunction.

Referring to the rule in *Lumley* v. *Wagner, supra,* respecting the enforcement by injunction of negative stipulations, Lord Selbourne said:

"I can only say that I should think it were the safer and better rule if it should eventually be adopted by this Court to look in all such cases to substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend upon a negative rather than on an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that form ought to be changed by the use of the negative rather than an affirmative."

Counsel for the Government seem to have thought that because the United States sought no pecuniary advantage to itself from the provisions referred to, and therefore could recover no damages for a breach, that the Government had no enforcible remedy. But the jurisdiction of a Court of Equity in such cases does not depend upon the showing of damage. Indeed, the very fact that the injury is of a public character and such that no damage

could be calculated, is an added reason for the intervention of equity.

Langdon v. *The Supreme Council,* 174 N. Y. 266.
Brown v. *King,* 101 Cal. 295.
Attorney Gen'l v. *Algonquin Club,* 153 Mass. 447.
22 Cyc. 859-860.
Elliott on Contracts, Sec. 2, 490-2, 528.

It follows that since, as we have seen, the provisions of the Acts of 1869 and 1870 respecting actual settlers are covenants prohibiting the railroad company from selling lands susceptible to actual settlement to persons other than settlers, if violations or threatened violations of these covenants have shown, a Court of Equity may grant equitable relief enjoining such violations.

POINT VI.

NO EVIDENCE WAS SUBMITTED OF A BREACH OF THE PROVISIONS OF THE ACT OF 1869 OR OF THE ACT OF 1870 REGARDING ACTUAL SETTLERS, WHETHER THEY BE REGARDED AS CONDITIONS OR COVENANTS, WHICH JUSTIFIES THE DECREE HEREIN OR REQUIRES ANY DECREE IN FAVOR OF THE COMPLAINANT.

The complaint alleges four breaches of these provisions.

First: The giving of a mortgage upon the lands granted in 1881 by the railroad company to secure the payment of bonds issued to provide for constructing the road.

Second: The giving of another mortgage in 1887 by the company for the same purpose covering the land grant.

Third: Sales of lands within the grant commencing in 1894 and continuing until 1903, which, it is alleged were in substantial violation of the terms of the proviso.

Fourth: The withdrawal from sale on January 1st, 1903, of all the lands, the subject of this suit, and the continuance of the refusal since to sell any of these lands.

While the Court below made no specific findings, the opinion pronounced upon the direction for a decree stated as the grounds of decision respecting a breach of the provisions, the facts stipulated by the parties, to-wit: that from about 1894 to 1903 the Oregon and California Railroad Company had sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person, and that prices exceeding $2.50 per acre, and in several instances between said dates, the said company sold lands of said grant in quantities from 1,000 to 20,000 acres to one purchaser, at prices ranging from $5 to $20 per acre, in one instance at $35 per acre, and in one instance at $40 per acre, and in one instance a sale of 45,000 acres at $7.50 an acre, was made by the company to a single purchaser. He recites also the fourth and sixth items of subdivision VIII of the stipulation as to the fact with regard to the sales of the lands to the effect that out of 5,306 sales, aggregating 820,000 acres, approximately 4,930 were quantities not exceeding 160 acres to one purchaser, aggregating about 296,000 acres, and approximately 376 for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. That substantially all of these 524,000 acres were sold to persons other than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of $2.50 an acre. Approximately 478,000 acres of the 524,000 were sold since 1897, and that approximately 370,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser.

The decision also recited the further stipulation that

"On or about January 1st, 1903, the Oregon and California Railroad Company withdrew from sale all the said unsold lands; and the said company at all times refused,

and still refuses, to approve or accept any of the applications to purchase referred to in the next preceding Item 3 of this Subdivision hereof, claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose."

The Court said that these stipulations showed that the Company had violated the provision, first, in selling large quantities of these lands in tracts exceeding 160 acres to a single purchaser, and for prices largely exceeding $2.50 per acre, and in withdrawing these lands from sale.

The Court did not hold that the execution of the mortgages in 1881 and 1887 were violations of the provisions of the grant. It is unnecessary, therefore, to deal with these alleged grounds of breach.

We confine ourselves to a consideration of the specifications of breach stated by the Court.

In the first place, we observe that the party who undertakes to work a forfeiture for a breach of condition subsequent, assumes the burden of establishing with strictness and certainty the facts entitling him to such forfeiture.

"A condition when relied upon to work a forfeiture is construed with great strictness. The grantor must stand on his legal rights and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture." *New York Indians* v. *United States,* 170 U. S. 25.

If we are right in the construction which we think should be placed upon the provisions respecting "actual settlers," and they are limited to lands capable of settlement and cultivation, not including timber lands, then it becomes necessary for the plaintiff to show that the Railroad Company in the case of each grant had sold lands which were capable of cultivation and settlement and were not timber lands, to persons who were not actual settlers, in amounts

in excess of 160 acres to one person, and at prices greater than $2.50 per acre. No such proof was submitted; no evidence was offered that any sale had at any time been made by the Railroad Company of lands included in either grant which were capable of settlement and cultivation to persons other than actual settlers, or in quantities greater than 160 acres to one purchaser, or at prices in excess of $2.50 per acre. There was no stipulation to that effect. On the contrary, the evidence, so far as it goes, tends to show that in the instances of land sold in considerable quantities and at prices in excess of $2.50 an acre, the lands were timber lands sold to timber operators and purchased because of the merchantable timber standing upon them; and this is corroborated by the evidence that only a meagre fraction of the unsold lands are susceptible of cultivation. The Government stands upon its strict rights. It calls for the most severe construction of the law; it proposes to take back the lands which it has granted, while it retains its right for all time to exact the large and valuable services which the Company undertook to render as compensation for the lands. It is only right that it should be held to the strict letter of the law; that it should be required to prove its case with every shade of nicety necessary to drive a Court of Equity into the enforcement of its demands.

We submit that it is impossible to find in the record the facts establishing a breach of the provisions of the Act of 1869 or of the Act of 1870 respecting actual settlers if they are construed as we insist they should be.

We come then to the next ground of breach propounded by the Court, namely, the withdrawal of the lands from sale. The defendant admits that about January 1st, 1903, the unsold lands were withdrawn from sale pending investigation of the Land Department transactions of the Oregon and California Railroad Company (Answer, Subdivision XII). The evidence is that the sale of lands was suspended because of the confusion into which the titles

of the lands had fallen. This grew out of several circumstances. One was that the donation lands had been granted before the country was surveyed; that there was still a large body of land unsurveyed and of which there were no field notes (Mr. Eberlein's testimony, Vol. V, pp. 2233-36). The work of examination was begun in the Spring of 1903 and completed in the Fall of 1904. Advertisements were then published saying that the lands would soon be opened for sale (2253-58), but the work was further delayed by the examination of the tax titles (2238-40). On April 18, 1906, the earthquake and fire at San Francisco destroyed all the records of the Land Department. The tract books, deed records, sales record and every book and scrap of paper, and the outstanding contracts were entirely destroyed. The Company was then without any means of transacting the land business.

In the Summer of 1906 notice was given that the Railroad Company would sell agricultural lands, but that as to timber lands they were not in a position to make sales. The reason for the exclusion of the timber lands from sale at that time was because they were then engaged in cruising (2258) and the evidence is that no application was made for lands except such as had timber (2259). The complaints which were made and which instigated the bringing of this suit were not that the Company had sold lands to persons other than actual settlers, or that they had sold lands in quantities in excess of 160 acres to one purchaser, or that they had sold lands for prices in excess of $2.50 an acre, but that they had withdrawn the timber lands from sale, and thus had prevented the acquisition of such lands by timber companies. This is the testimony of both Mr. Booth and Mr. Dixon, who are interestd in the Booth-Kelly Lumber Company.

There is no evidence of any intention to withdraw the lands permanently from sale. There is no reason to doubt the correctness of the reason given for the temporary withdrawal, and it is perfectly apparent that since the agitation over the terms of the grant in 1906, there was necessarily a

cessation of sales on account of the uncertainty of title, for no purchaser could be sure that his title would not be divested by a forfeiture.

The covenants, however, were simply prohibitive and not compulsory. The Railroad Company was obligated not to sell to persons other than actual settlers, but it was placed under no condition to sell to actual settlers, much less to sell to any particular person who claimed that he desired to become an actual settler. This is in accordance with the rule which we have frequently referred to, that words, which it is claimed constitute a condition, must be strictly construed; and it is in accordance with the construction placed by the Government upon the words of the proviso. Thus, in the brief presented on behalf of the Government it is said:

"In the case at bar, observance of the condition would consist in refraining from making sales to others than actual settlers, in quantities exceeding 160 acres to any one purchaser for a price exceeding $2.50 an acre. The thing prohibited was specifically stated in language which is not susceptible of any doubt or uncertainty." (Brief for Government on Demurrer, p. 226.)

The Decree should be reversed and a Decree should be directed dismissing the Bill of Complaint.

DOLPH, MALLORY, SIMON & GEARIN,
MILLER, KING, LANE & TRAFFORD,
Solicitors for Appellant Union Trust Company of New York.

JOHN C. SPOONER,
JOHN M. GEARIN,
Counsel.

Clerk's Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 679.

OREGON & CALIFORNIA RAILROAD COMPANY, A CORPORATION, ET AL., DEFENDANTS AND APPELLANTS; JOHN L. SNYDER ET AL., DEFENDANTS, CROSS-COMPLAINANTS AND APPELLANTS; WILLIAM F. SLAUGHTER ET AL., INTERVENERS AND APPELLANTS,

vs.

UNITED STATES OF AMERICA, APPELLEE.

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR JOHN L. SNYDER ET AL., DEFENDANTS, CROSS-COMPLAINANTS AND APPELLANTS.

A. W. LAFFERTY,
Solicitor for said Defendants, Cross-Complainants and Appellants.

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May it please your Honors:

There are four distinct angles in this case, and only four.

Railroad Company's Position.

First, counsel for the Oregon & California Railroad Company, principal defendant, and its incidental defendants, and counsel for the Union Trust Company, argue with much

ly

ability and apparent seriousness that all bills of complaint should be dismissed for lack of equity, and that this honorable court should, by its final decree soon to be entered, vest a complete and perfect title in the railroad company.

Government's Position.

Second, counsel for the Government of the United States, with equal ability and seriousness, argue that this honorable court should enter a final decree for an absolute forfeiture of the 2,300,000 acres of land here involved.

Position of Cross-Complainants.

Third, John L. Snyder and the 63 other actual settlers on the land, herein designated as defendants, cross-complainants and appellants, and who are admitted in the record to have been *bona fide* settlers on the land at the time the Government filed its bill, and who, for that reason, were necessarily made defendants, believe that by no just decision can they be deprived of their particular claims, and they ask for protection, in whatever form of decree may be entered, and they further ask that the whole grant be declared by this honorable court to be one in trust, and that receivers, or trustees, be appointed, whose duty it shall be to formulate, with the approval of the district court, suitable rules and regulations for the sale of all of the lands here involved, in accordance with the acts of Congress making the grant. In other words, the suits of Snyder and the 63 other actual settlers, herein designated as defendants, cross-complainants and appellants, were brought in behalf of themselves, and all others similarly situated, who may have been actually settled upon the land or who may hereafter, with leave of court, actually settle thereon in good faith, with the intention of making permanent homes. There were 65 of these actual settlers, who made settlement and filed suits before the Government filed

its bill, and who were made defendants in the Government's bill, but the last-named, Roy W. Minkler, has, during the progress of this litigation, been given a deed by the railroad and his suit has been dismissed. In this litigation I now represent John L. Snyder, and all of the 63 defendants whose names follow that of Snyder, in the Government's bill of complaint, except Roy W. Minkler, whose case, as stated, has been satisfactorily settled.

Position of Interveners.

Fourth, counsel for William F. Slaughter *et al.*, interveners, ask this honorable court to hold that actual settlement upon the lands involved in the grant, by a citizen, is not necessary in order to acquire a right to purchase a quarter section of the same, but that the mere presentation of a written application to purchase by a non-settler, together with a tender of the maximum amount the railroad was entitled to receive under the grant, with, at most, an implied promise on the part of the applicant that he would, after receiving a deed, actually settle upon the land, would be sufficient to entitle the applicant to a deed from the railroad company. With this position of the interveners I most emphatically disagree. From the beginning of this litigation I have contended that the thousands of non-settlers who have merely filed applications to purchase, without even having seen the claims applied for, were simply swindled out of the so-called "location fees," and that such non-settlers, herein designated as "interveners," have no standing whatever in this court.

From the foregoing it will be seen that there is nothing in common between the 64 actual settlers on the land, designated as defendants, cross-complainants and appellants, in this record, which actual settlers I represent, and the seven or eight thousand interveners who do not claim that they are now or have ever been actual settlers on the land.

B. W. Nunnally Complaint Typifies Interveners' Claim.

It is stipulated in the record that the complaint of B. W. Nunnally, the material parts of which are found at page 622 of the record, shall be considered as the complaint of each intervener for the purposes of this appeal, except as to name and description of land. It will be observed from the Nunnally complaint that he does not even allege actual settlement or an offer to actually settle upon the land. The case of each of the seven or eight thousand interveners, resting upon the Nunnally complaint as a foundation, must all fail. This honorable court will doubtless be able, at the outstart of its consideration, to reduce the issues involved to a triangle between the railroad company, the Government, and the 64 actual settlers, the latter representing themselves and all others similarly situated, or who may hereafter become actual, *bona fide* settlers.

Bill of John L. Snyder et al. Typifies Claim of Cross-Complainants.

It is stipulated in the record that the cross-complaint of John L. Snyder and others, which is set out at pages 642 to 676 of the record, shall, for the purposes of this appeal, be considered as the cross-complaint of each of the 64 defendants, cross-complainants and appellants, except as to name and description of the land settled upon. An examination of this cross-complaint will show that each of said defendants, cross-complainants and appellants, in good faith, actually settled upon a quarter section of the land involved, and with the *bona fide* purpose and intention of making the same a permanent home, and that long prior to the institution of any suit, or the assertion of any claim of forfeiture, or other claim, by the Government, each of these *bona fide* settlers had, in writing, advised the Oregon & California Railroad Company of the fact that they had made such *bona fide*

settlements, and were actually living on the land. The cross-complaint further shows that each of these 64 *bona fide* settlers, long prior to the institution of any suit, or the assertion of any claim of forfeiture or other claim by the Government, and under the circumstances already detailed, made their several tenders to the railroad company of $2.50 per acre for the claims by them settled upon, and that they went further and offered to pay in addition all taxes and disbursements of every kind and character which the railroad company had paid out on account of said lands by them severally settled upon, and that they thereupon demanded that the railroad company accept the cash so tendered and execute deeds, which tenders and demands were refused and denied by the railroad company. The cross-complaint further shows that Snyder and the 63 other actual settlers thereupon filed their separate suits against the railroad company, making the Union Trust Company a party defendant, and asked that the grant be held to be one in trust for the benefit of themselves and all others who might then be or who might thereafter become actual *bona fide* settlers on the land for the purpose of making homes thereon, and praying for a decree for the appointment of receivers or trustees to execute the trust.

Government's Bill Filed One Year After That of Snyder et al.

The United States did not file its bill until September 4, 1908. By that bill the Government recognized, as it was forced to do, that the 64 actual settlers who had previously gone on the land and filed suits were each claimants of an interest in the land. Therefore, the Government made each of these 64 settlers defendants. The individual suit of Snyder had been filed September 16, 1907, lacking but a few days of being one year in advance of the date the Government filed its bill asking for a decree of forfeiture, and during all of that time, as the undisputed record discloses,

Snyder had been an actual, *bona fide* settler on the land, claiming under the act of Congress of May 4, 1870, and each of the other 63 actual settlers who are defendants, cross-complainants and appellants in this record occupied a position identical with that of Snyder, except that their suits were filed ranging from a few days to a few months after that of Snyder's, but all being several months in advance of the Government's suit.

Several months after the United States practically intervened in the litigation started by these actual settlers, and filed the bill of complaint making the settlers defendants, the court ordered that the settlers, for the purposes of convenience to the court, consolidate their individual complaints into one bill, to be thereafter designated as a "cross-complaint," and, in obedience to the court's order, I filed such cross-complaint January 15, 1909.

Railroad Company's Demurrer to Complaint of Snyder et al. Sustained After Government's Bill was Filed.

The railroad company demurred to the cross-complaint of the actual settlers, to the bill of complaint of the United States, and to the bill of intervention of B. W. Nunnally, which, as stated, it is stipulated shall be considered upon this appeal as the complaint of each of the seven or eight thousand interveners.

On April 24, 1911, the district court sustained the demurrer to the cross-complaint of the actual settlers, but overruled the same as to the Government's bill. It is hardly necessary to state that the demurrer was sustained as to Nunnally's bill of intervention.

Snyder et al. Had No Voice in Taking of Testimony on Merits.

From the day the demurrer was sustained to the cross-complaint of the actual settlers, which was April 24, 1911, till the day of the rendition of the decree of forfeiture by the district court, which was July 1, 1913, the actual settlers were not permitted to have any voice in the proceedings. They were not permitted to appeal in advance of the railroad's appeal, although they made efforts to do so.

During the two years and more that intervened between April 24, 1911, when the demurrer to the cross-complaint was sustained, and the rendition of the decree of forfeiture, July 1, 1913, the railroad company made answer to the Government's bill of complaint, and volumes of irrelevant testimony and miscellaneous exhibits were introduced before an examiner. Only two of the actual settlers on the land were called as witnesses.

While the actual settlers had no voice in the taking of this mass of irrelevant testimony, and while their theory of the case was, therefore, not protected, still the court will find no escape from the conclusion from the evidence adduced by the railroad company itself, and the photographs taken by the railroad, that the lands involved are of the most fertile character and suitable for any form of agriculture, horticulture, or grazing, when properly cleared for those purposes.

The court should not overlook the fact that the photographs of the houses of the actual settlers on the land were offered in evidence without any opportunity upon the part of the settlers to explain the circumstances under which they were taken, or to offer other photographs taken after more improvements had been made.

By Demurring Railroad Company Admits Allegations in Complaint of Snyder et al.

As is admitted by the record in this case, John L. Snyder and the 63 other actual settlers, designated herein as defendants, cross-complainants, and appellants, settled upon their claims in 1907, in good faith, and they have lived there, and cultivated and improved the land, from that time until the present. It will be noticed that the photographs introduced by the railroad company, at a time when the settlers were not present and had no right to be present, were taken immediately after the settlements were made eight years ago. The court will naturally presume that these settlers have made many additional improvements in the past eight years, and if the decree of the court below, sustaining the demurrer to their complaints, be reversed, and these settlers be permitted to introduce testimony, they will show a record as to cultivation and improvements vastly more favorable than the one before the court. But let me repeat, that even upon the record now before the court, there is no escape from the conclusion that the lands involved in this litigation are comparatively level, extremely fertile, and are not only capable of being settled upon in good faith for the purpose of making homes, but their fertility is such and the amount of rainfall in the vicinity where they are located is so great and the climate so mild that even 40 acres would support any ordinary family, much less 160 acres, the maximum amount allowed to any one settler under the law.

Character of Land in Grant.

It is well known to every one that Oregon is divided by the Cascade Mountain range, running north and south, quite a distance west of the center line of the State, and that the State has two distinct climates. In eastern Oregon, or that

portion east of the Cascade Mountains, the lands are high and dry, cold in winter and hot in summer. In western Oregon, however, or west of the Cascades, the climate is very mild both winter and summer, being quite similar to that of California, and the rainfall is very great. Western Oregon has been very aptly referred to as "The Switzerland of America."

Every expert timber thief in Oregon has been called by the railroad company to testify that these lands, in this paradise of America, are unfit for settlement. Among these witnesses is one F. A. Kribs, whom the records of the Federal court in the Ninth Circuit show has been charged innumerable times with defrauding the Government in the matter of unlawfully acquiring timber lands, and who turned State's evidence and furnished the testimony, of doubtful character, which convicted the late Senator John H. Mitchell.

Government Witnesses All Agree that Land Is Suitable for Settlement; Timber Speculators and Railroad Company Employees Testify to Contrary, But Are Contradicted by Photographs.

The officers and agents of the Booth-Kelly Lumber Company were called, men who have been made millionaires by the unlawful purchase of 66,000 acres of the lands embraced in this grant, and who would now further increase their profits upon those purchases by testifying that the remaining lands of the grant, which are involved in this suit, are unfit for settlement. By so testifying they expect either that the Government will win and secure a decree of forfeiture, and put the lands into a forest reserve, or that the railroad will be allowed to keep the land, and that in either case the lands will be put out of competition with the private lumber companies of the State. Not satisfied with these witnesses, the railroad called its own employees and agents to testify that these lands were unfit for settlement. Among these

were Homer D. Angell, A. W. Rees, B. A. McAllister, Charles W. Eberlein, William Singer, J. B. Eddy, Ben Irwin, Fred H. McClure, B. A. Gifford, and F. A. Elliott. It is true that Elliott appears to be temporarily holding a political appointment as "State Forester" in Oregon, but there can be little doubt from the fact that he has worked for 17 years for the railroad company that he will go back into its employ at the end of his term. It further appears that Elliot gave a statement in 1907 to Special Assistant Attorney General B. D. Townsend, which is in direct conflict with the testimony he gave before the examiner.

The witnesses called by the Government all testified that the larger portion of the lands involved in this suit are suitable for agricultural or horticultural purposes, and their estimates as to the proportion of the lands that could be so utilized range from 66⅔ to 100 per cent.

Court Below Renders Opinion Based on Agreed Facts.

At the conclusion of the taking of the testimony and the offering of exhibits before the examiner the case was submitted to the district judge without argument. That judge decided the case the following morning, making no findings of fact whatever, but referring to the agreed statement of facts, which is in the record, as furnishing sufficient proof that the railroad company has flagrantly violated the law from the start.

The oral opinion of the court below, upon the merits of the case, is certainly one of the most interesting documents in the record, but for some unexplainable reason it was omitted from the transcript of the record on appeal. However, for some equally unexplainable reason it is set out in full in the railroad company's "Brief of Facts," recently filed, and begins on page 14 thereof. This opinion shows that the district judge decided the case over night, adopting literally the forfeiture theory which had been advanced by

Special Assistant Attorney General B. D. Townsend. The district judge stated that he had not read any part of the thousands of pages of testimony and exhibits, save and except portions of the stipulation of facts, which stipulation will be found in volume 4 of the record, at page 1552.

The stenographic report of the opinion of the district judge, as copied at page 14 of the railroad company's Brief of Facts, in part reads:

> "WOLVERTON, *District Judge:*
>
> "Case No. 3340, the case of the United States against the Oregon and California Railroad Company and others, was submitted on last evening, without argument, to the court, upon the merits of the cause, for its determination.
>
> "The vital and paramount question in the case is with reference to the condition that was imposed by the Government at the time the grant of these lands was made to the Oregon Central Railroad Company, the predecessor of the defendant Oregon and California Railroad Company. That condition is as follows:
>
> " 'Provided, further, that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre.' "

The learned judge then referred briefly to the fact that a great deal of testimony had been taken, running up into thousands of pages, and that a very great number of exhibits in various forms would have to be examined, should the court go into the entire testimony, but stating that this would be unnecessary, as the stipulation of facts referred to furnished a proper basis for the court's final decree. I think the lower court is to be congratulated upon its good judgment in refusing to have its time taken up with the laborious consideration of the stuffed record in this case.

The opinion of the lower court concludes as follows:

"Now, so far as it concerns the Union Trust Company and the mortgage that was given upon this property, it seems to the court that the grant to the railroad company carries upon its face notice of what it is. The grant is not only a grant—it is a law, and people dealing with the grant must take notice of the terms thereof, and of the law itself; and when the Union Trust Company took a mortgage upon this property, it took the mortgage with full notice of what the law required, and it must be considered to hold subordinate to any interest that the Government might acquire in the property by reason of an infraction of the law which would entail a forfeiture of the grant.

"I think that will dispose of the case. The court will direct that a decree be entered forfeiting these lands to the United States Government, and adjudging that the Government recover its costs and disbursements."

Brief Analysis of Record Shows Same to Be "Padded."

It will require but a casual examination of the 18 volumes of the record in this case to appreciate how empty the record really is.

Volumes 1, 2, 3, and 4 contain nothing except the bill of complaint and other pleadings in the case, a description by metes and bounds of each legal subdivision of the lands involved, a stipulation as to certain facts, and numerous immaterial deeds and conveyances.

The oral testimony begins in the latter part of volume 4, at page 732, and runs to the end of volume 8.

It will be unnecessary to read in full the first four volumes, except the material portions of the pleadings. It will be unnecessary to read at all volumes 4 to 8, inclusive, containing the oral testimony, because in a sentenec, as the Circuit Court of Appeals certified, the witnesses for the railroad testified that the lands, for the most part, were unfit for settlement, and the witnesses for the Government testified to the

exact contrary. Therefore this court will have to use its own common sense, and by resort to the photographs introduced by the railroad company itself, occupying the whole of volume 18, it will be seen that the lands are comparatively level, very fertile, and in the highest degree adapted to homes. Besides, the court's common knowledge of the geography and climate of the western portion of the United States will turn the scales in favor of the truthfulness of the testimony of the Government's witnesses that these lands are suitable for settlement.

Volumes 9 to 16, inclusive, contain nothing of importance, being exhibits of directors' meetings and other immaterial exhibits, offered by the Government and the railroad before the examiner. The orders allowing the appeal appear at the end of volume 16.

The foregoing practically completes the printed record. Volume 17 is only an index to the previous volumes, while volume 18 is made up entirely of photo-engravings from the photographs of the improvements of the defendants, cross-complainants, and appellants.

Allow me to repeat that the mass of irrelevant testimony found in the record was all offered at a time when the writer of this brief was not present, and when he had no right to be present, because his clients, the actual settlers, herein designated as defendants, cross-complainants, and appellants, had been, by the order sustaining the demurrer to their cross-complaint, excluded from any participation in the trial of this case upon the merits in the court below.

Slurring References to Cross-Complainants.

An examination of the record will disclose numerous slurring references by counsel for the railroad company and counsel for the Union Trust Company to the "Lafferty settlers." The able counsel for the Union Trust Company has referred in like manner to the testimony of David MacLaf-

ferty, who, with his aged wife, has lived upon and cultivated one of these claims for the past eight years, and who took seriously, as did all the other settlers in the case and all the people of Oregon, the acts of Congress of April 10, 1869, and May 4, 1870. David MacLafferty is in no way related to the writer of this brief, but came to me a stranger eight years ago to represent him in this litigation.

Much immaterial and manifestly incompetent matter was also offered before the examiner in the form of affidavits, press dispatches, and letters referring to the crooked locaters who filed the applications for some of the interveners. This matter was only offered by the railroad company for the purpose of prejudicing the cases of the actual settlers, who have acted in good faith from the start, and who have, with greater vehemence than has the railroad company, denounced the fake locaters here referred to. In an interview given out by myself as early as September 20, 1907, and printed in the *Evening Telegram*, of Portland, Oregon, I called upon the Department of Justice to prosecute the fake locaters who were fleecing actual applicants throughout the United States out of from $25 to $50 each for the idle service of presenting an application to purchase 160 acres of land here involved. I there pointed out that the law meant just what it said, to wit, that the lands should be sold to actual settlers only, and that this did not mean to "actual applicants" who were non-settlers. I pointed out that if the railroad company would accept the application of a non-settler and give him a deed it would be violating the law. I pointed out that when a non-settler applied to the railroad company for a deed he was merely asking the railroad company to violate the law, and that the applicant could not predicate any equity or preference right upon such unlawful request.

In the record also appears, as an exhibit, the form of an absurd application, alleged to have been used by some person who is a stranger to this record. The applications of the 64 settlers whom I represent were not allowed to be offered in

evidence, but they each recite that the settler was at the time living upon the land, in a house, and making the same his home, cultivating and improving the same, with the *bona fide* purpose and intention of residing permanently thereon for the future. In other words, in each of the cases represented by myself, the act of actual settlement in good faith preceded the application to purchase and the tender of the purchase price. Such application and tender of payment of the purchase price and all taxes and other disbursements being thereupon made by the settlers and being refused by the railroad company, the 64 settlers whom I represent, herein designated as defendants, cross-complainants and appellants, filed their separate suits, all of which proceedings took place nearly one year before the Government saw fit to intervene in the litigation, and file its bill asking for a forfeiture.

The interveners, on the other hand, made no settlements, either before or after tendering their applications, nor did they then or since offer to settle, nor did they file any proceedings until long after the actual settlers had blazed the way and taken the burden of starting the litigation, nor until after the Government had filed its bill of complaint. Then it was that the thousands of interveners, who manifestly have no rights in this case, appeared and attached themselves to the litigation by a petition in intervention.

Assignment of Errors of Snyder et al.

The assignment of errors of John L. Snyder and the other actual settlers, found in volume 15 of the record, beginning at page 8199, alleges error of the court in sustaining the demurrers to their cross-complaint, and in holding the grant to have been one of an estate upon condition, instead of an estate in trust for the benefit of all citizens of the United States competent to contract, who might, in good faith, settle upon any vacant quarter section, or less legal subdivision, of the lands granted.

We here urge that the decree of the court below be
versed, and that relief be granted herein as follows:

First. That each of the 64 defendants, cross-complainan
and appellants be allowed to submit testimony to sh
whether or not he is a qualified actual settler, in good fai
upon the land, and making the same his home, and that
the issues upon those questions be found in favor of t
cross-complainants that title be decreed to them, upon t
payment into court, for the railroad company, of $2.50 p
acre for the lands severally claimed, together with all ta
and disbursements which the railroad company may ha
paid out heretofore on account of said tracts.

Second. We ask this court, by its opinion and decree,
declare and announce that all of the lands involved in th
litigation constitute a trust estate; that such trust estate
now in the custody of the court; that no person whomsoev
shall be permitted hereafter to settle upon any part of t
land involved except in accordance with the decree of th
court and by permission of the court below, and directi
the court below, for the purposes of administering the tru
to appoint three competent receivers to take charge of t
grant and hold and administer the same under the ord
of the court. The decree should direct that the receiv
formulate and promulgate, with the approval of the cou
suitable rules and regulations for the disposition of all
the unsold lands here involved, and it should be requir
by the decree of this court that all of said lands not actua
settled upon in good faith prior to the date of its decree,
prior to any earlier date that might be fixed by this cou
shall be sold by such receivers through a system permitti
all qualified persons so desiring to draw by lot for preferen
rights to settle upon said lands, and it should be direct
that all of such unsold lands not already settled upon und
such circumstances as to entitle existing settlers to pref
ence rights shall be sold in tracts of 40 acres, which is t
smallest legal subdivision known to the survey system of t

United States, or in lots approximating 40 acres, as near as may be, where the land surveyed has been designated as a lot rather than as a quarter of a section.

The Defenses of Laches and Statutes of Limitation.

It is only necessary to mention the defenses of laches, statutes of limitation and payment of taxes. These lands were nearly all patented to the railroad after the year 1895, and during nearly half of that period they have been involved in this litigation, so there has not been any delay in beginning the litigation. Moreover, statutes of limitation do not run in the case of an express trust. Furthermore, it was intended by Congress that the railroad company should hold these lands for settlers, and until such time as settlers desired to go upon them, regardless of how long that might be after the making of the grant. There can be no merit in the contention that this is a suit to set aside a patent, brought more than six years after the issuance of the patent. The railroad company could not sell to settlers until after it received patents, and this is a suit to enforce the title secured under the patent and not to set the patent aside.

The Defense of Payment of Taxes.

As to the payment of taxes, it is due to the railroad company's ulterior purpose and desire that it has paid any taxes at all. It is well settled that when lands are granted by the Government to a State or to a private corporation in trust, to be disposed of to others, under any governmental policy, and at a price usually charged for public lands, that the holder of the trust estate is not to pay any taxes at all. Besides, at the time the suits were brought by these actual settlers the railroad company had paid in taxes less than 25 cents per acre, all told, upon the lands involved in this liti-

gation. Immediately after the actual settlers started this litigation the railroad company became very anxious to pay taxes, and for the manifest purpose of building up a defense in this case. In volume 14 of the record, at page 7251, is set out a table of taxes paid by the railroad company, showing that up to 1911 the total taxes paid upon its lands in Jackson County, Oregon, amounted to only 75 cents per acre, and in Douglass County to only 93 cents per acre. This is true, although upon some of its lands the railroad company succeeded in being allowed the privilege of paying 50 cents an acre per year during the years immediately following the beginning of this litigation by these actual settlers in 1907. Again the payment of taxes can be no defense, since the settlers on the land, acting for themselves and all others similarly situated, have included a prayer in their complaint that they be permitted to pay to the railroad company, in addition to the $2.50 per acre, all taxes or other disbursements of every kind and character, which it has paid out on account of said lands.

The Defense of the Union Trust Company.

So far as the defense of the Union Trust Company is concerned, we believe that the court below was correct in holding that when the Union Trust Company took a mortgage upon the property, it took with full notice of what the law required. But we do not agree with the court below that the right of the Union Trust Company to have the proceeds of the sale of these lands applied to its security can equitably be cut off by a forfeiture decree. It is true that the mortgage to the Union Trust Company to secure the bondholders in the sum of $20,000,000 covers other property in addition to this land grant, and such other property, standing alone, is at this time undoubtedly worth a great deal more than the $17,000,000 of bonds remaining unpaid. But these bonds do not fall due until 1927, and who can say at this time that

such other security will be sufficient at that time to pay the $17,000,000 of bonds remaining unpaid? The holders of these $17,000,000 of bonds are undoubtedly innocent encumbrancers, and they bought the bonds under a contract represented by the mortgage, which provided that when any of these lands should be sold the money should go into a fund to help pay off these bonds. Of course, the bondholders took with knowledge that the land could be sold only to actual settlers at $2.50 an acre, and that is very evidently the reason why the bondholders required additional security. But the $6,000,000, in round numbers, that the sale of these lands to settlers will turn into the fund to apply on the payment of these bonds constitutes no mean proportion of the security which the bondholders have relied upon, and it should not be cut off and taken from them without any fault of theirs, when full justice can be done in this case to the Government, and to all parties concerned, by enforcing the law through a receivership.

Absurdity of "Condition Subsequent" Theory.

The "condition subsequent" theory adopted at the outstart of this litigation by Special Assistant Attorney General B. D. Townsend, and apparently followed up with a lesser degree of enthusiasm by his successors in the case, will, we candidly submit to this honorable court, appear as utterly absurd when tested by the most elementary principles of real estate law and common logic.

In the first place, a "condition subsequent" creates what is known as an estate upon condition. The holder of the estate upon condition may do as he likes with the land, so long as he refrains from violating the condition. He may lease it for 99 years. He may cut all of the timber off of it if any be growing upon it. He is obligated to pay taxes upon the land, the same as a fee-simple owner. The condition subsequent in his grant is nothing more nor less than

something he has agreed to do or forbear as one of the considerations of his right to hold and enjoy the estate.

But in the case at bar, if the provision requiring the railroad company to sell the lands to settlers be called a "condition subsequent," then it follows that the very minute the railroad company got through complying with the condition subsequent it would have no estate left to hold or enjoy. In other words, the mere observance of the condition subsequent would require the grantee to part with all title and all possession of the estate, and end the estate for all time to come.

If the foregoing be a condition subsequent, then, indeed, something new under the sun has been discovered by Government counsel.

In the court below Mr. Townsend jauntily met the force of the foregoing logic by shifting to the equally absurd position that the grant did not require the railroad company to sell the lands at all, but merely prohibited the company from selling to others than settlers. The learned counsel for the Union Trust Company, Senator Spooner, has not failed to see the great advantage the last-named contention gives to the railroad, and he has reserved for page 214, the last page of his brief, even the last paragraph thereof, a quotation embodying the "admission" of Government counsel, as set out at page 226 of Mr. Townsend's brief upon the demurrer in the court below, which extract, as it appears in Mr. Spooner's brief in this court, is as follows:

> "In the case at bar observance of the condition would consist in refraining from making sales to others than actual settlers, in quantities exceeding 160 acres to any one purchaser for a price exceeding $2.50 an acre. The thing prohibited was specifically stated in language which is not susceptible of any doubt or uncertainty" (Townsend's Brief on Demurrer, p. 226).

Of course, Senator Spooner would seize upon such an absurd admission, for the purpose of precipitating the Government, and the actual settlers, into a hole from which it would be impossible for them to extricate themselves!

"Actual Settler" Clause Affirmative; Not Negative.

But the truth is that the provision in the act of April 10, 1869, and the provision in section 4 of the act of May 4, 1870, are both affirmative. Those laws do not merely "prohibit" the railroad company from selling otherwise, which construction would permit the railroad to hold this land as a monopoly until the last setting of the sun, if it had never sold an acre up to this day, but said acts require that the lands "shall be sold," and the word "only" limits the company to actual settlers in making such sales. No other construction would be in consonance with reason or common sense. The construction adopted by Mr. Townsend, which he found necessary to sustain his condition-subsequent theory, and to destroy the trust theory, at the same time destroys his case. For if the "actual settler" provision in the grant is negative the courts were from the beginning, and still are, powerless to grant any relief for inaction. In adopting such an absurd construction of the law, Mr. Townsend hoisted himself by his own petard. The court below was lead into error by adopting the theory of Mr. Townsend, and decreed a forfeiture of these lands to the United States, upon the supposition that the grant was one of an estate upon condition and not a grant in trust.

Would any reasonable person allow himself to indulge seriously in the belief that Congress was so idiotic as to adopt language which, while manifestly intended to prevent a land monopoly, would actually create the biggest land monopoly in the world?

If the railroad company was prohibited from selling these lands, except in a certain manner, but was not required to

sell them at all, then the effect of the language used by Congress was well calculated to create the greatest land monopoly that ever existed, for it is to be presumed that the railroad company would retain the lands itself, sell the timber therefrom, and then lease the lands out to tenants, instead of selling at $2.50 per acre.

Again, would any reasonable man allow himself to indulge in the belief that Congress intended to create an estate upon condition, which, as heretofore observed, would have placed upon the company the obligation to pay taxes as a fee-simple owner, which taxes might easily have amounted to $2.50 per acre, before any settler applied, and then, by the same law, require the company to sell to actual settlers for $2.50 per acre?

Railroad Company Was Made Trustee.

All of these considerations go to show beyond the peradventure of a doubt that Congress intended only to make the railroad company a trustee, or sales agent, for the Government, and that it was never intended or contemplated that the railroad company should pay any taxes at all upon these lands, and had the railroad company proved to be an honest trustee it would have applied to a Federal court of equity for relief from any demands that may have been made upon it for the payment of taxes, and had the railroad company been an honest trustee it would have applied to a Federal court of equity for authority to make its deed to 66,000 acres to the Booth-Kelley Lumber Company, and it would have applied to a Federal court of equity for authority to make its deed to 47,000 acres to the Hammond-Winton Lumber Company. The railroad company now claims that the half-million acres, and more, that it has already sold in tracts of more than 160 acres, and for prices as great as $20 per acre, were unfit for settlement purposes, and that for such reason it found itself unable to carry out the terms of its sacred

agreement with the United States. Why did not the railroad company then apply to a Federal court of equity of the United States for a construction of the trust created by the acts of April 10, 1869, and May 4, 1870? The answer is that the railroad company had repudiated the trust and was deliberately refusing to carry it out.

If the railroad company attempts to answer the foregoing question by the statement that the reason it did not so apply to a Federal court of equity for advice is that it has never considered the grant to be one in trust, but has considered it to be one of an estate upon condition, then if it found itself unable to comply with the condition that it believed to have been imposed by Congress, and agreed to by it, why did it not apply to Congress for remedial legislation, allowing it to sell all lands incapable of actual settlement to others than actual settlers, and for such prices as it might be able to secure upon the open market? The answer clearly is that the railroad company realized that these lands were capable of actual settlement, and knew that Congress would refuse any such legislation, if requested, and for that reason the railroad sought, by gum-shoe methods, the smothering of the press, and the control of public officials in Oregon, to criminally evade this law, and it succeeded up until September 16, 1907, when John L. Snyder instituted the present litigation.

Complaint of Snyder et al. Includes Settlers in Both East and West Side Grants.

About half of the 64 actual settlers, herein designated as defendants, cross-complainants and appellants, are on the west-side grant, which was made by the act of May 4, 1870, and about half are on the east-side grant, which the company received under and by virtue of the act of April 10, 1869.

Brief of Interveners Answered.

The briefs of the railroad company, the Union Trust Company, and the interveners have been carefully read by the writer of this brief. The brief for the interveners contains seven points, admirably indexed on the front page, and with all of which we heartily agree, except point 7, which holds that the interveners have shown that they offered to settle on the lands, and that the court below committed error in refusing to protect their alleged rights. Reference to the Nunnally complaint, which it is stipulated shall be considered as the complaint of each intervener, shows that neither actual settlement by the interveners nor offer to actually settle is alleged.

Brief of the Union Trust Company Answered.

The brief for the Union Trust Company is cleverly prepared, full of specious argument, and is divided into six points.

With point No. 1 in the brief for the Union Trust Company, and each of the seven subdivisions of that point, we emphatically disagree. The substance of the argument in said point number 1 is that Congress never intended that the actual-settler clauses in this grant should apply to timbered lands, and in support of that contention Mr. Spooner endeavors to show that the homestead and pre-emption laws and other settlement laws, as construed by the courts and the Land Department, did not comprehend timbered lands. The exact opposite is the truth. Thousands of homesteads and pre-emptions in Kentucky, Illinois, Missouri, Indiana, Ohio, Michigan, and other central States were made upon lands completely covered with timber. I admit that not a great many people were allowed to take homesteads on timbered lands in Wisconsin, the original home of the distinguished counsel for the Union Trust Company, because in that State

the railroads, through grants, succeeded in getting, as a gratuity, nearly all of the lands that contained valuable timber. A map recently issued by the Interior Department, showing the millions of acres of railroad grant lands in the United States, discloses that the railroads secured a larger portion in Wisconsin than in any other State in the Union, which fact is at least interesting in connection with the long residence there of the distinguished gentleman who now argues so ably that the railroad company should have the lands involved in this grant.

Thousands of the most prosperous homesteads in the States of Washington, Oregon, and California were taken under the homestead and pre-emption laws. Neither the courts nor the Land Department have ever held that the homestead settler is required to show anything with reference to the character of his claim, except that it is non-mineral, and that he has actually resided upon, cultivated, and improved the same for the period required by law. The pre-emption law required six months' residence and cultivation. After its repeal the commutation clause of the homestead act required 14 months' residence and clutivation. And the free-homestead law originally required five years' residence and cultivation, but now requires but three years' residence and cultivation. It is true that the timber and stone act required that the applicant to purchase under that law should show that the lands applied for were more valuable for timber or stone than otherwise, and unfit, in their existing state, for agriculture, but it has never been required that a homestead or pre-emption settler, or homestead commuter, should show that his claim was devoid of valuable timber or valuable stone, except minerals, nor has any homesteader, pre-emptioner, or commuter ever been lawfully deprived of his claim because of its timbered condition, no matter how heavy the stand of timber, nor because his land was unfit for agriculture at the time he settled upon the same, provided he was able to show, at the time of his final or commutation

proof, that he had actually resided upon, cultivated, and improved the land for the period required by law.

Point 2 of Senator Spooner's brief, we think, is well taken. It seems elementary that a condition subsequent, impossible of performance, does not defeat the estate granted, but, of course, we contend that there was no condition subsequent in this case, and, further, we assert that the affirmative requirement for sales to actual settlers is not only possible of performance, but could easily be fulfilled were it not for the fact that the railroad company early repudiated the trust.

With point 3 of Senator Spooner's brief we heartily agree, in so far as it seeks to establish, as a matter of law, that this grant was not one of an estate upon condition, but with his contention that it was merely a "restrictive covenant" we emphatically disagree, and we assert that the trust created by the grant is clear and unmistakable. We further heartily agree with point 3 of Mr. Spooner's brief, in so far as it holds that neither the case of Nichols *vs.* Southern Oregon Co. nor Warrior River C. & L. Co. *vs.* Alabama State Land Co., decide anything respecting the matters involved in this case. In neither of those cases were the acts of Congress, or the facts, sufficiently similar to the case at bar to make them of any value whatever as a precedent here.

With point 4 of Mr. Spooner's brief we heartily agree, in that it seeks to establish, as a proposition of law, that this grant was not of an estate upon condition.

We disagree with point 5, holding that the actual-settler clauses in the grants were merely restrictive covenants, and, if enforceable at all, are enforceable only as to lands susceptible of settlement and cultivation.

We wholly disagree with point 6, the last point in Mr. Spooner's brief, holding that there was no evidence submitted of a breach of the provisions of the act of 1869 or 1870 regarding actual settlers. The testimony of David MacLafferty, appearing in volume 8 of the record, at page

3872, shows that at the time he gave his testimony in 1912 he had been continuously a settler on his claim for five years, during which time he had each year cultivated and improved the same. While Mr. MacLafferty was the only settler on the west side grant called by the Government to the stand, it appears from his testimony that all of the other settlers on the west side grant have performed like acts of residence, improvement, and cultivation. The testimony of O. J. Lawrence, found in volume 7 of the record, at page 3257, one of the actual settlers, herein designated as defendants, cross-complainants, and appellants, who is living on the east side grant, testified as to the actual residence, improvement, and cultivation of the claims of himself and other actual settlers on the east side grant. Besides, the complaints of the 64 actual settlers in this record, which allege *bona fide* residence, improvement, and cultivation, are necessarily admitted to be true by the demurrers, which were interposed by both the Union Trust Company and the railroad company, and Mr. Spooner will hardly be heard to say now that there is no evidence in the record of a violation of the trust as to actual settlers.

Brief of the Railroad Company Answered.

The brief for the railroad company is divided into eleven points, several of which are identical with certain of the points in the brief for the Union Trust Company already noticed.

Point 1 of the brief for the railroad company holds that the paramount object of the grant was to secure the building of the road, and not to bring about the settlement of the lands, and that, as the lesser object of the law must subordinate itself to the greater, it was lawful for the railroad company to make such sales as it was able to make in order to build the road. That point might be a defense were it urged against a suit to now enforce the

settler clause against portions of the land that were sold at a date when settlers could not be found to purchase, if such a time ever existed. But no one is now seeking to enforce the settler clause as to any lands, except those which settlers now desire to buy, and, as the road is already built, it certainly cannot be said that the sale of these lands by the company to settlers would now defeat the building of the road. We also concede that point No. 1 of the railroad company's brief is well taken as against the forfeiture contention of the United States, as a forfeiture would serve to cut off the security for the $20,000,000 obtained to aid in the building of the road by the execution of the mortgage to the Union Trust Company. The case of Platt against the Union Pacific Railroad Co., 99 U. S., 48, instead of being an authority for the railroad company in the case at bar, is the direct contrary. It is clearly apparent that had the act of Congress in that case required the sale of lands to settlers without regard to time, as in this case, the court would have decided unanimously against the railroad and in favor of Platt. The majority and minority opinions in that case, when read together, leave no doubt upon this point.

With point 2 of the brief for the railroad company, holding that this is not a grant of an estate upon condition, we are in hearty accord.

Point 3 of the brief for the railroad company contends that the company did not need the amendment of April 10, 1869, in order to secure or earn the grant, and that same was, therefore, a nullity as to the present defendant company. The truth is, however, as shown by the record, that the Oregon Central Railroad Company, which was organized April 22, 1867, under which the present defendant claims title, could not possibly have acquired the grant, except for the passage of the act of April 10, 1869, for these reasons: The act of 1866 required assent to be filed to its terms by the grantee company within one year from the date of the act, and further required that the grantee company be first

designated by the Oregon legislature as a proper company to receive the grant. The Oregon Central Railroad Company, under which the present defendant claims, was not designated by the legislature of Oregon as a proper company to receive the grant until October 20, 1868, and could not, therefore, by any possibility, file its assent within one year from the passage of the act of 1866, and thereby become the recipient of the grant. Therefore, it was by virtue of the act of 1869, and by virtue of that act alone, that the Oregon Central Railroad Company, predecessor of the defendant Oregon & California Railroad Company, received the east side grant. Of course, point No. 3 in the brief for the railroad company could in no case avail against those settlers who are on the west side grant, because there the settler clause appears in the original granting act; but it is equally clear that the point is of no force as to the east side grant. The Oregon Central Railroad Company reorganized itself in 1870 as the Oregon & California Railroad Company, merely to perfect certain defects in its original incorporation papers, and it is the same corporation that received this grant and still holds 2,300,000 acres thereof, unaffected by the claims of any innocent purchasers, except as to the mortgage of the Union Trust Company.

Point 4 of the railroad company's brief holds that the grant did not create a condition subsequent, and with that holding we, of course, agree.

Point 5 of the railroad company's brief holds that the United States, as a suitor, cannot enforce the actual-settler clause in the grant, assuming that its words create a condition subsequent, because of waiver, acquiescence, affirmative knowledge of continued breaches, and estoppel. This point may be well taken as against the forfeiture theory, because it is well known that a grantor cannot blow hot and cold in the matter of claiming a forfeiture, and that a waiver or affirmance as to any considerable violation is a waiver as to all breaches, but point 4 is not urged by the railroad com-

pany as against the trust theory, and, clearly, it would not be well taken against the alternative prayer of the Government's bill, which is for the enforcement of the trust as to the unsold lands. In other words, there is no rule that the grantor in a trust, by permitting a part of the trust estate to be misapplied, waives his right to demand full compliance with that part of the estate remaining intact in the hands of the trustee.

Point 6 of the railroad company's brief is not well taken or applicable in any view of the case to the unsold lands now remaining in the hands of the company, which actual settlers desire to buy. Of course, a condition subsequent must be possible of performance, and so must a trust provision be possible of performance. It is also true that the condition or provision in either case must be possible of performance within a reasonable time, but it is submitted that in this case Congress contemplated that the railroad company would hold these lands until such time as it completed its railroad and secured patents from the Government. In no event could the railroad give a good title at an earlier date. Now, none of these lands were, as to the west side grant, patented prior to 1895, and the larger portion of the lands as to the east side grant were not patented until 1895 and later. The road was completed in 1887, but for some reason, ulterior or otherwise, the railroad company chose to delay applying for its patents as to most of these lands. The railroad company never advertised or offered to sell the lands to settlers at any time, and we submit that it was not unreasonable that settlers did not apply in large numbers until 1907, 12 years after the lands were, for the most part, patented to the company. There is nothing in any of the statutes cited under point 6 by the railroad company's brief tending, in the slightest, to support the point, and especially is this true of the act of August 20, 1912, referred to as the innocent-purchaser act. The latter act was simply to compromise this litigation in so far as it involved, through sep-

arate suits, those persons who had purchased from the railroad company prior to 1907, so as to clear the decks for the trial of the main case, which is now before the court, involving the 2,300,000 acres of unsold lands. There was no purpose or intention on the part of Congress, through the act of August 20, 1912, to assert or claim any forfeiture, except in so far as the United States might show itself to be entitled to a forfeiture, as the result of the present litigation. The point had been raised in court in this case, which was then pending in the court below, that the court was without jurisdiction to hear a suit in equity which sought forfeiture as relief, and the only object of the first section of the act of August 20, 1912, was to give this court undoubted jurisdiction to hear the present case, and to decree a forfeiture, should it ascertain judicially that forfeiture was the proper remedy, and that forfeiture had been incurred.

Point No. 7 of the railroad company's brief, holding that the actual-settler clause in the grant is so vague, indefinite, and uncertain as to be unenforceable, is without merit. I dare say that if the president of the railroad company would send a telegram from New York to its land department in Oregon to proceed, within the next 90 days, to dispose of all of these unsold lands "to actual settlers only, in quantities not greater than 160 acres to any one settler, and for prices not exceeding $2.50 per acre," the head of the land department would not wire back to the president of the road and ask him what he meant. But if there had been at any time any uncertainty on the part of the railroad company's officials as to how they should administer this great trust, it was their privilege and their duty to have applied to a Federal court of equity for instruction and guidance in the premises, and, having failed so to do, the company cannot now claim that it is relieved from all obligations.

Point 8 in the railroad company's brief is without application. To say that a requirement to sell these lands would defeat the purpose of the grant is a proposition that has already been answered.

In point 9 of the railroad company's brief, the absurd contention is advanced that Congress only contemplated that sales would be made to actual settlers during the progress of the building of the road, because in no other way could money be raised to help build the road, and the acme of far-fetched reasoning is attained when the brief asserts that "as a necessary corollary" all the lands remaining unsold when the road was completed became the absolute property of the company, because there was no longer any reason for selling them. This point of the railroad company's brief assumes that Congress had no object in view whatever in dealing with this land, except to apply it to the building of this railroad, and that when the railroad was built Congress did not care what became of the lands, and had no further interest in them. The railroad company further contends that this absurd point is sustained by the absence of any affirmative provision for the payment of taxes. Earlier in this brief, we have shown that Congress never contemplated that any taxes at all should be paid upon these lands, and the railroad company would never have been required to pay any taxes had it offered opposition thereto. The truth is that the railroad company has paid taxes only for the purpose of building up a defense and avoiding, if possible, the carrying out in good faith of the trust which it agreed to perform.

Point No. 10 of the railroad company's brief cities irrelevant statutes, and contends that this suit cannot be maintained because "the lands involved in suit were mainly patented more than five years prior to the commencement of this suit." This point has been heretofore answered in this brief. Point No. 10 contends that, inasmuch as the Oregon & California Railroad Company reorganized in March, 1870, changing its name from Oregon Central Railroad Company to its present name, and taking a deed from itself, under its former name, to itself, under its new name, it became an innocent purchaser of all of the lands in the east side

grant, and that, inasmuch as this reorganized Oregon & California Railroad Company, on October 6, 1880, took a deed from the west-side Oregon Central Railroad Company for all of its trackage and rights to the west-side grant, it thereupon became an innocent purchaser of the west-side grant. But it must be remembered that both of these "purchases" were made prior to the issuance of any patents, and that, at most, the present defendant, Oregon & California Railroad Company, merely became the successor of the former companies, and inasmuch as it accepted the patents from the United States as the successor of the former companies, it is now estopped from denying that it is bound by all of the terms of the law under which those patents were issued. In point 10 the railroad company further claims that from April 1, 1870, to April 30, 1911, it paid taxes on both grants amounting to $1,827,234.10, and that from April 30, 1911, to April 30, 1914, it paid taxes amounting to $930,859.97, making a total of $2,758,094.07. Instead of these figures constituting an argument in favor of the railroad company, they are just the reverse. The total acreage received by the company under both grants was 3,100,000 acres, so that up to this date the company has paid less than $1 per acre in taxes. As heretofore stated, the company had paid less than 25 cents an acre in taxes when this suit was started by John L. Snyder, in 1907, and the settlers offered, in their complaints, to reimburse the railroad company for those taxes and for all other disbursements.

Point 11, which is the last point in the railroad company's brief, is certainly novel, but without merit. It contends, first, that it was unconstitutional for Congress to place upon it the burden of selling these lands to actual settlers only, in quantities not greater than 160 acres to any one settler, and for prices not exceeding $2.50 per acre. It asserts, therefore, that these provisos in the grant are void. The argument might just as well be made that the grant of the land

itself was void, if Congress attempted to make a grant upon terms which it was powerless to make. Therefore, if there was anything in the argument under this point, it would be as strong in favor of the position that no grant ever took effect at all as it is in favor of the contention that the grant took affect, but that the terms upon which it was made did not. In other words, counsel for the railroad take the absurd position that, in so far as the grant benefits them, Congress acted within the scope of its constitutional powers, but as to those portions of the law which the railroad company now finds it convenient to disregard, the action of the National Legislature was void. Further words need not be wasted in answer to such effrontery. The final point of the railroad company's brief is that, title having vested in the company to lands in Oregon, this court will construe the grant under the laws of Oregon, and that there is no room, therefore, in this case for the application of the doctrine that a public grant will be strictly construed in favor of the Government. It matters little whether the court construes the grant now before it under the law of Oregon or under the Federal decisions; the conclusion reached must be the same, to wit, that the language of the grant is clear and unmistakable, and places upon the railroad company the duty to sell the lands to actual settlers, as provided in the acts.

The brief for the railroad company, at the end of the 11th point just noticed, winds up with a "conclusion," the last paragraph of which is in the form of a peroration, reciting that "after 37 years" it is now sought to enforce this law, and asks if the railroad company "must be punished by the depletion of its estate, after it has paid in taxes vast sums of money which it can never recover, after it has constructed its road, after it has operated it without profit for nearly 40 years," and so forth.

The principal trouble with this peroration is that it is untrue.

As heretofore shown, these lands were not patented to the company until 1895, and the suits were started by the settlers 12 years thereafter, and within one year of the issuance of some of the patents. It has been shown that the "vast sums" in taxes, which the railroad company claims to have paid, amount to considerably less than $1 per acre down to this hour, and that the settlers offered to reimburse the company even for these taxes, and all other disbursements. As to the railroad company being "punished" by a decree requiring it to live up to the law hereafter, it may be stated that for the lands heretofore sold in the west-side grant the company has already received an amount in excess of $2.50 per acre for the entire west-side grant, including all taxes paid, and that for the lands sold in the east-side grant the company has received in excess of $2.50 per acre, an amount far greater than all taxes it has paid out on the east-side grant, so that for the court now to render a decree which would only require the company to live up to the law hereafter and which would not require an accounting would be to show leniency and magnanimity to this corporation rather than to "punish" it.

Now, as to the crowning sentiment of the peroration of this poor railroad company that it has "operated its road at a loss for 40 years," I beg to quote from page 1027 of Moody's Manual of Corporations for 1914 the following table:

Income Account of the Oregon & California Railroad Company, Years Ended June 30 —

	1913.	1912.
Earnings	$9,034,664	$8,477,316
Expenses	5,475,016	4,981,912
Net earnings	3,565,685	3,501,080
Taxes, interest, and miscellaneous.	2,189,232	2,270,172
Surplus for the year	1,376,453	1,230,908

From the foregoing table it will be seen that the "loss" of the railroad company for the year 1912 turns out to be a "surplus for the year" of $1,230,908, and that the "loss" for the year 1913 turns out to be a "surplus for the year" of $1,376,453. These are the only figures I happen to have at hand, but they are sufficient to show the unreliability of the peroration of the railroad company, and the authority to which I have referred will be found in the Congressional Library.

The Debates in the Senate and House upon the Act of May 4, 1870.

If there should remain any lingering doubt as to the meaning of the clear wording of the acts of April 10, 1869, and May 4, 1870, the same would certainly be dissipated by a reference to the discussions in the Senate and House upon the latter act. While the debates in Congress are not admissible to show what Congress may have intended by particular language in a bill, yet it was always proper to refer to such debates as contemporaneous history, not to ascertain what any particular language in a given bill meant, but to find what the condition of the country was with reference to the subject-matter of the bill, if that particular subject was discussed. The act of May 4, 1870, was debated in the House on April 1, and again on April 29, 1870, and in the Senate on February 2, and on February 19, 1870, the bill having originated in the Senate. An abstract of the debates on all four of these days follows:

[From the Congressional Globe for Apr. 1, 1870.]

Mr. SMITH of Oregon: The bill, I will state, is one in which the interests of the Government have been carefully guarded. There has never been a land grant in which those interests have been so carefully guarded as in this bill. * * *

Mr. LAWRENCE: Does the bill make any provision in regard to actual settlers?

Mr. SMITH of Oregon: It provides that the land shall be sold only to actual settlers, in quantities not exceeding 160 acres to each person and at a price not exceeding $2.50 per acre. It is the most carefully guarded bill ever presented to this House.

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Mr. HOLMAN: Mr. Speaker, as some indication of public sentiment on this subject, I desire to have the clerk read a petition which is being signed by thousands and tens of thousands of citizens of the United States all over this broad land.

(The clerk read memoral urging Congress to cease granting land subsidies to railroads and other companies, but to set the same apart for the exclusive use of settlers in limited quantities.)

Mr. MCCORMICK of Missouri: Who is that from?

Mr. HOLMAN: It comes from New York. I have received a number of such memorials. I trust the House will allow me to call attention to the fact that we only a week ago last Monday, without even a division of the House, adopted a resolution declaring it was the true policy of this Government that grants of lands to railroad corporations should cease; that it was the true policy to hold these lands for the exclusive purpose of securing homes to actual settlers under the homestead and pre-emption laws.

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Talk about $2.50 per acre. If there ever was any one measure that ever passed Congress with universal approval as a measure in conformity with the enlightened spirit of the age and the advanced ideas of our country it was the homestead law. And yet step by step, by policy as remorseless as death, you defeat that great measure by giving away your lands to corporations who are to charge $2.50 per acre for lands which ought to be free to the actual tiller as the good gift of God to mankind.

[From the Congressional Globe of Apr. 29, 1870.]

Mr. HOLMAN: * * * The only limitation is that the bill imposes on the company the duty to sell lands to actual settlers at a price of $2.50 per acre—a proposition, in fact, to require the settlers on these lands to pay to this corporation the sum of $2,320,000. The question comes up as fairly upon this bill as upon any that is pending before Congress—what shall be our future policy in reference to grants of our public lands? Shall the public lands go to the actual settler under the homestead and preemption laws, or shall they be given to corporations?

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Mr. SARGENT: One word in regard to the policy of land grants for railroads in the future. If they can be carefully guarded, as this bill is, so that while they construct roads the lands shall also go to the settlers in limited quantities at small prices, then I am in favor of them. * * * The fault of the system heretofore has been that the grants have been made without restrictions to the companies, which could hold them indefinitely for a rise in value. By this means monopolies have been created and the settlers kept from the lands except on the even sections. But we propose to change all that, and do so by this bill. We compel the companies to sell the lands only to actual settlers at not more than $2.50 per acre, and in lots of not more than 160 acres.

The only difference it makes to the settler is that he pays double the minimum for his land; but the proximity of a railroad is certainly an advantage that counterbalances the price. The gentleman's blind rage does not discriminate between this system and that which was unrestricted, and would leave the vast West that needs development a wilderness for the long future.

The gentleman from Indiana [Mr. Holman] also says that the lands along the Union Pacific now sell for $10 per acre. The lands that bring that price must be of a very limited quantity, but if they are worth that it is the road that has given the value, for without it they would be worthless. Under this bill

the lands can never realize but $2.50 per acre to the company, even if the road makes them worth $100 per acre.

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Mr. LAWRENCE: Does this bill contain any provision that the lands granted shall be sold to actual settlers only?

Mr. FITCH: Yes, sir; the bill is carefully guarded in that respect.

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Mr. MCCORMICK of Missouri: I do not, Mr. Speaker, propose to occupy more than a very few minutes. I wish to call the attention of the House to the land policy of the country, and the policy which is now governing the Committee on the Public Lands in this House. There seems to me no reason for that fear of landed monopolies which the gentleman from Indiana [Mr. Holman] seems to entertain. This bill secures to the use of all actual settlers all the lands granted to the road, and the price is limited to $2.50 per acre, the lands to be sold in quantities not exceeding 160 acres to any one individual. It is impossible for any monopoly to grow up under such a system. * * *.

In the Senate the following discussion was had upon the bill, which became a law May 4, 1870:

[From the Congressional Globe of Feb. 2, 1870.]

Mr. WILLIAMS of Oregon: I suppose it is not necessary now to defend the policy that has been adopted by the Government to assist in the construction of railroads in new States by grants of land. Oregon is a State that has nearly 100,000 square miles within its borders. It has had one grant for a railroad, and now asks Congress to make another grant to assist in the construction of another small railroad in that State. The objection which the Senator makes to this bill is not available, for the reason that the bill provides expressly that every foot of the land shall be sold to actual settlers. The lands granted are as

open, under the provisions of this bill, to actual settlers as they are under the pre-emption laws of the country. It simply provides that when settlers go upon these lands they may buy them of the company, and the proceeds shall be applied to assist in the construction of the road. * * *

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Mr. THURMAN: Mr. President, at the last session of Congress there were presented by my colleague certain resolutions of the General Assembly of Ohio against any of these grants to railroad companies for the reasons that are set forth in those resolutions, and Senators and Representatives from Ohio were requested to oppose all such grants. I concur with those resolutions. I think they lay down the proper policy, that the land of this Government ought now to be saved for actual settlers, and not granted to railroad companies. * * * I move that this bill be referred back to the Committee on the Public Lands, with instructions to strike out all the grant in the bill except that of the mere right of way.

The VICE PRESIDENT: The pending question is on the motion of the Senator from Ohio [Mr. Thurman] to recommit the bill to the Committee on Public Lands, with instructions to strike out all grants of land except for the right of way.

Mr. STEWART: That is the question. I do not think it is the time to change the policy of the Government toward the remaining Territories and States of the West which have not had these grants, so far as the building of railroads is concerned, except perhaps as it is changed in this bill. In this bill there is a provision for disposing of the lands granted to settlers, and we have a provision against any possible monopoly on the part of the railroad company.

[From the Congressional Globe of Feb. 19, 1870.]

Mr. THURMAN: * * * Then, sir, I have other objections to the bill apart from the general question involved in it in regard to the policy of granting lands. It was said the other day when this bill was up that there is a provision in it that removes

one of the most serious objections made to all other bills of this kind, and that that provision is that the land granted to the company shall be sold to actual settlers and to no other persons. Now, if there is an effectual provision of that kind in the bill, one that can be made operative and that cannot be defeated, it is certainly a great improvement upon any bill of this kind that has heretofore passed Congress. But is that a fact? Is it a fact that this bill does secure to actual settlers as well the land granted to the railroad company as the land retained by the United States? I am very much afraid there is not. Although that provision is contained in the fourth section of the bill, yet the fifth section, very obscurely drawn, provides, upon any fair interpretation that I can give it, that the company shall be authorized to execute a first mortgage, and that without limitation, and therefore a first mortgage upon land that we here grant; and after having executed such first mortgage, there is a provision that the proceeds of the lands will go to certain trustees in another mortgage for the purpose of creating a sinking fund. But suppose the first mortgage be created and the condition broken, and the mortgagees do not see fit to await the tardy operation of this sinking fund, what then? Then, sir, they go into the courts of Oregon, foreclose their mortgage, and sell the property, and then what becomes of the provisions that the land granted can only be sold to actual settlers? Defeated, sir. Defeated. * * *

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Mr. WILLIAMS of Oregon: I am surprised that the Senator should make that objection, contending, as he does, against land grants to railroad companies. Wherever there is a provision in the bill which is intended to protect the public, he objects to it. Here is a grant made to this company of public land, and Congress has the right to attach any condition it pleases to that grant. It provides that the net proceeds of these lands shall be secured to the persons who hold the bonds of this company, so that the company may not use this grant for any other purpose whatever except to construct this road. Now, the

entire object of this section is to make the grant insure the purpose contemplated by the bill—that is, to aid in the construction of the road, providing that the net proceeds of the lands granted shall be invested and set apart to secure the bondholders who may advance money for its construction.

As to the objection that it will affect the lands in the hands of actual settlers, I am sure the Senator cannot be sincere in that, for it only provides that the net proceeds of the lands shall be applied in this way. Actual settlers are to go upon the lands and take them up and pay the company for them; and the proceeds of the sales of the lands by the company are to be applied in this way, and this mortgage or deed of trust or whatever may be executed for the purpose to secure to the bondholders applies in no way to the land, but to the moneys in the hands of the company.

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I do not wish to take time, but I should suppose the Senator would know that if a mortgage was executed to any person under and by authority of this act it would be just such a mortgage as the company could execute, and the company is required under this very act to sell these lands to actual settlers at $2.50 an acre, and the company cannot by virtue of this law execute any mortgage that would interfere with the rights of the settlers under this act.

* * * * * * *

Mr. VICKERS: As I understand the bill, the company has no right to sell the lands to anybody but an actual settler. If the lands are sold to actual settlers there is no forfeiture. If a portion of the land is sold to actual settlers the portion unsold will be forfeited to the Government if that condition is violated. That is the sole object of the amendment. It is to secure the sale of the lands to actual settlers, according to our purpose. If any other phraseology can be suggested by the Senator from Vermont, I shall be very happy to adopt it. That is the idea, object, the sole purpose of the amendment.

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Mr. CASSERLY: What security has the Government that this important provision in the bill will be complied with? I respectfully ask the Senator from Oregon—who I know will understand that my query proceeds from a desire to carry out what is the distinguishing feature of this bill—to state in what way that clause of the bill is to be enforced which provides for confining the sales by the company of this land to settlers? Suppose they do not sell to settlers?

Mr. WILLIAMS of Oregon: I suppose this law has as much effect as any other law with reference to public lands. There is no law in reference to the public lands of the United States that may not be violated, and the remedy is in the hands of the Department.

Mr. VICKERS: If it is the design of the company to act in good faith toward the Government I can see no objection to this provision. The grant is made expressly upon the condition that the lands are to be sold to actual settlers. Now, there ought to be some security that this shall be done, for if they are sold to other persons the design of the grant, of course, is defeated, the purpose for which the land is given rendered abortive. I can see no difficulty in giving a mortgage on the land. In truth, I do not understand how a mortgage can be given on the money derived from the sale of the land and not upon the land itself. I do not see what a mortgage is to operate upon except it be upon the land; and in order to prevent a mortgage of the land itself so as to interfere with the rights of settlers I have offered this amendment to make the matter plain and explicit.

Mr. CASSERLY: * * * What is the theory of this bill? Its theory and its distinguishing feature, as I understood all along, is this: that notwithstanding the grant of this aid to this railroad company, the settlement of the lands by actual settlers shall proceed as if the grant had not been made. If that is not the theory of this bill I have not understood it, and the Senator from Oregon will correct me if I am wrong. That being the theory of this bill, I ask him, and I ask other Senators, what valid objection there can be to making that plain and certain; what valid reason he can give in opposition to an amendment the object

of which is to carry out the declared theory of his bill and to assure that it shall not be disregarded or violated by the company?

The object of the Senator from Maryland by his amendment is to provide that in case the company shall give a mortgage upon this road for any purpose, notwithstanding the mortgage the right of the settler shall continue, as the theory of this act is that it must continue, namely, as free to enter and acquire title to these lands as though the act had not been passed.

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Mr. VICKERS: If this company were to execute a mortgage upon these lands and that mortgage should be foreclosed and the lands sold by trustee, what would become of the rights of actual settlers? It is only to avoid what would follow as a result of an event of that kind that I have offered this amendment.

* * * * * * *

I offer another amendment—to insert after the word "company," in line 10, section 5, the words "on road, depots, stations, sidetracks, and wood yards," so as to confine the mortgage to the road and its appurtenances and not allow it to extend to the lands.

* * * * * * *

Mr. WILLIAMS: I do not care anything about that. If that will be any satisfaction to the Senator he can have it that way. The bill means that now.

The amendment was agreed to.

The bill referred to in the foregoing discussions, which became the act of May 4, 1870, passed the Senate on February 19, and the House on April 29, of that year, and was approved by the President on the day named.

Attempt of the Railroad Company to Secure False Construction of Grant in 1872, *and Rebuff of Secretary Delano, Holding that Actual-settler Clause "Means Just What It Says."*

From the foregoing, it will be seen that Senator Williams, of Oregon, was author of the act of May 4, 1870. In volume 10 of the record, at page 5343, will be found a short letter, dated June 5, 1872, and signed by C. Delano, Secretary of the Interior, from which, in connection with the other letters printed in the record in the same connection, it will appear that Senator Williams, two years after the passage of the act of May 4, 1870, was Attorney General of the United States, and that in such capacity he transmitted to the Commissioner of the General Land Office a letter from the European & Oregon Land Company, a subsidiary of the defendant railroad company, asking that a certain construction be placed upon the actual-settler clause of the act of April 10, 1869. With the papers so transmitted to the Land Department at that time was the form for an opinion, prepared in advance, to be signed by the Secretary of the Interior, holding that the actual-settler clause of the act of April 10, 1869, applied only to settlers who might be found on the land when the railroad should be surveyed and established. This blank opinion, which it was sought to have Secretary Delano sign, is found in volume 10 of the record, at pages 5345 and 5346. Secretary Delano's reply, which, as stated, is found at page 5343 of the same volume of the record, states that he believed the proviso of the act of April 10, 1869, to mean just what it said, and that "to limit the proviso's operation to those on the lands granted at or before the survey of the road" would utterly defeat the intention of Congress.

This interesting bit of history shows conclusively that it was not true that the railroad company originally, or at any time, had any desire or *bona fide* intention to sell these lands

to actual settlers, if it could by any possible scheme or device escape its obligation to do so. The fact that the railroad company, in 1872, within two years after the grant of May 4, 1870, was made, and within three years after the grant of 1869, and 15 years before it had completed its road, was scheming and contriving to find some means of escaping its obligation to carry out this trust, shows that it never at any time intended to live up to the promise it made when it filed its written acceptance of the act of April 10, 1869.

Act of May 4, 1870, Could Not Have Passed Without Actual-settler Clause.

It is clear to the casual reader of the debates that the act of May 4, 1870, could not have been passed, except for the incorporation of the provision in the grant, insuring the sale of the lands to settlers, in small quantities, and at reasonable prices. Congress was actuated by the same policy in passing the act of April 10, 1869.

No Trust Too Big for Court of Equity to Administer.

No trust is too big for a court of equity to administer, and the fact that the administration of a trust might be difficult or involved, will not properly weigh with a court of equity against its enforcement. However, in the present case it will not be difficult for the court below, with the aid of three competent receivers, to administer this trust, and dispose of every acre of the lands remaining unsold to actual settlers, in quantities not greater than 160 acres to any one settler, and for prices not exceeding $2.50 per acre.

Forfeiture Would Create More Confusion Than Enforcement of Trust.

Special Assistant Attorney General B. D. Townsend, originally in charge of this case, seemed bent on securing a forfeiture, because that would be a "simpler remedy," and "more favorable to the Government." I challenge the proposition that a decree of forfeiture would either be simpler or more favorable to the Government.

If the news goes out from the chamber of this honorable court that these 2,300,000 acres of lands are forfeited to the United States, and are Government lands, settlers will go upon practically every tract, and in many instances there will be disputes, and possibly bloodshed, as to who first settled, or as to the rights between two or more settlers on a given tract. It is true that these settlers will have no right to go upon the land in this way, but once it becomes known that the Supreme Court of the United States has pronounced these lands to be Government lands, no earthly power could keep settlers from rushing onto them, except a provision in the decree of this honorable court to the effect that the court below should appoint receivers for the sale of the lands to actual settlers, under a drawing system, and providing that any person who might settle on any portion of the land on or after the date of the decree of the Supreme Court, would thereby forfeit his right to participate even in the drawing.

The reason for my foregoing contention is this: If a decree of forfeiture be entered, the public will assume that inasmuch as the lands have become public lands by such forfeiture, that Congress will, sooner or later, provide for their opening under the homestead laws, and that the usual practice of giving preference rights to actual settlers on the land will be followed in such case.

But if this honorable court shall hold that these lands constitute a trust estate, which is now in the custody and under the control of the court, and shall direct by its decree

that receivers be appointed to sell the lands in such quantities as may appear best to this honorable court, through a drawing system, and shall provide by the decree that no person who shall have settled after a date to be fixed by the court, which we suggest should properly be either the date the Government bill of complaint was filed, September 4, 1908, or the date the decree was entered in the court below, July 1, 1913, or the date the Supreme Court shall render its decree, shall have any preference right, and that any person who may settle or attempt to settle on or after the date of the decree of this court shall even be allowed to participate in the drawing, then the whole grant can be administered amicably and without any trouble from any source, and full justice can be done to the United States, the Union Trust Company, the railroad company, and to the people of Oregon, the development of whose State has been hampered and held back by the unlawful course of the railroad company.

Receivers Could Formulate Rules for Orderly Disposition.

It would certainly be proper for this court, by its decree, to require that the receivers in the court below, in disposing of the lands under the drawing system, formulate suitable rules and regulations, requiring of those desiring to participate in the drawing to first show by suitable proofs their qualifications to so participate. It was manifestly the intention of Congress that the words "actual settlers," as used in this grant, should include only those persons who were then qualified to take 160 acres of land under the public-land laws. No person at that time was entitled to so take 160 acres, except the following: A male citizen of the United States, 21 years of age or the head of a family, either native born or duly naturalized, who had not already received lands under the public-land laws, which, together with the lands desired by him to be entered, would exceed 320 acres; second, a female citizen of the United

States, 21 years of age, and a *feme sole*, or, if married, the sole support of herself alone, or both herself and her family, by reason of having been abandoned by her husband. Therefore, I think the court's decree should limit the receivers to sales to persons who would be qualified to receive title were they applying for the same lands under the public-land laws of the United States.

The 64 Actual Settlers Have Vested Rights.

Up to the present stage of this litigation, the 64 actual settlers on the land have been treated by counsel for the Government, and by the court below, as having acquired no rights by their settlements, made from one year to several months in advance of the filing of any suit, or assertion of any claim of forfeiture, or other claim, by the United States. This position on the part of counsel for the Government, which originated with Special Assistant Attorney General B. D. Townsend, and was adopted by the court below, necessarily implies that these 64 actual settlers, in going upon the land, were trespassers.

Now, the law making the grant required the railroad company to sell to actual settlers. The debates in Congress, as well as common sense, agree that this law, by necessary implication, gave any qualified citizen of the United States leave and license to go upon any vacant tract of the railroad land at any time after the grant went into effect, provided that he did so with the *bona fide* purpose and intention of settling thereon and making the same his permanent home. In the debates in Congress, it was said that the settlement of these lands would proceed the same as though the grant had not been made, and that the only difference would be that the settler would buy from the railroad company instead of buying at the Government land office.

This was the assertion of Senator Williams, who, two years later, was Attorney General of the United States, and it was the unanimous sentiment expressed by all those who

participated in the debate upon the bill which became a law May 4, 1870, and that law is identical with the act of April 10, 1869, in so far as the actual-settler clause is concerned.

Trust Created by Act Is Definite and Certain.

Under the public-land laws, the citizen is not required to go to the land office and first secure permission to make settlement, except where an opening is held under a special proclamation, or under extraordinary circumstances, but he may go, of his own volition, upon any vacant unreserved public lands, and make his settlement, and after becoming established upon the same in a house, with the *bona fide* purpose and intention of making the same his home, he may then go to the land office and apply to make his initial entry of record.

It has been urged that this grant is not sufficiently definite and certain as to the beneficiaries to raise a trust. That is certain which may be made certain, and the moment any qualified citizen became an actual settler upon a quarter section, or lesser subdivision, of these railroad lands, he became the certain *cestui que trust* in the grant as to that particular tract of land, and he had a right, in his own name, and without joining as a party the grantor in the trust, to maintain a suit to compel observance of the law. It was held in Shepley *vs.* Cowan, 91 U. S., 330, that where a party has settled upon public land with a view to acquiring a right of pre-emption, the land being open to settlement, his right thus initiated is not prejudiced by a refusal of the local land officers to receive his proofs of settlement. The authority of this court as announced in Shepley *vs.* Cowan shows conclusively that each of the 64 actual settlers in this case, herein designated as defendants, cross-complainants, and appellants, either now have vested and absolute rights to the tracts by them settled upon, conceding their complaints to be true, which are admitted by the demurrers, or the law

making this grant was a nullity from the start, and never gave to any citizen the right to settle upon the land. Logic absolutely excludes any conclusion, except that these settlers had a right to go upon the land, or that the law making this grant was a nullity from the start.

Government Counsel Blow Hot and Cold.

Counsel for the Government will scarcely be allowed to play fast and loose, to blow hot and cold, in this case. For the distinguished counsel for the United States to say in one breath that the only *bona fide* settlers who went upon these lands and were refused deeds prior to the Government's claim of forfeiture, were themselves trespassers, and had no right upon the lands, and to then assert in the next breath that because the railroad company has refused to sell to actual settlers it has incured a forfeiture, approaches the extreme of hot and cold that is admirably illustrated by the story of two Missourians, John and Bill Smith, who decided, a good many years ago, to remove to Arizona, provided the climate proved suitable.

Bill had a large family, and for that reason John decided to go to Arizona first, and report as to conditions. At the end of six months Bill received from his brother the following letter:

> DEAR BROTHER BILL:
>
> If you haven't started, don't come, for this is the most hellacious climate I ever saw. Yesterday while I was driving across the *perarie* with my best yoke of oxen, one of them was killed by a sunstroke, and while I was a skinnin' him, a blizzard came up, and the other one froze to death.
>
> Your affectionate brother,
>
> JOHN.

"Good Gift of God to Mankind."

A great and solemn duty now rests upon this, the mightiest court of the mightiest nation of the world. A Congress of the past generation has made a will, for the benefit of those who now live and struggle, and the question is, Shall that will be enforced or shall it be disregarded? When the late Representative Holman, of Indiana, in the House of Representatives, referred to these lands as the "Good Gift of God to Mankind," he gave utterance to the unmistakable policy that has from the earliest times guided Congress in the disposition of the public domain. The scandal of the Union Pacific grant, where an exception was made, was still fresh in the public mind. Those favoring the present grant were emphatic in their declarations that all of the evils of the Union Pacific grant had been rendered impossible by the actual-settler clause. In other words, this grant safeguarded the agrarian policy of the nation, which has always been to dispose of the public lands to settlers, in small tracts, and at reasonable prices. Representative Sergeant, of California, said: "It makes no difference if the building of this road makes these lands worth $100 per acre, the company can never realize more than $2.50 per acre for them." "It is impossible," he said, "for a land monopoly to grow up under such a grant." Senator Williams, author of the bill, said: "The lands granted by this act will be as free and open to settlers as they are under the pre-emption laws of the country."

With this clear understanding, the Congress of the past generation, representing the people of that day, solemnly enacted into law the legislation to apply a part of the public domain toward the aid of a railroad. The company was given an interest in the land to the extent of $2.50 per acre and no more. That interest, with other property, was mortgaged to the Union Trust Company to secure $20,000,000,

with which the road was paid for. Therefore, the interest granted did aid in the building of the road. The company had received 3,100,000 acres under the grant. At $2.50 per acre this amounted to more than one-third of the cost of the road. It was a liberal donation by the United States. But now the railroad wants to claim all the land and the full value thereof. It has already sold 800,000 acres contrary to law, having left 2,300,000 acres, and it asks this honorable court to give it leave and license to sell the remaining lands as it pleases, or to hold them as its own. The lands have increased in value, and the railroad, without any consideration whatever therefor, desires to receive the full benefits of this increased value.

Marked, indeed, is the contrast between this greedy desire of the railroad company for an additional gratuity, and the wish of settlers to go upon these lands and take them up in tracts of 40, 80, 120, or 160 acres each, whichever the court or the receivers may prescribe, and to then give to the Nation in work and energy, in improvements and cultivation, and in building roads, schools and churches, practically the full value of their claims, in addition to the $2.50 per acre, and all taxes and other disbursements, which they will pay to the railroad company.

The unsold lands here involved would make 15,000 claims of 160 acres each, or 60,000 claims of 40 acres each. Oregon is suffering far more than the Eastern States because of a scarcity of people upon the land. Polk's last city directory gives Portland 275,000 people, which is nearly half the population of the State. One-fourth of the State's area, 16,000,000 acres, is already in the forest reserves, and kept off the tax rolls. The total area of the State is but 61,000,000 acres, and much of the lands in eastern Oregon, which are outside of the forest reserves, are desert wastes. The brilliant theory which Assistant Attorney General B. D. Townsend formed, to have this court forfeit these 2,300,000 acres to the United States, and add

them to the 16,000,000 of forest reserves which we already have, because that would be a "simpler" and "more favorable" remedy to the Government, is not supported by actual existing conditions. Oregon people are long suffering. They have as good spirit as any of the Anglo-Saxon race. Although they are now resting under the burden of the enormous tax of $30 per capita per year, or $150 per family—probably the heaviest average tax of any State in the Union—they do not complain, but love their country, have confidence in their courts, and are hopeful of the future.

Provisions are as high in Portland as in any city in the Nation, due largely to the scarcity of people upon the land. Yet the magnificent scenery and mild climate each year draws an increasing number of immigrants from the East. Since Portland was founded in 1840, its population has doubled every 10 years, according to the United States census.

The claim is made that these lands, stretching out from the Columbia River to the California line, and all within 30 miles of the line of railroad which they helped to build, are unfit for settlers. If, indeed, God ever gave to mankind lands more suitable for settlement than these, I should like to have counsel for the railroad point out where they are.

These lands all lie west of the Cascades, in the west third of Oregon, where the climate is mild both winter and summer. They lie in the valleys of the Willamette, the Umpqua, and the Rogue rivers and in the foothills of the Cascades to the east and the Coast Range to the west. Through the center of this strip of land the railroad threads its way, and along its line many prosperous towns and cities have been built up. Running lateraly from the main line of railroad, and sometimes parallel to it, are many branch railroads, built by independent capital, and hundreds of valuable county roads, built by taxes collected from the people. (Taxes paid by the railroad are but added to

the cost of transportation, so in the end all taxes are paid by the people of the neighborhood where the improvements are made.)

If settlers shall now be allowed to go upon these lands, and take them up for homes, in tracts of from 40 to 160 acres each, under the final decree of this court, and under a receivership which shall provide for an orderly disposition through a drawing system, generations yet unborn will rise up and call blessed the decision of this tribunal. Some of the lands are heavily timbered, but not a stick of timber would be wasted. Every tree cut would go toward putting a roof over the head of some human being somewhere, or toward some valuable structure needed for the comfort of the human race. No more trees would be cut than would be necessary, for the people now know the value of timber. Probably only the ripe timber would be cut from year to year, except as to small areas needed for vineyards, orchards or fields. A very small area of cleared land in this fertile region would support a family, in connection with the sale of ripe timber as it matured. Each settler, in the heavily timbered areas, would have a little forest reserve all his own, and his annual revenue therefrom would be no mean amount even if the owner cut only the ripe trees, allowing the younger ones to grow up and take their place. Tree growth, like all other agricultural growth, is phenominally rapid in this region, as is a matter of common knowledge.

And the pleasure of living in the green hills of western Oregon, which would be afforded to hundreds of thousands each generation, for all the long future, ought to make what we believe now to be the duty of this honorable court, a pleasant one to perform. From any point in this grant, winter or summer, snow-covered peaks are in view along the summit of the Cascades to the east. Crystal rivers and streams come pouring down both from the Cascades and the Coast Range, swelling the Rogue River, the Umpqua, and the Willamette. The forests in this entire grant are

almost exclusively of Douglass fir and are evergreen. The air is fragrant at all seasons, and especially so in summer, when wild flowers and roses bloom in profusion. Houses of prosperous farmers, now residing upon the even sections of the grant area, have steep gables and peaked roofs, harmonizing with the hills and the trees, and invariably open sleeping porches look out into the tree tops, and many times overlooking the snow-covered mountains in the distance.

Indeed, such houses as I have just described are numerous on Portland Heights and Willamette Heights, in the city of Portland, which is within the area of the grant. I happen to have a room now in a splendid mansion on Portland Heights, and a sleeping porch looking out into the tops of the fir trees of Tanner Creek canyon, and the land upon which this house stands was taken up under the Donation Land Law by Lafayette Grover, later Governor, Congressman, and United States Senator from Oregon. Only a few acres of this donation claim were ever actually cultivated, but Governor Grover made a living upon it for many years, and after the trolley line scaled the hill the old homestead was divided up into many homes. Not only is this part of Portland, which is rougher than nine-tenths of the land grant, "susceptible of settlement," but to live there is such a luxury that only a few are able to enjoy it. Poor folks have to live down on the flat lands. Yet, because this land grant is filled with many other such sites for homes, it is claimed that the whole grant is "unfit for settlement." Not a single quarter section of land within this grant is unfit for settlement, and the record herein bears out this statement.

A 40-acre home within this grant would make any family happy. I wish I had such a home myself. It is now within the power of this court to see to it that every tract in the grant shall be devoted to the purpose of making a home, and that absolute fairness and justice be done to all. Such a decree would carry out the law.

Reply to Brief for Government Filed in This Court.

The brief for the United States filed in this court was not served upon me until my arrival here from Portland on April 15, 1915. Owing to its reference to the actual settlers as "trespassers," this chapter is added for the purpose of reply.

"Trespassers!" What manner of double-barreled action is this, that would have the court use one arm to evict the only actual settlers who ever went upon the grant, and seeks to have the court use its other arm to grab back the land, including the claims so settled upon, because the railroad has ignored the rights of actual settlers?

The only new thing in the Government brief here filed is this gratuitous reference to the 64 actual *bona fide* settlers as "trespassers." The remaining parts of the brief are literal extracts from the original "Townsend Brief" filed in the court below. Not one new argument is made. Scarcely a new authority is cited. Not one new answer is made to the railroad company's defenses. The same historical facts, the same debates in Congress, and the same extracts from court decisions are referred to. Not one original idea is advanced, except that the actual settlers are "trespassers."

Does this belated argument comport with the declaration of Secretary Delano, cited with great gusto by the Government elsewhere, that the actual-settler clause "means just what it says?"

Does the "trespasser" theory comport with the debates in Congress at the time the grant was made, when it was said that settlers would have the right to go upon the lands and take them up "the same as if the grant had not been made."

Would it be possible for Congress to place upon the railroad the obligation to sell the lands to "actual settlers" without giving to settlers, by necessary implication, the right to go upon the lands? Would not this implication follow as

necessarily as would a right of easement over my farm to A, should I deed to A one acre in the center of my place containing 160 acres?

Senator Casserly, on February 19, 1870, said:

> "What is the theory of this bill? Its theory and its distinguishing feature, as I understood all along, is this: that notwithstanding the grant of this aid to this railroad company, the settlement of the lands by actual settlers *shall proceed as if the grant had not been made.*"

"Shall proceed as if the grant had not been made." How would actual settlements have proceeded if the grant had not been made? They would have proceeded under the homestead and pre-emption laws of the country. Under neither of those laws was it necessary for the settler to first secure permission from the proprietor, the Government, to settle upon the land. Actual entrance upon the land had to precede an entry of record at the land office. The settler was the sole judge as to what particular vacant tract he would select, and he was the sole judge as to whether he would take 40 acres, or any multiple thereof up to 160 acres. The settler could not take less than 40 acres, because that was the smallest legal subdivision recognized by our system of surveys, and all settlements had to conform to established surveys. But the law had extended to settlers the right to take up lands, and it was the practice and the custom of the United States Government to permit the citizen to be the sole judge as to what vacant lands he would take, and the sole judge as to the amount he would take, up to 160 acres.

Was it intended by Congress in making this grant that settlers should have the same identical rights against the railroad, as to the granted lands, as they had against the former proprietor, the United States, before the lands were granted? If so, then the actual settlers in this case are not "trespassers," but they are lawfully upon the lands selected by and settled upon by them in good faith for homes.

What did Senator Williams, author of the bill, say as to this point? Here are his words uttered in the Senate on February 2, 1870:

> "Senator WILLIAMS: The objection which the Senator makes to this bill is not available, for the reason that the bill provides expressly that every foot of the land shall be sold to actual settlers. *The lands granted are as open, under the provisions of this bill, to actual settlers as they are under the pre-emption laws of the country.*"

And, as stated, under the pre-emption laws of the country the settler did not have to procure the consent of any one before going out upon any of the vacant lands and settling thereon in a house, and beginning his improvements. In fact that act on the part of the pre-emptioner, or homesteader, was the initial step invariably taken, and it was this act that gave to the settler his initial right, a right which was superior to any attempted subsequent settlement by any other person.

In the House on April 1, 1870, Mr. Sergeant, of California, said:

> "Mr. SERGEANT: The fault of the system heretofore has been that the grants have been made without restrictions to the companies, which could hold them indefinitely for a rise in value. By this means monopolies have been created *and the settlers kept from the lands except on the even sections.*"

"And the settlers kept from the lands except on the even sections." Does not this imply that by the pending bill it was intended that settlers should have reserved to them the same rights to go on the odd sections granted to the railroad that they had as to the even-numbered sections retained by the Government. Mr. Sergeant answered this question in this language:

> "Mr. SERGEANT: *But we propose to change all that, and do so by this bill.* We compel the companies to

> sell the lands only to actual settlers at not more than $2.50 per acre, and in lots of not more than 160 acres. *The only difference it makes to the settler is that he pays double the minimum for his land.*"
> * * *

Now, it certainly made a very wide difference to the settler if, by going on this railroad land, he became a trespasser when prior to the grant he had a perfect right to select, without let or hindrance from any one, any vacant tract of the public domain not less than 40 nor more than 160 acres, and build his house and make his home thereon, and to later go to the land office and pay $1.25 cents per acre therefor and receive patent.

Who should know more about what this land grant means, the men who made it, or Mr. Townsend, *who said that this provision was merely restrictive,* and his successors, who have adopted his theory of the case without question?

Why did Mr. Townsend adopt the theory that the actual-settler provision was merely restrictive, as quoted on page 214 of Senator Spooner's brief, and which absurd contention is adopted by Government counsel here?

The reason is that to adopt the only other theory, to wit, the opposite of restrictive, namely, that it was affirmative, and required the railroad company to sell the thing granted at all events, would totally destroy the pet "condition subsequent" theory, and would absolutely prevent a forfeiture in this case. It is admitted that forfeiture can be had only if the grant was made upon a "condition subsequent." If it were a grant in trust, then the Union Trust Company has rights in the land to the extent of its mortgage upon the $2.50 interest held by the railroad, and the actual settlers have vested rights, and finally, the Government has an adequate remedy by enforcement of the trust.

Why can this not be a "condition subsequent" if the sale requirement be affirmative? Because the mere observance of the "condition" would end the estate. Such a thing

is unheard of, and the most fantastic imagination could not conjure up such a possibility. It is elementary that a "condition subsequent" creates an estate upon condition, and that so long as the grantee refrains from violating the condition, he holds and enjoys his estate forever. But here, if the grantee refrain from violating an affirmative requirement to sell, he could not possibly hold and enjoy his estate, because the mere act of compliance would of necessity put beyond him forever both the title and the possession to the estate which he was to hold and enjoy on condition that he would not violate the terms of his grant.

I do but poor justice when I give this court credit for having intellect and judgment so far superior to average Government counsel that the comparison of day and night is not overdrawn. This court will scarcely be moved by the shallow sophistry that has been so generously indulged in by counsel for the Government in this case.

To say that the settler provision in this grant was restrictive only, does the most outrageous violence to the plain words of a statute. A forfeiture of the land is desired *at one fell swoop*, and no mere question of logic or reason is to be allowed to interfere with the consummation of that end, if Government counsel have their way. Inconsistent and irreconcilable arguments of the most obvious character have been wantonly indulged in by Government counsel in order to attain a forfeiture, and to thereby, without the expenditure of any brain power, or energy, secure a final adjudication of this case in their favor. Government counsel feel that enforcement would involve labor, and labor is to be avoided at all hazards. But this honorable court will scarcely outrage that common sense which characterizes the American people by becoming a party to this transparent twisting of reason and logic, merely to suit the convenience of Government counsel.

Why did the Government include in its bill an alternate prayer for relief, asking for the appointment of receivers

and for the enforcement of this grant as a trust, if its counsel have always been so cock-sure of their "condition subsequent" theory as their last brief would seem to indicate? The answer is that the author of that bill well knew that the *restrictive theory* of the settler clause is not tenable, and the alternate prayer upon the trust theory was put in to save the Government's case. This court should render judgment upon that alternate prayer, and not upon the first prayer which rests solely upon the contention that the settler clause was *restrictive merely*.

Consider for a moment the absurd conclusion to which the restrictive theory leads. If that theory be the true one, then Congress, while professedly desiring to avoid a land monopoly, put it within the power of the railroad to build up the biggest land monopoly in the world. For if the company was merely restrained from selling otherwise, but was not compelled to allow settlers to go on the land and to sell to them for $2.50 per acre when they did go on, then, by merely refusing to sell at all, the company could have held every acre until the last setting of the sun. Is Congress to be charged with such idiocy? That is exactly what young Mr. Townsend charged, by necessary implication, when he said in his brief, quoted at page 214 of Senator Spooner's brief herein, that the company was simply prohibited from selling otherwise than to actual settlers. Mr. Townsend was at least frank enough to admit that he had to take that position in order to torture the acual-settler clause into a "condition subsequent" and Government counsel here affirm that brief by Mr. Townsend, and they even go further and accuse the actual settlers of being "trespassers" who have gratuitously interfered with their pet forfeiture plans.

In Warrior River Coal & Land Company *vs.* Alabama State Land Company, 154 Ala., 135, the question of construing the act of Congress was not before the court, and the expression there was the merest *obiter dicta*. The holding

there that no person other than the grantor may take advantage of a breach of a condition subsequent is quite correct. In that case no actual settler was asking for enforcement in his own behalf, and the question as to whether the grant was one in trust or was one of an estate upon condition was not before the court.

The same thing is true of Nichols *vs.* Southern Oregon Company, 135 Fed., 232. The court there merely held that for breach of a condition subsequent no one but the grantor could complain. The court held right. The act in that case expressly stated that it was made *upon condition, and it did not require sales to settlers,* so manifestly no trust was raised for persons capable of being identified as in the present case.

On the other hand, Jumbo Cattle Company *vs.* Bacon, 17 S. W., 136, is directly in point, and holds that an act of the Texas Legislature providing for the sale of lands at 50 cents per acre to any responsible person who would survey the same, was, when accepted and the survey made, a contract enforceable by the person who had paid out his money for the survey. The beneficiary of the act was in that case able to identify himself by the performance of the act of survey, while in the cases at bar the beneficiaries were able to identify themselves by "going upon the lands and taking them up. and becoming actual settlers thereon, the same as if the grant had not been made."

"Quibbling" is the only term that will do moderate justice to the contention of Government's counsel that it was within the power of the railroad to arbitrarily limit a settler to 10 acres or to 50 acres, and that, therefore, the trust theory fails for uncertainty. If the law be affirmative, and if it "means just what it says," and if settlers had the right to go upon the lands and take them up "the same as if the grant had not been made," all of which propositions were affirmed years ago by Secretary Delano and Senators and Congressmen, which affirmations are quoted with approval

elsewhere by Government's counsel, then an undoubted trust was raised which equity will enforce, and the trustee would not be permitted to defeat the trust by arbitrary rulings antagonistic to the plain intent of the trust instrument. The railroad may have had the right to publish rules limiting settlers to 40 acres, the smallest legal subdivision known to our surveys, though I doubt if it ever had even that authority. I think Congress gave to settlers the right to appropriate these lands "the same as if the grant had not been made," which means that the settler was to be the sole judge as to what vacant land he would select and the sole judge as to the amount he would select up to 160 acres. Certainly the settler had that right until the railroad had seen fit to reduce the amount that might be appropriated by any one settler, and up to this date the company has promulgated no rule reducing the amount.

That portion of the Government brief devoted to cross-complainants (pp. 72 to 82) contains some extraordinary statements. These things are held: That experience had shown that railroads, in matters of this kind, should be *restrained,* not trusted; that if Congress had thrown trust provisions around the grant it would deliberately have committed to an adverse trustee duties to which it might prove recreant; *that Congress gave to the railroad the unrestricted power to sell, and to select its own settlers, and to fix the amount to be sold at from one acre to 160 acres;* that the settlers contemplated by Congress must belong to one of two classes, (*a*) those who have actually settled upon the lands, or (*b*) *those who have not, but are actual settlers elsewhere;* that if settlers belong to the first class they are trespassers; that, *"indeed, to say that it was within the intention of Congress that persons might acquire a right to the lands by becoming trespassers thereon would be to say that Congress had given them a right conditioned on their doing wrong, which would be absurd";* that if this be a trust, some of the details of its execution were left to the railroad, thereby mak-

ing it *executory*, and that, therefore, settlers could have no rights until the trustee had exercised its choice as to who the settler should be, how much land he should have, and upon what terms; that this is not a charitable trust, but, if it were, individual settlers could have no rights, *because charitable trusts never give exclusive interests, because "in a charitable trust the persons to be benefited must be vague and indefinite"*; that *"apropos the tests which we have employed to determine whether the actual-settlers provision raises a trust, we have not forgotten that Congress could have changed the rules with respect to this matter as far as the canons of reason would allow, but it has not done so nor attempted to do so."*

I invite special scrutiny of all the foregoing contentions, and particularly the last one.

"Congress could have changed the rules as regards these *tests* which we have applied," say Government counsel, "but it has not done so nor attempted to do so."

The palpable cunning of counsel for the United States in this statement is but little short of exasperating. After first using, in a very contradictory manner, all the rules of construction of a private grant, counsel profess knowledge that such rules are not applicable to a public grant, but that Congress *has not seen fit to change the rules of private construction in this case.* Congress did not have to *change* any rule! The rule already *was* and *is* that whatever Congress *intended* is the law, and that the rights of the actual settlers will be measured according to that intent.

Counsel for the Government pretend now to believe that the railroad had the right to select its settlers and to sell in tracts of one acre if it so desired. Suppose the railroad had adopted that very construction at the start, and, as the result of a requirement that the lands be sold only in tracts of one acre, and only to persons who had been 20 years in the railroad service, very few sales had been made. And suppose that the company was meantime cutting all the tim-

ber off the land and leasing it to tenants in tracts of thousands of acres for grazing purposes. Then would Government counsel stand in this court and repeat the argument that the railroad company had absolute power to select settlers and to make terms so long as it kept within the maximums fixed by Congress?

"Experience had shown that railroads must be *restrained,* not trusted," says the brief. What is the point to this contention? Does it mean that Congress merely *restrained* the company from selling otherwise than within the maximums prescribed, but did not affirmatively require sales at all? Nowhere, even in this latest brief for the Government, is a contrary position taken. Therefore we observe that counsel have taken the position that the railroad had to be *restrained* from selling except in a certain manner, but that Congress ought not to be charged with having required the company *actually to sell* in a particular manner, *and to actual settlers* (which term *had* and *has* a well-defined meaning in the public-land laws), because a requirement for such sales to settlers "would be committing to a party having a known adverse interest" certain duties to which it might prove recreant! What Websterian intellect! According to this contention the company had an "adverse interest" which might prevent it from selling to settlers *if required to do so.* Therefore the only safe thing for Congress to do *was not to require sales to settlers!*

Another brilliant contention is that settlers "must belong to one of two classes, (*a*) those who have actually settled upon the lands, or (*b*) *those who have not,* but are *actual settlers elsewhere.*"

Counsel actually pursue this travesty upon analysis until candor and intellectual honesty are worse than imperiled. The idea that Congress could have meant "actual settlers elsewhere" is quite too absurd to call for answer. That designation would include everybody on earth, and therefore would mean nobody.

The next "point" in the brief is that if every detail of the trust was not fixed in advance by Congress it was an executory trust, at most, and, therefore, not enforceable by actual settlers until such time as the railroad shall prescribe rules. Several answers might be made to this "point," but it is sufficient to say that the trust was executed in advance by Congress. Congress was its own conveyancer, and when a settler had taken up his claim and established a home thereon and tendered to the company the maximum amount it was entitled to receive, nothing remained to be done.

In final conclusion, let me refer to the act of August 20, 1912, as that act may appear of importance to the court. While I was the author of that act, I realize that this fact does not authorize me to give to it any interpretation other than that borne upon its face. But I do contend that by the act Congress expressed no intention to declare legislative forfeiture. Certainly there was no actual intention to so declare. Congress could not have lawfully declared a forfeiture at that date, nor could it have lawfully revoked the grant in trust at that date, so as to cut off rights of actual settlers which had become vested, or rights of the Union Trust Company which had become vested. Such an act would have violated the Fifteenth Amendment to the Constitution. Moreover, Congress can never lawfully declare a forfeiture to lands, the title to which has passed out of the United States, unless there was in the grant a condition subsequent and that condition has been broken.

The reason for the act of 1912 was this: In the court below counsel for the railroad had made much of the contention that the Government was proceeding without authority to claim a forfeiture, inasmuch as Congress had never authorized or declared a forfeiture, and, besides that, the Government was proceeding wrongfully in a court of equity. By the act of 1912 Congress sought merely to ratify the action the Attorney General had taken in claiming forfeiture as one of the remedies being pursued, and to give the court undoubted jurisdiction, in the event it should find, independ-

ent of the act of 1912, that forfeiture had been incurred.

In other words, the act of 1912 was not intended to create a forfeiture, but only to give to the Government the right to recover upon its claim of forfeiture in this suit, if, independent of the act of 1912, the court should find that forfeiture was the proper remedy.

I do not understand that it is even claimed by Government counsel that any new substantive rights were or could have been created by an act passed in 1912, four years after the suit was instituted, but I go into this phase of the case fully in order that my position may be clear if the question be raised by the court.

Above and beyond all the foregoing consideration, if the court finds that the grant was made in trust, and not as an estate upon condition, then all reference to the forfeiture claim of the Government, or the acts of Congress intended to further that claim, are eliminated. For in the case of an absolute grant, even of a trust estate, Congress is powerless by its mere fiat to forfeit the title granted. That is conceded in this case upon all hands. It is elementary. Congress may only declare forfeiture for conditions broken, and if there was no "condition" in the grant, but if it were one in trust, then any action taken by Congress or the Attorney General looking to a forfeiture may be ignored by the court.

In this connection it is very pertinent to call attention to the claim of the Union Trust Company. A valid mortgage has been given to that company to secure those persons who advanced the money with which to build this road. Those persons, for the most part, live upon the Rhine, in Germany, and were induced to part with their money by one Henry Villard, a German, who was one of the men who completed this enterprise. These bondholders advanced $20,000,000 from their frugal earnings. As a part of their security for the return of this money when the bonds shall fall due in 1927, is their mortgage upon these lands. Only $3,000,000 of the indebtedness has ever been paid, leaving the bonds so secured and now outstanding amount to $17,000,000. It

is true that these bondholders took with notice of the act of Congress, and they knew that this land grant was good as security for not more than $2.50 per acre. But they did have a right to rely upon receiving under their mortgage whatever these lands might bring, up to $2.50 per acre. It is true that the other security taken is probably now sufficient to cover the indebtedness, exclusive of this land grant. But who can say that the other security will be sufficient in 1927, independent of the land grant, to pay off the bonds then falling due, and accrued interest? Securities shrink in value and the times are fluctuating. These bondholders knew that the company had built the road and earned this grant in trust. The bondholders took a mortgage upon the $2.50 per acre interest of the company, which will yield nearly $6,000,000, or more than one-third of the outstanding bonds. This security constitutes no mean part of the assets now lawfully impounded to pay these bonds. Congress had no power in 1912, nor had the court below any power in 1913, to cut off this security, or to violate the Fifteenth Amendment to the Constitution. Congress did not intend to take any such action. Congress only intended to put this court in a position where it would have lawful jurisdiction to hear and determine all the claims advanced in the suit, and to that extent alone did it have authority to act.

To me the presentation of this case means business, and it means serious business. My clients are destitute. They have spent their all upon these lands, and they did so upon my advice, and upon their faith in the acts of Congress making the grants, which they read at the time in my office. We took these statutes to mean just what they say, and we believed that Congressmen and Senators knew what they were about when they said that settlers would have the same right to go upon these lands and take them up as if the grant had not been made.

I started this litigation one year ahead of any action by the Government, and I have kept at it to this hour. I kept the case from dying in the court below. This has been a fight to the death, as are all fights where $50,000,000 worth of

property is involved, and a great corporation is on one side. This court knows something of what has taken place since the case reached here, and the manner in which I met the same by a former brief filed herein.

With suave demeanor, Government counsel but recently in the case, refer to my clients as "trespassers." For 35 years paid attorneys for the Government stood by and permitted this railroad to violate a plain statute of the United States made to protect settlers and to protect the public domain, attorneys whose sworn duty it was to enforce this law. When I went to Oregon in 1905 as a special agent of the General Land Office, and dug up these statutes from the musty volumes of 1866 to 1870, I resigned my position in order to institute the present suit. At my own expense I prepared an exhaustive brief on these grants, had the same printed, and on June 12, 1907, made a present of that brief to Attorney General Bonaparte. That brief set out all the debates in Congress. It set out all the history of the various companies claiming the grant and their designations by the Oregon legislature, as now set out, as the result of much apparent industry, by counsel for the Government.

My bill of complaint filed for John L. Snyder, September 16, 1907, was practically copied verbatim by the Government when it filed its bill one year later.

Yet my clients are now called "trespassers."

Believing that the 64 actual settlers in this record are legally entitled to that for which they have prayed, not only in their own behalf, but also in behalf of the enforcement of the entire grant as a trust through a receivership, and having faith that this honorable court will grant such relief, I finally submit this case. My last request, if I may be permitted to make one, is that, if possible, the case be decided one way or the other within the next six weeks, and in any event before the summer adjournment.

Respectfully submitted,

A. W. LAFFERTY,

Solicitor for John L. Snyder et al., Defendants, Cross-complainants, and Appellants.

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No. 679

In the Supreme Court of the United States

OCTOBER TERM, 1914

OREGON & CALIFORNIA RAILROAD COMPANY, A Corporation, *et al.*,
Defendants and Appellants

JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants

WILLIAM F. SLAUGHTER, *et al.*,
Interveners and Appellants

vs.

THE UNITED STATES OF AMERICA,
Complainant and Appellee

Brief for Interveners

STATEMENT.

The Congress of the United States, by an Act bearing date July 25, 1866, made a grant of land in the State of Oregon in aid of the construction of a railroad to run from Portland, Oregon, to the Oregon and California boundary at a point to intersect or connect with a road to be constructed from a point on the Central Pacific Railroad and running northwardly to the California and Oregon boundary. By Section 12 of the Act creating this grant the Congress reserved the right to "Amend, alter or repeal" said act.

By an Act bearing date the 10th day of April, 1869 —no Company having qualified under the terms of the Act of July 25, 1866, to claim the rights granted thereby, and no right having been acquired by any person, nor by any corporation, the Congress amended the said Act of July 25, 1866, by providing amongst other things that: "And *provided further* that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser and for a price not exceeding $2.50 per acre."

Thereafter, to-wit: On April 4, 1870, the Oregon and California Railroad company, having in the meantime acquired all rights of the Oregon Central Railroad Company, an alleged corporation, which had attempted to incorporate and to qualify to accept and acquire the advantages under said Act of July 25, 1866, duly accepted the terms of said Act as amended by the Act of April 10, 1869, such assent and acceptance being in the words and figures following:

"Resolved, That this Company do accept the grant conferred by Act of Congress, and all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified; and

Resolved, That the President and Secretary of this Company be, and they are hereby, authorized and directed to file the assent of this Company to such Act of Congress, *and amendments thereto,* as aforesaid, in the office of the Secretary of the Interior, which shall be done by filing a copy of these resolutions in such office, certified to under seal of this Company, and signed by the President and Secretary respectively. R. Vol. , Page ." This assent was filed in the office of the Secretary of the Interior of the United States as required by said Act, the same being a condition precedent to the acquiring of any rights thereunder. Under the rights acquired by said O. & C. Railroad Company by its assent to the terms and conditions of said Act of July 25, 1866, and the amendments thereto, said Company built the railroad and telegraph line contemplated, has maintained and operated the same, has transported and carried the United States mails, munitions of war, etc., etc., and has done everything required of it by the terms of said Act of July 25, 1866, and the Acts amendatory thereof—*Except* that it has sold lands in larger quantities than one quarter section or 160 acres to one person, and at prices in excess of $2.50 per acre, and *has refused* to sell lands to persons who have applied to purchase the same under the terms of the grant, to-wit: to these interveners, who each became an actual settler

upon a quarter section of said granted lands, made application to purchase the same, tendered the maximum price of $2.50 an acre therefor and demanded a deed, which application, tender and demand were in the case of each intervener, rejected, denied and refused.

These conditions existed when on September, 1908, the United States of American filed a suit in equity in the Circuit Court of the United States for the District of Oregon, in which suit it demanded a forfeiture of the unsold portions of said grant, or a decree to enforce specific performance of the terms of the grant *upon the grounds of the alleged sales in violation of the terms of the grant, and refusal to sell in compliance with the terms of the grant.*

By proper orders these interveners were made parties to said suit and were permitted to be heard therein as to their alleged rights based upon their several applications, tenders and demands. By its order and decree entered July 1, 1913, the District Court of the United States for the District of Oregon, having jurisdiction of said cause, dismissed the petitions of these interveners upon the ground that they had no equitable interest in the subject matter of said suit.

This statement of facts relates to what is known as the East Side grant, but the same facts apply to the West Side grant made by Act of Congress of May 4, 1870, with the exception that the provision as to the sale of the lands was embraced in the original Act and not in an amendment. All other facts are the same as to both grants, and both are embraced in the suit in

question, and the orders and decree entered and rendered therein.

In view of the contention of the Complainant-Appellee that it should have a forfeiture of the unsold portions of the granted lands, another fact is important. The record shows that in a number of instances patents were issued to purchasers from the railroad company of large bodies of the granted lands, which had been sold in violation of the terms of the grant, and Complainant has condoned the offense of selling in larger quantities than 160 acres by accepting settlement from the purchasers of these larger tracts.

Considering these facts the interveners insist upon the following

PROPOSITIONS

I.

The intention of Congress in providing the manner in which the lands should be sold was to create a trust in the granted lands for the benefit of those who might desire to acquire title thereto and to make the company, which should qualify under the law to take the rights and privileges granted, the trustee to administer the trust.

II.

The Complainant-Appellee, having created a trust in the granted lands, having accepted the benefits accruing to itself from the building and operation of the road under and by virtue of the grant, and having invited applications to purchase the lands under the terms

of the trust, should not be heard to claim a forfeiture of any portion of the trust estate, but should be required to assist in enforcing the terms of the trust.

III.

The Appellant, Defendant, O. & C. R. R. Co., having accepted all the terms of the grants, and having under such acceptance received all the rights, privileges and benefits of the grants with the conditions and limitations attached thereto should not be heard to claim any greater rights in the trust estate accepted by it than is given by the plain letter of the law creating the grant, to-wit: the sum of two dollars and fifty cents per acre for each acre of the granted lands which it could or might sell for that price. It should be held strictly to the terms of the trust which it accepted.

ASSIGNMENT OF ERRORS.

The errors assigned by these interveners are so numerous and so voluminous that it is impracticable to embrace them all in a brief. They cover ninety-six pages of the printed transcript of record and are found at page 8471 in volume sixteen, extending to page 8567 in said volume, being numbered consecutively from 1 to 859. Many of these, however, are repetitions, being repeated for each set of interveners. Only the general assignments, and some of those relating to one set of interveners, will be cited.

By the stipulation entered into by all the parties to this cause, through their respective attorneys, which stipulation is found at page 8652 of the printed transcript of record, it is agreed that the bill in intervention of B. W. Nunnally, et al., shall be printed in the record, and that all other bills in intervention are, in substance and effect, the same. R. Vol. 16, p. 8652.

The assignments of error relating to this bill are found on page 8497 of the printed transcript and are numbered from 111 to 120, ending on page 8499 of the transcript. They are as follows:

111

The Court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to the bill of intervention of the intervener, B. W. Nunnally, and the other interveners with him in his said bill joined, for want of equity in said bill, and

112

The Court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as Trustee, to the bill of intervention of said interveners, for want of equity in said bill, and

113

The Court erred in sustaining the motion of the defendants, Oregon & California Railroad Company,

Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

114

The Court erred in sustaining the motion of the defendant, Union Trust Company, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

115

The Court erred in sustaining the motion of the complainant for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill, and

116

The Court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to answer said bill of intervention, and

117

The Court erred in not requiring the Union Trust Company, individually and as Trustee, to answer said bill in intervention, and

118

The Court erred in not requiring the complainant to answer said bill in intervention, and

119

The Court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively, in said bill, and

120

The Court erred in not granting to said interveners or any of them, any equitable relief,

As said bill of intervention contains allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners and each of them to the relief prayed for by them and each of them, respectively, in said bill.

The general assignments of error to which the attention of the Court is called begin with No. 281 at page 8589 of the record, and run through to No. 359 on page 8567. They are as follows:

281

The Court, being a court of equity, erred in decreeing a forfeiture to the complainant of all right and interest of the defendants in or to the lands embraced within the grant of 1866, for breach of the assumed condition contained in the amendment of April 10, 1869, as

(a) Assuming that said proviso was a condition subsequent, for breach of which forfeiture could be had, such condition subsequent was and is also a covenant; and

(b) The complainant prayed in its bill of complaint for a specific performance of this covenant, and

(c) Such forfeiture was and is inequitable and should not be decreed by any court of equity where there is any other means of doing justice between the parties; and

(d) The complainant prayed for specific performance of the covenant, and the Court should have granted such prayer, as by such performance justice and equity could have been done to all of the parties to the suit without forfeiture; and

(e) The Court was without jurisdiction to and it was inequitable for it to divest the defendant, Oregon and California Railroad Company of title as trustee for the benefit of the interveners and cross-complainants, sestui que trustent, with interests vested prior to said decree; and

(f) In divesting the railroad company of title by forfeiture, the Court, in effect, imposed a penalty upon the railroad company to the extent of its interest in the land forfeited, to-wit: in the amount of $2.50 per acre for each acre of the land so forfeited, for and on account of the breach of its covenant, the imposing of which penalty is wholly inequitable, and

(g) By forfeiture the Court divested the vested interest of these interveners and cross-complainants and each of them, without any fault on their part or on the part of any of them, all of which is wholly inequitable.

The Court, being a court of equity, erred in decreeing a forfeiture to the Complainant, of all right and interest of the defendants, in or to the lands embraced within the West Side land grant, for breach of the assumed condition contained in the Act of May 4, 1870, as

(a) Assuming that said provision was a condition subsequent, for breach of which forfeiture could be had, such condition subsequent was and is also a covenant; and

(b) The complainant prayed in its bill of complaint for a specific performance of this covenant, and

(c) Such forfeiture was and is inequitable and should not be decreed by any court of equity where there is any other means of doing justice between the parties; and

(d) The complainant prayed for specific performance of the covenant, and the Court should have granted such prayer, as by such performance justice and equity could have been done to all of the parties to the suit without forfeiture; and

(e) The Court was without jurisdiction to and it was inequitable for it to divest defendant, Oregon and California Railroad Company of title as trustee for the benefit of the interveners and cross-complainants, sestui qui trustent, with interests vested prior to said decree; and

(f) In divesting the railroad company of title by

forfeiture, the Court, in effect, imposed a penalty upon the railroad company to the extent of its interest in the land forfeited, to-wit: in the amount of $2.50 per acre for each acre of the land forfeited, for and on account of the breach of its covenant, the imposing of which penalty is wholly inequitable, and

(g) By forfeiture the Court divested the vested interest of these interveners and cross-complainants and each of them, without any fault on their part or on the part of any of them, all of which is wholly inequitable.

283

The Court erred in not holding that this suit cannot be maintained by complainant as one to enforce forfeiture nor to quiet title, as

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture had not been adjudicated by a court of law; and

(c) The defendant, railroad company, holds legal title to and the possession of said granted lands; and

(d) Complainant having asked for forfeiture and in the alternative, for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance; and

(e) In view of specific performance, a decree quieting title in the Government, cannot be had.

284

The Court erred in not holding that the Government was estopped to claim forfeiture of the lands embraced within each and both of said land grants, as

(a) The Government in its bill of complaint bases its right to recover, upon the refusal of the railroad company to sell said lands to the interveners and cross-complainants and others similarly situated, and

(b) The Government in its bill of complaint prayed that these interveners and cross-complainants might be permitted to enforce their rights herein, and

(c) The Government having come into a court of equity is estopped to claim forfeiture when equitable relief by performance can be had; and

(d) The Government is estopped to claim forfeiture in lieu of performance, since the interveners and cross-complainants have come into court upon the invitation of the Government and furnished the means whereby performance may be had.

285

The Court erred in holding that the provisions in each and both of said land grants concerning sales to settlers, are negative provisions only, designed to prevent sales to others than settlers in quantities greater than one-quarter section to any one purchaser and at prices greater than $2.50 per acre, and not positive provisions requiring sales to settlers in quantities not greater

than one-quarter section to any one purchaser and at a price not greater than $2.50 per acre.

286

The Court erred in not holding that the provisions of each and both of said land grants concerning sales to settlers were both positive and negative, requiring the grantee to sell to settlers, who should apply to buy, not more than one-quarter section, at a price not greater than $2.50 per acre, and requiring said grantee to refrain from selling any of the granted lands to others than settlers or in quantities greater than one-quarter section or at a price greater than $2.50 per acre.

287

The Court erred in holding that the provisions in each and both of said land grants, requiring sales to settlers, are not positive covenants which may be specifically enforced.

288

The Court erred in holding that the provisions in each and both of said land grants requiring sales to settlers, is a negative covenant only, which may be enforced by the Government only, and that the only means of such enforcement are by forfeiture for breach thereof.

289

The Court erred in decreeing a forfeiture of those lands included in either or both of the grants to the

railroad company or which the interveners and cross-complainants had made application to purchase from and tendered to the railroad company the sum of $2.50 per acre and offered to become actual settlers on the lands so applied for, prior to the adoption by Congress of the joint resolution of April 30, 1908, as

By so applying, tendering the purchase price and offering to become an actual settler upon the lands so applied for, each intervener and cross-complainant has acquired a vested interest in the land applied for, which cannot be divested by Congress, assuming that said provisions are conditions subsequent, and that the adoption of said joint resolution by Congress was a declaration of forfeiture for breach thereof.

290

The Court erred in holding that although the provisions in each and both of said land grants were designed to devote the lands conveyed by said grants, to settlement and tillage and to prevent the monopoly of the land and that such grants were laws as well as grants, that notwithstanding the railroad company might defeat the purposes of the provisions requiring sales to settlers, by themselves monopilizing and holding the lands and refusing to sell them at all, and by refusing to sell any of them except to such persons and in such quantities as it saw fit within the price and terms provided in the grant.

291

The Court erred in not holding that the purpose of the joint resolution of Congress of April 30, 1908, was to authorize the enforcement of a forfeiture for any breach of an assumed condition subsequent in either of said land grants, as an alternative only, of the refusal of the railroad company to perform the covenants requiring sales to settlers, after such performance had been decreed by the Court.

292

The Court erred in not holding that the joint resolution of Congress of April 30, 1908, authorized the enforcement of forfeiture for any breach of an assumed condition subsequent in either of said land grants, only in the event that specific performance of the covenants in said grants, requiring sales to settlers, could not be enforced.

293

The Court erred in not holding that the joint resolution of Congress of April 30, 1908, authorized a forefeiture of the legal title of the railroad company for breach of an assumed condition subsequent in either of said land grants, only as a means of carrying into effect the covenants in said grants requiring sales to settlers.

294

The Court erred in holding that at the time of the filing of the bill of complaint herein and ever since,

and for a long time continuously next prior thereto, the Oregon and California Railroad Company, did not have possession of said land grants or either of them.

295

The Court erred in not holding that at the time of filing of the bill of complaint herein, and ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company had legal title and the possession of all lands of which forfeiture is sought by said bill of complaint.

296

The Court erred in holding that the United States, complainant herein, is the owner in fee simple or in possession of said lands or any part thereof or entitled to said lands or entitled to the possession of the same or any part thereof, which are sought to be purchased by these interveners and cross-complainants or any of them.

297

The Court erred in holding that, as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the complainant was in possession of the said grants, or either of them, or any part thereof; and in holding that the Oregon and California Railroad Company did not have the possession of the same.

298

The Court erred in holding as a foundation for a

suit by complainant, to quiet its title to the said grants or either of them, or any part thereof, that the same had not been reduced to possession, and were unoccupied and vacant, and not in possession of said defendant, Oregon and California Railroad Company.

299

The Court erred in not holding that the United States, complainant herein, is not the owner in fee simple, nor in possession of said lands or any part thereof, nor entitled to said lands, nor entitled to the possession of the same or any part of the same, which are sought to be purchased by these interveners, and cross-complainants or any of them.

300

The Court erred in holding that the complainant is the owner in fee simple, or in possession of said lands or any part thereof, or entitled to the possession of the same or any part thereof.

301

The Court erred in holding that as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant, Oregon and California Railroad Company did not have the legal title to such grants.

302

The Court erred in holding that the title of the United States of America, of or in said lands or estates in lands sought to be purchased by these interveners and cross-complainants or any of them, be or is by said decree, quieted and confirmed, particularly as to any claim or claims of right, title and interest, in, to or upon the same, in favor of these interveners and cross-complainants or any of them.

303

The Court erred in holding that the lands and estates in lands in the said decree described, and which were sought to be purchased by the interveners and cross-complainants herein or any of them, either in whole or in part, now are forfeited to, or that the title to or any part thereof, has reverted to and now is revested in the United States of America, or that the same or any part thereof, now are the absolute property of the United States of America, or are free from any and all claim or claims of right, title or interest or lien in, to or upon the same or any part thereof, by or in favor of these interveners and cross-complainants or any of them.

304

The Court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any

of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the act of July 25, 1866, and the act of April 10, 1869, amendatory thereof.

305

The Court erred in not holding that the United States, complainant herein, was not entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants and upon the terms provided in the act of July 25, 1866, and the act of April 10, 1869, amendatory thereof.

306

The Court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants and upon the terms provided in the act of May 4, 1870.

307

The Court erred in not holding that the United States, complainant herein, was not entitled to an in-

junction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the act of May 4, 1870.

308

The Court erred in holding that the United States, complainant herein, was entitled to any injunctive relief whatever as against these interveners and cross-complainants or any of them.

309

The Court erred in holding that the United States, complainant herein, was entitled to a decree restraining these interveners and cross-complainants, or any of them, from claiming or asserting any right, title, interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

310

The Court erred in not holding that the United States, complainant herein, was not entitled to a decree restraining these interveners and cross-complainants or any of them, from claiming or asserting any right, title or interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

311

The Court erred in holding that the title of complainant to the said lands, or any part thereof, should be quieted.

312

The Court erred in holding that the United States, complainant herein, was entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

313

The Court erred in not holding that the United States, complainant herein, was not entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

314

The Court erred in holding that the proviso in the amendatory act of April 10, 1869, was not a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the Oregon and California Railroad Company to accept and become vested with the title to the lands under the grant of 1866.

315

The Court erred in holding that the word "provided" introducing the proviso contained in the amendatory

act of April 10, 1869, imported a condition subsequent, as

(a) The word "provided" is as appropriate for the purpose of importing a condition precedent as a condition subsequent, and

(b) Said proviso is coupled with a clause in said act contained permitting the grantees to except said grant one year after the passage of said amendatory act, and

(c) Said proviso is not coupled with and does not bear any relation to the granting clause in said act amended.

316

The Court erred in not holding that the proviso in the amendatory act of April 10, 1869, was and is a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the railroad company to accept and become vested with the title to the lands under the grant of 1866.

317

The Court erred in refusing to direct and decree a specific performance on behalf of the United States, the complainant herein, and against the defendant, Oregon and California Railroad Company and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by

each respectively, upon payment of the purchase price therefor.

318

The Court erred in not holding that the defendant, Oregon and California Railroad Company and other defendants, claiming an interest in said land, be required to convey said land to the interveners and cross-complainants applying to purchase the same.

319

The Court erred in holding that the defendant, Oregon and California Railroad Company and each and all of the other defendants claiming an interest in said land, should not be required to convey said lands to the interveners and cross-complainants applying for the same.

320

The Court erred in holding that Congress did not intend by the act of April 10, 1869, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of July 25, 1866, according to the terms of the proviso in said act of April 10, 1869.

321

The Court erred in not holding that Congress intended by the act of April 10, 1869, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of

July 25, 1866, according to the terms of the proviso in said act of April 10, 1869.

322

The Court erred in holding that Congress did not intend by the act of May 4, 1870, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the West Side land grant, according to the terms of the provision in said act of May 4, 1870.

323

The Court erred in not holding that Congress intended, by the act of May 4, 1870, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the West Side land grant, according to the terms of the provision in said act of May 4, 1870.

324

The Court erred in refusing to direct and decree a specific performance on behalf of the interveners and cross-complainants and each of them, against the defendant, Oregon and California Railroad Company, and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by said interveners and cross-complainants, respectively, as prayed for in their several bills.

The Court erred in holding that the provisions in each and both of said grants did not constitute contracts entered into by and between the Government and the railroad company, for the benefit of and enforcible by the interveners and cross-complainants.

The Court erred in holding that the proviso in the amendatory act of April 10, 1869, requiring sales to settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land, and to purchase the same in quantities and at prices provided by said amendatory act.

The Court erred in not holding that the proviso in the amendatory act of April 10, 1869, requiring sales to settlers, was a covenant to a use and impressed a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided by said amendatory act.

The Court erred in holding that the provision in the act of May 4, 1870, relating to sale of land to actual settlers, was not a covenant to a use and did not im-

press a trust upon said lands for the benefit of those who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided by said act.

329

The Court erred in not holding that the provision in the act of May 3, 1870, relating to sale of lands to actual settlers, was a covenant to a use and impressed a trust upon said lands for the benefit of those who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided in said act.

330

The Court erred in holding that the railroad company was not constituted a trustee for the benefit of the interveners and cross-complainants as sestui que trustent, under the provisions requiring sales of lands to settlers, referred to, in that

(a) "The nature and quality of their interests are not specific and definite," and in that

(b) "They are not susceptible of identification as such," and,

331

The Court erred in not holding that the railroad company, by the provisions in said grants contained, was constituted a trustee for the benefit of the interveners and cross-complainants as sestui que trustent, as

(a) The nature and quality of said interests under said grants are sufficiently specific and definite, and

(b) Their application to purchase and offer to settle upon the lands is a sufficient identification.

382

The Court erred in holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, did not give to the respective interveners and cross-complainants a vested interest in said lands, in default of an acceptance of such offers and conveyances of said lands by the Oregon and California Railroad Company.

383

The Court erred in not holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, gave to the respective interveners and cross-complainants, a vested interest in said lands, in default of an acceptance of such offers and conveyances, by the Oregon and California Railroad Company.

384

The Court erred in holding that the proviso in the act of April 10, 1869, is not sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

335

The Court erred in not holding that the proviso in the act of April 10, 1869, is sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

336

The Court erred in holding that the proviso in the act of April 10, 1869, requiring sales to settlers, is sufficiently definite and certain as a condition subsequent, to entitle the Government to a forfeiture for its breach, and that it is not sufficiently definite and certain to be specifically enforced as a covenant to a use, or a covenant creating a trust.

337

The Court erred in not holding that the proviso in the act of April 10, 1869, for the sale of lands to actual settlers was intended by Congress as and was and is a covenant to a use only, and not a condition subsequent, as

(a) Said proviso contains specific and direct commands which were assented to, and performance thereof promised, by the Oregon and California Railroad Company, and

(b) Said proviso does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

338

The Court erred in holding that the proviso in the act of April 10, 1869, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

339

The Court erred in not holding that the proviso in the act of April 10, 1869, was a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

340

The Court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the East Side grant, or any part thereof, except as a settler of the trust in said lands.

341

The Court erred in holding that the provision in the act of May 4, 1870, is not sufficiently definite and certain to be enforced as covenant to a use or as a trust.

342

The Court erred in not holding that the provisions

in the act of May 4, 1870, is sufficiently definite and certain to be enforced as covenant to a use or as a trust.

343

The Court erred in holding that the provisions in the act of May 4, 1870, requiring sales to settlers, is sufficiently definite and certain as a condition subsequent, to entitle the Government to a forfeiture for its breach, and that it is not sufficiently definite and certain to be specifically enforced as a covenant to a use, or as a covenant creating a trust.

344

The Court erred in not holding that the provision in the act of May 4, 1870, requiring sales to settlers, was intended by Congress as and was and is a covenant to a use only and not a condition subsequent, as

(a) Said provision contains specific and direct commands which were assented to and agreed to and performance thereof promised by the Railroad company, and

(b) Said provision does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

345

The Court erred in holding that the provisions in the act of May 4, 1870, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

346

The Court erred in not holding that the provision in the act of May 4, 1870, was a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

347

The Court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the West Side grant, or any part thereof, except as a settler of the trust in said lands.

348

The Court erred in holding that the United States, complainant herein, had any right, title or interest in and to the lands embraced within the East Side land grant or any part thereof, which it could enforce in this action, except such rights as it has as a settler of the trust in said lands, to enforce the provision of said trust, and

such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands, and

349

The Court erred in holding that the United States, complainant herein, had any right, title or interest in and to the lands embraced within the West Side land grant or any part thereof, which it could enforce in this action, except such rights as it had or has as a settler of the trust in said lands to enforce the provisions of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands, and

350

The Court erred in not holding that this suit can only be maintained by complainant as one to compel the specific performance of a trust covenant, or to enforce a public policy, as

(a) Neither of said land grants contains a provision importing a condition subsequent, upon the breach of which forfeiture could be had, and

(b) Congress has never declared a forfeiture of either of said land grants for breach of any condition subsequent, assuming that there is such condition in either of said land grants, and

(c) The fact or forfeiture has never been adjudicated by a court of law, and

(d) The defendant, Oregon and California Rail-

road Company holds the legal title to and possession of said lands, and

(e) Complainant having asked for forfeiture and in the alternative for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance, and

(f) In view of specific performance a decree quieting title in the Government, cannot be had.

851

The Court erred in not holding, on the assumption that the said proviso in the act of April 10, 1869, is a condition subsequent, for breach of which forfeiture might be had, that complainant elected, by filing its suit in equity, to waive forfeiture, and elected to specifically enforce said proviso as a covenant to a use only.

852

The Court erred in not holding on the assumption that the said provision in the act of May 4, 1870, is a condition subsequent, for breach of which forfeiture might be had, that complainant elected, by filing its suit in equity, to waive forfeiture, and elected to specifically enforce said provision.

853

The Court erred in holding that the interveners and cross-complainants were not such actual settlers as were contemplated by the acts of April 10, 1869, and May 4, 1870.

354

The Court erred in holding that these interveners and cross-complainants did not have vested interests in the lands sought to be purchased by them and each of them respectively, by reason of their various offers and tenders to purchase said lands upon the terms provided in the acts of April 10, 1869, and May 4, 1870.

355

The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

356

The Court erred in not holding that the evidence in this cause was insufficient to support or sustain the decree rendered.

357

The Court erred in holding that the evidence adduced in support of the complaint of the United States, complainant herein, was sufficient to entitle complainant to a forfeiture of the title to the lands sought to be purchased by these interveners and cross-complainants or any of them.

358

The Court erred in not holding that the evidence adduced in support of the complaint of the United States, complainant herein, was not sufficient to entitle complainant to a forfeiture of the title of the lands sought

to be purchased by these interveners and cross-complainants or any of them.

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The Court erred in holding that the United States, complainant herein, was entitled to recover its costs and disbursements herein, or any costs or disbursements herein, against these interveners and cross-complainants, or any of them, and that a decree should be entered to that effect.

The petition and bill in intervention of B. W. Nunnally and others, which states the claims of all the interveners in this suit, is found in volume two of the printed transcript of record and covers pages 541 to 688, both inclusive. Special reference is made to this bill in intervention and the special attention of the Court is invited thereto.

ARGUMENT.

The United States Circuit Court of Appeals certified ten questions to this Honorable Court for solution. I believe that three questions are paramount.

First: Is the Government entitled to a forfeiture of the unsold portion of the grants in question?

Second: If the Government is not entitled to a decree of forfeiture, what are the rights of the appellant-defendants, the O. & C. R. R. Co. and its allied interests, in the lands embraced in the grants?

Third: If the Government is not entitled to a de-

cree of forfeiture, and the O. & C. R. R. Co. took only a limited estate in the granted lands, what rights, if any, did the interveners acquire by their applications to purchase the granted lands, and *tendering performance* as alleged in their petitions in intervention?

In order to the proper solution of these questions it becomes necessary to familiarize ourselves with the provisions of the laws making the grants.

PROVISIONS OF ACT OF JULY 25, 1866.

Section 1 provides that the companies shall "lay out, locate, construct, finish and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad in California." Record, V. 1, pp. 6-7.

Section 5 provides, "That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit dispatches by said telegraph line for the Government of the United States, when required to do so by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph therefor, at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service, and said railroad shall be and remain a public highway for the use of the Government of the United States, free from all toll or other charges upon the transportation of the property or troops of the United States; and the same

shall be transported over said road at the cost, charge and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States." (Record, V. 1, pp. 10-11.)

Section 8 provides, "That in case the said companies shall fail to comply with the terms and conditions required, *namely*, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the time of any such failure, shall revert to the United States." (Record, V. 1, page 12.)

Section 6 provides, "That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, One thousand eight hundred and seventy-five; and the said roalroad shall be of the same gauge as the Central Pacific Railroad of California, and shall be connected therewith." (Record, V. 1, page 11.)

SECTION 6 AMENDED BY ACT OF APRIL 10, 1869.

By Act of Congress of date April 10, 1869, the foregoing section six was amended as follows: "Be

and the same is hereby amended so as to allow any railroad company heretofore designated by the legislature of the State of Oregon in accordance with the first section of said act (act of July 25, 1866), to file its assent to such act, in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act; Provided, that nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land; and provided further, that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." (Record, V. 1, pp. 20-21.)

GROUNDS FOR FORFEITURE.

It will be seen that section 8 of the law making the grant (act of July 25, 1866, R. V. 1, p. 12), contains specific grounds for forfeiture or reverter.

These grounds are: First—failure to file assent within the time prescribed; and second—failure to construct the road and telegraph line as provided in the act.

There is no other provision for a ground of reverter, or forfeiture; and this section (8) has not been amended

in any particular, but stands today as it was originally enacted. It was not disturbed by the Act of April 10, 1869, amending section 6 of the granting act.

If the Congress had purposed to make the proviso in the amendment of section 6 a condition subsequent for which forfeiture or reverter might be had it would have amended section 8 so as to show such purpose. The fact that it did not amend section 8, shows that the purpose of Congress was to make no additional provision for forfeiture or reverter.

The Act of April 10, 1869, providing for a revivor of the lapsed grant of July 25, 1866, by permitting assent to the filed within a year from that date, and attaching thereto the proviso as to the manner in which the lands should be sold, shows the purpose of Congress to require any company which should desire to get the advantages offered under said granting act to covenant with the Government to carry out the intention to have the lands granted distributed to the people in small holdings, and thus prevent a monopoly in the hands of such corporation or company.

COVENANT DEFINED.

According to the books a covenant is "a subordinate stipulation forming a part of the same instrument to which it is incidental."

This covenant required by the amendment of April 10, 1869, being incidental to the grant, and relating to the lands granted, comes within the description of covenants which run with the land.

"A covenant which runs with the land must have relation to the interest or estate granted and the act to be done must concern the interest created or conveyed." (Conduitt vs. Ross, 102 Ind. 166; Wells vs. Benton, 108 Ind. 585; Indianapolis Water Co. vs. Nulte, 126 Ind. 373; Wheeler vs. Schad, 7 Nev. 204.)

"Such covenants, and such only, run with the land as concern the land itself, * * * and become united with and form part of the consideration for which the land or some interest in it is parted with between the covenantor and covenantee." (Cole vs. Hughes, 54 N. Y. 444, 13 Am. Rep. 611.)

The doctrine of covenants which run with the land is extensively elaborated in 82 Am. State Rep. P. 664—and the authorities there referred to confirm the contention that the covenant made between the Government and the railroad company in the case at bar, by the assent of the company to the amendment of April 10, 1869, was a covenant which would run with the land, and was such as would, and did create a trust in the lands which should be and were earned by the company under the grant, which trust could, and can be discharged only by the conveyance of the land in accordance with the proviso relating thereto.

"Covenants are to be understood according to the plain meaning of the word, and not according to any secret reservation."

The filing of assent in the Department of the Interior was one of the conditions precedent to the acquiring of any right to claim the benefits of the grant,

hence no right was, or could be acquired by any company *before* the filing of its assent as required—and this assent must be a complete acceptance of the Government's whole proposition, according to the plain meaning of the words, *and without any secret reservation.*

This assent created a covenant, not only to build, equip, maintain and operate the railroad and telegraph line, but as well to perform the subordinate stipulation to sell the lands in accordance with the proviso relating thereto; and was, and is such a covenant as can be enforced by a decree of specific performance, hence a Court of Equity will not grant a forfeiture for its non-performance but will enforce it.

If the appellant-defendants had failed to build and equip the railroad and telegraph line it would have forfeited its right to the grant, that being a ground for reverter or forfeiture under section 8 of the law creating the grant; but it built and equipped the road and telegraph line, *and earned the benefits of the grant under* its terms, and these benefits cannot be forfeited. The subordinate stipulation, however, as to the manner in which it agreed to dispose of the lands can be specifically enforced. It was, and is a covenant to a use amounting to a *trust* which the grantor, or settlor of the trust may enforce through the agency of a Court of Equity by a decree of specific performance.

The complainant-appellee, therefore, is not entitled to nor should it be heard to insist upon a decree of forfeiture, but should, and must be held to its right to a decree of specific performance only.

RIGHTS OF APPELLANT-DEFENDANTS.

The appellant-defendant, the O. & C. R. R. Co. built and equipped the railroad and telegraph as it was required to do. If it has maintained and operated the road and telegraph, has transported the United States mails, has given all service over its lines required of it by any department of the government, and, thereby, has earned the benefits guaranteed it by the terms of the act creating the grant. It has earned the right to sell the lands for what it could get for them, *not exceeding two dollars and fifty cents per acre,* and to appropriate to its own use the proceeds of such sales. It has earned just this right, and not a jot nor tittle beyond it, so far as the granted lands are concerned. Its title to the lands was, and is limited to just that. Its covenants with the Government made by the filing of its assent to the Act of July 25, 1866, *and the amendments thereto,* restrict its interest in the lands to the two dollars and fifty cents per acre and it could take no greater interest than that.

With all the legerdemain which may be thrown around the proposition by learned counsel the fact remains that the company—the O. & C. R. R. Co.—covenanted to sell the lands *under the terms of the grant, and not otherwise.* It covenanted to take, nor claim any greater interest in the land than that named in the amendment of April 10, 1869, to-wit: two dollars and fifty cents per acre, or the price at which it could be sold, not exceeding that price. It necessarily follows that those claiming

an interest in the lands under or through the O. & C. R. R. Co. unless acquired by parties contemplated as beneficiaries by the amendment referred to, could take no greater interest than the company itself had. It could mortgage only the interest which it had; hence its allied interests—defendant-appellants—are entitled only to such interest as it could legitimately convey, and they must be content to look elsewhere for the payment of the balance of their debts due from the O. & C. R. R. Co. after they shall have received what it can justly claim under the law under which it holds the granted lands.

But, appellee asserts: That defendant-appellant, the O. & C. R. R. Co., has refused to sell the granted lands to those who have applied to purchase the same *under the terms of the grant.* This is true, but has the appellee been damaged by such refusal? If not why should it be heard to demand a forfeiture upon that ground? Who has any cause to complain of the refusal of the railroad company to sell the lands under the terms of the grant? Palpably those who have applied to purchase under the terms of the grant are the only ones aggrieved by the rejection of their applications; hence they are the only parties who are in position to demand redress. This they have done by coming into Court at the instance of the appellee, and asking the Court to enforce by its decree specific performance of the terms of the grant.

The appellee and the railroad company both insist, however, that no *trust* was created in the granted lands,

for the reason that no beneficiaries were named; that no class of persons was sufficiently designated so that beneficiaries could be identified. This question must not be determined upon the narrow lines of private trusts created by will, but upon lines of a broad public policy. The purpose of the Congress was to have the lands acquired naturally by individuals in quantities not exceeding the acreage embraced as a maximum in other acts for acquiring the lands of the public domain—this to prevent a monopoly of the public lands in the hands of large holders. It was certainly not intended by the Congress to *create* a monopoly and prevent settlement of the public lands. The primary object in making such grants has at all times been to facilitate the settling up of the public lands. This purpose has been recognized by the Courts.

In support of the proposition that a trust is effective as such without the naming of beneficiaries the Court's attention is directed to the matter of Smith's Estate, 144 Pa. 428, where the Court held that where the language states in general terms the purpose of the grantor to have the grantee do some act for the benefit of a third party, it is sufficiently definite and will be enforced.

In Perrin vs. Carey, 65 U. S. 465 the Court held the following langauge suffifficient to uphold the trust: "To the support of the poor white male and female orphans neither of whose parents are living."

In Jones vs. Habershaw, 107 U. S. 174-191, the following was held to be sufficiently definite:

"To one or more Presbyterians or Congregational Churches in the State of Georgia in such destitute and needy localities as the proper officers of said independent church may select, so as to promote the cause of religion among the poor and feeble churches of the State," etc.

In the case of First National Bank of Elgin vs. Schween, 127 Illinois 378, the Court held that "Beneficiaries in a deed of trust need not be designated by name. Hence a deed of trust to secure such farmers and dairymen as should furnish the grantor with milk to be manufactured into butter and cheese is not void for want of designated beneficiaries."

The books are full of such decisions, but the foregoing are sufficient to show the rule to be that "Where a conveyance of an estate is made to grantee, which requires him to dispose of the same in a particular way, or for the benefit of a particular class, a trust is thereby created."

In the case at bar the particular class to which the lands were required to be sold were "actual settlers." A class easily ascertained, hence the trust intended to be established cannot fail for want of designated beneficiaries. By each selecting a particular portion of the granted land, applying to the railroad company to purchase the same, tendering the maximum price named in the law in payment for such selected lands and demanding a deed therefor, the interveners have established their identity as beneficiaries under the trust.

ACTUAL SETTLER. WHAT CONSTITUTES?

I find but two decided cases defining what constitutes an actual settler under a law giving privileges to "Actual Settlers."

In Philip Hickie et al, vs. Alexander B. Starkie et. al. reported in 1st Peters, 94, Chief Justice Marshall said: "In Henderson vs. Poindexter the term 'actual settler' seems to have been understood as synonomous with residence. That case, however, did not require that the precise meaning of the term should be fixed, and the Court is disposed to think that a settlement made by another person would be sufficient; though the proprietor should not reside on the estate, or within the territory." The other is the case of Northern Pacific Railroad Co. vs. Hinchman, 53 Fed. 523 *et. seq.* The Court said: "On the 5th day of June, 1872, Congress enacted a statute in relation to the Bitter Root lands, a part of which is as follows:

"Sec. 2. That, as soon as practicable after the passage of this act, the surveyor general of Montana territory shall cause to be surveyed, as other public lands of the United States are surveyed, the lands in the Bitter Root valley lying above the Lolo Fork of the Bitter Root River, and said lands shall be opened to settlement, and shall be sold in legal subdivisions *to actual settlers only,* * * * in quantities not exceeding one hundred and sixty acres to each settler." * * *

After quoting the section in full the Court proceeded:

"This law, as we have seen, excluded these lands from the operation of the pre-emption and homestead laws. All the lands, odd and even sections, are to be sold to actual settlers. The improvements required under the provisions of section 2259 of the Revised Statute are not necessary. The oath prescribed in section 2262 of said statutes is not necessary."

Thus clearly showing that neither residence nor cultivation was adjudged necessary to constitute an "actual settler." The application to purchase and the payment of the price ($1.25 per acre) being the only requirements.

It will be noted that the language used in the statute is identical with that used in the grant, or law involved in the case at bar—*"Shall be sold to actual settlers only,"* is the language used in each case; and the definition of the term promulgated by Justice Marshall seems to have been in the thought of the Congress in enacting the law creating the grant involved in the case at bar, as well as in the case cited above. If residence or cultivation had been contemplated Congress would certainly have incorporated a provision to that effect.

The contention, therefore, of the appellant-defendant, the O. & C. R. R. Co. that the lands embraced in the grant are not fit for residence and cultivation is not in order, residence and cultivation being wholly unnecessary.

This contention of counsel for the defendant railroad company would seem to be outside the range of legitimate argument for another reason. The Congress is

presumed to have sufficient information to enable it to act intelligently, and in the law making the grant in question the Congress said "the lands *granted* shall be sold." It was known to Congress what lands were being granted, and it provided that these identical lands should be sold. It did not say that such of the lands as were susceptible to residence and cultivation should be sold, but the *lands granted—all* the lands granted shall be sold to actual settlers only—that is to individuals who should apply to purchase one hundred and sixty acres or less, and should tender the purchase price; the option being with the applicant to demand one hundred and sixty acres or less—the company having no option in the matter except to refuse to sell *more* than one hundred and sixty acres.

CONCLUSION.

Having shown, as we think, that the complainant-appellee has no right to a forfeiture, but should be granted a decree of specific performance; that the defendant-appellant railroad company (and its allied interests for they can claim no greater right than the railroad company had in the granted lands) took no greater interest in the lands granted than the price at which it could sell them, *not exceeding $2.50 per acre;* that it held the lands in trust to be conveyed to actual settlers under the terms of the grant; and that the interveners have duly qualified as actual settlers; *as beneficiaries under the trust,* it is confidently expected that

this Honorable Court will enter a decree establishing their several rights as such beneficiaries, as the same are asserted and demanded in their petitions in intervention, answers and cross-bills of complaint.

Respectfully submitted,

LEWIS C. GARRIGUS,
Attorney for Interveners.

Mills Day
of Counsel

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No. 679.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

OREGON AND CALIFORNIA RAILROAD COMPANY, a corporation, et al.,
Defendants and Appellants,

JOHN L. SNYDER, et al.,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, et al.,
Interveners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR INTERVENERS-APPELLANTS ELMER L. HANCOCK, AND OTHERS, and R. E. CAMERON, AND OTHERS.

JNO. MILLS DAY and
M. E. BREWER,
Solicitors and Attorneys for Interveners and Appellants.

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JNO. MILLS DAY and
M. E. BREWER,
Solicitors and Attorneys for Interveners and Appellants.

STATEMENT.

On May 25th, 1908, the United States filed in the Circuit Court (now District Court) of the United States for the District of Oregon, its bill of complaint setting forth in substance that the Congressional land grant of July 25th, 1866, conveyed the odd numbered sections of land along the right of way of the railroad companies mentioned, to the California and Oregon Railroad Company in California and a company to be designated by the Legislature of Oregon, in Oregon.

Section 6 of the Act is as follows:

> "And be it further enacted, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the 'Central Pacific Railroad' of California, and be connected therewith."

Section 8 of the Act contained the following:

> "And be it further enacted, That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this Act, or by not completing the same as pro-

vided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States." (14 Stat. 239.)

This Act was amended by an act of Congress, approved June 25th, 1868, extending the time for the construction of the road. (15 Stat. 80.)

On October 6th, 1866, steps were taken and proceedings had for the purpose of organizing a corporation, styling itself The Oregon Central Railroad Company. This Company will hereafter be called the West Side Company.

On October 10th, 1866, the Legislature of Oregon, by resolution, designated this Company as the grantee to take title under the grant of July 25th, 1866.

On July 6th, 1867, this Company duly filed its acceptance of the grant in the office of the Secretary of the Interior, as required by the Act of July 25th, 1866.

In the meantime in April, 1867, a second company was organized, styling itself also the Oregon Central Railroad Company.

This company is hereafter referred to as the East Side Company. The East Side Company, after its organization, influenced the Legislature of Oregon

to adopt and it did, on October 20th, 1868, adopt a joint resolution in which it stated that there was no company lawfully organized at the time of the adoption of its resolution of October 10th, 1866, and thereupon designated the East Side Company to take the grant. A controversy arose between these two companies as to which was entitled to the grant.

The time having elapsed in which the East Side Company could accept the grant, it applied to Congress, for, and on April 10th, 1869, obtained the enactment of the amendment of the Act of July 25th, 1866, by which amendment the time for the acceptance of the grant was extended until one year from that date. A proviso was incorporated into the amendment of April 10th, 1869, which proviso was as follows:

> "*Provided,* That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land.
>
> "*And Provided, Further,* That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre." (16 Stat. 47.)

On June 30th, 1869, after the approval of this amendment, the East Side Company filed in the office

of the Secretary of the Interior, its acceptance of the grant, and proceeded with the construction of its line of railroad.

On March 17th, 1870, the defendant, Oregon and California Railroad Company, organized as a corporation to take over all rights which the East Side Company had acquired under and by virtue of the Act of July 25th, 1866, and the amendments thereto, and expressly stated in its Articles of Incorporation that the purpose of its organization was to comply with all of the provisions of said Act.

On April 27th, 1870 the Oregon and California Railroad Company filed with the Secretary of the Interior, its acceptance of the grant of July 25th, 1866, and the amendments thereto. The East Side Company having conveyed all of its rights to the grant, and all of its property to the Oregon and California Railroad Company, became dissolved and disincorporated, on March 29th, 1870.

Thereafter on May 4th, 1870, the West Side Company, having abandoned its right to the grant of July 25th, 1866, and having applied to Congress, therefor, secured from Congress another grant of land. Concerning this grant of May 4th, 1870, to the West Side Company, we will hereafter have little

to say, as we are concerned with the East Side grant only.

The East Side road was constructed and most of the land embraced within the grant has been conveyed by patent to the Oregon and California Railroad Company. Meantime the Oregon and California Railroad Company has secured title to the property of the West Side Company, including most of the lands granted to the West Side Company under the Act of May 4th, 1870, which were not forfeited to the Government for failure to construct the road.

Both the East Side and the West Side roads have been leased to the Southern Pacific Company.

The defendant, Oregon and California Railroad Company, having sold certain of the lands granted in violation of the terms of the proviso in the amendment of April 10th, 1869, and also in violation of a similar proviso in the act of May 4th, 1870, and having finally monopolized and refused to sell any of the lands then remaining unsold, at any price, or on any terms, the Legislature of the State of Oregon, by joint resolution, asked Congress to compel the Railroad Company to sell the lands, as provided by the laws of April 10th, 1869, and May 4th, 1870.

Congress by joint resolution of April 30th, 1908, authorized and directed the Attorney General to bring

this suit, which the Attorney General did by filing his complaint in equity in the suit at bar, September 4th, 1908.

In substance the relief asked for by the Government is as follows:

1st. That all of the lands remaining unsold in both grants be forfeited to the Government or

2nd. That receivers be appointed to take and be invested with the title to the lands and be directed to convey the lands as required by the laws of April 10th, 1869, and May 4th, 1870, or

3rd. That the Oregon and California Railroad Company be required by mandatory injunction to sell and convey the lands according to the law, and that those aggrieved by the refusal of the Railroad Company to convey the lands to them, might come in and obtain relief in their own behalf.

Then follows prayers for injunction, accounting, and other relief, which prayers do not concern the rights of these interveners and which they will not be called upon to discuss. (Vol. 1, pp. 1-86, Transcript of Record).

Both prior to and subsequent to the filing of the Government's complaint, many people, including these interveners, applied to the defendant, Oregon

and California Railroad Company, to purchase various tracts of land as provided by the act of April 10th, 1869, and tendered full performance of all requirements of said Act. (Vol. 2, pp. 541, etc. Transcript of Record).

These tenders being refused by the Railroad Company, these interveners applied for and obtained leave to file their bills in intervention and filed such bills, in which bills they asked that they be permitted to settle upon and purchase the lands by them tendered for respectively. (Vol. 2, pp. 689, etc., Transcript of Record).

The defendants, Stephen T. Gage and the Union Trust Company, claim to have certain interest in or liens upon the lands, which liens, if they have, the interveners claim to be junior and inferior to the rights of the interveners.

To these bills in intervention the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, interposed demurrers upon the grounds: first, that the bills do not show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; second, that said bills do not show any cause or equity entitling the interveners to maintain their suit; third that the bills

do not show that the interveners are entitled to a discovery; and fourth, that the bills do not show that the interveners are entitled to any relief. (Vol. 2, p. 685, Transcript of Record).

These demurrers were duly presented and on April 24th, 1911, overruled by the Court. (Vol. 2, p. 693, Transcript of Record).

Thereafter on or about June 9th, 1913, Complainant filed its several motions to dismiss the bills of intervention of the interveners, for want of equity in such bills, which motion was on July 1st, 1913, sustained. (Vol. 3, pp. 1286 and 1287, Transcript of Record).

Thereafter on June 23rd, 1913, the Union Trust Company, individually and as trustee, filed its motion to dismiss the petitions in intervention and thereafter on the 25th of June, 1913 an order was entered by the Court sustaining said motion. (Vol. 3, pp, 1290 and 1292, Transcript of Record).

The evidence meanwhile having been adduced on behalf of the complainant and the defendants, on July 1st, 1913, the Court entered a decree forfeiting the lands involved in the suit, including all lands claimed by the interveners, to, and quieting the title to the same in, the United States of America, and enjoining these interveners and others from claiming any in-

terest therein. (Vol. 3, p. 1296, Transcript of Record).

From the various orders and decrees entered in favor of the complainant, all of the defendants, cross-complainants and interveners have prosecuted a joint appeal and from all orders and decrees entered in favor of the various defendants and against the cross-complainants and interveners, the cross-complainants and interveners have prosecuted a joint and several appeal. (Vol. 15, p. 7923, and Vol. 16, p. 8428, Transcript of Record).

From the numerous assignments of errors set up jointly and severally by the cross-complainants and interveners, those which we consider applicable to our cases and which we urge and rely upon are the following:

ASSIGNMENT OF ERRORS.

(Numbers in brackets are the numbers in the record.)

1. (91) The Court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to the bill of intervention of the intervener, Elmer L. Hancock, and the other interveners with him in his said bill joined, for want of equity in said bill, and

2. (92) The Court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as trustee, to the bill of intervention of said interveners, for want of equity in said bill, and

3. (93) The Court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to strike the bill of intervention of said interveners for want of equity in said bill, and

4. (94) The Court erred in sustaining the motion of the defendant, Union Trust Company, individually and as trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

5. (95) The Court erred in sustaining the motion of the complainants for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill, and

6. (96) The Court erred in not requiring the Oregon & California Railroad Company Southern Pacific Company and Stephen T. Gage, individually and as trustee, to answer said bill in intervention, and

7. (97) The Court erred in not requiring the Union Trust Company, individually and as trustee, to

answer said bill in intervention, and

8. (98) The Court erred in not requiring the conplainant to answer said bill in intervention, and

9. (99) The Court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively in said bill, and

10. (100) The Court erred in not granting to said interveners or any of them, any equitable relief.

As said bill of intervention contains allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners, and each of them to the relief prayed for by them and each of them, respectively, in said bill.

11. (151) The Court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to the bill of intervention of the interveners, R. E. Cameron and the other interveners with him in his said bill joined, for want of equity in said bill, and

12. (152) The Court erred in sustaining the demurrer of the defendant, Union Trust Company, in-

dividually and as trustee, to the bill of intervention of said interveners, for want of equity in said bill, and

13. (153) The Court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

14. (154) The Court erred in sustaining the motion of the defendant, Union Trust Company, individually and as trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

15. (155) The Court erred in sustaining the motion of the complainant for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill, and

16. (156) The Court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to answer said bill in intervention and

17. (157) The Court erred in not requiring the Union Trust Company, individually and as Trustee, to answer said bill in intervention, and

18. (158) The Court erred in not requiring the complainant to answer said bill in intervention, and

19. (159) The Court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively in said bill, and

20. (160) The Court erred in not granting to said interveners or any of them, any equitable relief,

As said bill of intervention contains allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners, and each of them to the relief prayed for by them and each of them, respectively, in said bill.

21. (251) The Court erred in holding that these interveners and cross-complainants were not entitled to the relief prayed for by them and each of them, respectively, and

22. (252) The Court erred in not holding that these interveners and cross-complainants were entitled to the relief prayed for by them and each of them, respectively, and

23. (253) The Court erred in holding that none of these interveners and cross-complainants were

entitled to the relief prayed for by them, and

24. (254) The Court erred in holding that none of these interveners and cross-complainants were entitled to any relief;

As their said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling these interveners and cross-complainants and each of them to equitable relief; and

Said bills of intervention and cross-complaint and each of them, contain allegations and matters entitling the interveners and cross-complainants and each of them, to the relief prayed for by them and each of them, respectively, in their said bills.

25. (255) The Court erred in holding that the United States, complainant herein, was entitled to a forfeiture of the lands or any of the lands sought to be purchased by the interveners and cross-complainants herein or any of them.

26. (256) The Court erred in not holding that the United States, complainant herein, was not entitled to a forfeiture of the lands or any of the lands sought to be purchased by the interveners and cross-complainants herein or any of them.

27. (257) The Court erred in holding that the lands or any thereof described in this decree, were

and had been forfeited to the complainant, and that a decree be entered forfeiting said lands, or any thereof, to the complainant.

28. (258) The Court erred in holding that the lands sought to be purchased by the interveners and cross-complainants herein, should be forfeited.

29. (259) The Court erred in holding that the lands or any thereof sought to be purchased by these interveners and cross-complainants, or any of them, described in said decree, were and had been forfeited to the United States, complainant herein, and that a decree be entered forfeiting said lands or any thereof to the complainant.

30. (260) The Court erred in holding that the proviso in the said act of April 10th, 1869, was a condition subsequent.

31. (261) The Court erred in holding that the proviso in the amendment of April 10th 1869, requiring the sale of lands to actual settlers only, in quantities not exceeding one-quarter section to any one purchaser and at a price not to exceed $2.50 per acre was or is a condition subsequent, the breach of which entitled the United States, complainant herein, to a forfeiture of the lands covered by said land grant.

32. (262) The Court erred in not holding that the proviso in the amendment of April 10th, 1869, requiring the sale of lands to actual settlers only, in quantities not exceeding one-quarter section to any one purchaser and at a price not to exceed $2.50 per acre, was not and is not a condition subsequent, the breach of which would entitle the United States, complainant, to a forfeiture of the lands covered by said grant.

33. (265) The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of the proviso of April 10th, 1869.

34. (266) The Court erred in holding that the consequence and penalty of forfeiture was intended by Congress to be attached to a breach, should such there be, of the covenant or proviso in the act of April 10th, 1869, requiring sales of land to settlers.

35. (271) The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture of said East Side grant for the breach of an assumed condition subsequent if such there was in said proviso of said act of April 10th, 1869.

36. (272) The Court erred in holding that there was jurisdiction in the Court on the equity side to

decree a forfeiture of the title of the defendants to the lands embraced in and covered by the East Side grant, for breach of an assumed condition subsequent in the proviso contained in the act of April 10th, 1869.

37. (273) The Court erred in assuming jurisdiction on the equity side to enforce a forfeiture of the East Side grant for breach of an assumed condition subsequent in the proviso in the act of April 10th, 1869, as

(a) The effect of such assumption was to divest the interests of the interveners and cross-complainants which had become vested, in parts of said East Side grant, under the terms of said proviso, and

(b) No declaration of forfeiture had ever been made by Congress prior to the vesting of such interest, and

(c) No declaration of forfeiture had been made by Congress prior to the entry of said decree, and

(d) No declaration of forfeiture had been made by Congress prior to the commencement of said suit.

38. (277) The Court erred in holding that by its joint resolution of April 30th, 1908, the Congress of the United States forfeited or intended to forfeit, or authorized the forfeiture by the Attorney General or intended to authorize the forfeiture by the Attorney General, or authorized or intended to authorize

or empower the Court to forfeit or decree a forfeiture of the lands embraced within the East Side grant, for or on account of any assumed breach of conditions of the proviso of the act of April 10th, 1869.

39. (279) The Court erred in holding that there was any cause of action or foundation of jurisdiction for forfeiture in respect to either of said grants, in any re-entry for breach of condition or legislation equivalent thereof, or in any legislative declaration of forfeiture.

40. (280) The Court erred in not holding that the proviso in the amendatory act of April 10th, 1869 requiring sales to settlers, was not sufficiently definite to be enforced as a condition subsequent;

As such proviso does not contain any words importing a right of forfeiture or re-entry for condition broken.

41. (281) The Court, being a court of equity, erred in decreeing a forfeiture to the complainant of all right and interest of the defendants in or to the lands embraced within the grant of 1866, for breach of the assumed condition contained in the amendment of April 10th, 1869, as

(a) Assuming that said proviso was a condition subsequent, for breach of which forfeiture could be

had, such condition subsequent was and is also a covenant; and

(b) The complainant prayed in its bill of complaint for a specific performance of this covenant, and

(c) Such forfeiture was and is inequitable and should not be decreed by any court of equity where there is any other means of doing justice between the parties; and

(d) The complainant prayed for specific performance of the covenant, and the Court should have granted such prayer, as by such performance justice and equity could have been done to all of the parties to the suit without forfeiture; and

(e) The Court was without jurisdiction to and it was inequitable for it to divest defendant, Oregon and California Railroad Company of title as trustee for the benefit of the interveners and cross-complainants, *sestui que trustant,* with interests vested prior to said decree; and

(f) In divesting the railroad company of title by forfeiture, the Court, in effect, imposed a penalty upon the railroad company to the extent of its interest in the land forfeited, to-wit: in the amount of $2.50 per acre for each acre of land so forfeited, for and on account of the breach of its covenant, the imposing of which penalty is wholly inequitable, and

(g(By forfeiture the Court divested the vested interest of these interveners and cross-complainants and each of them, without any fault on their part or on the part of any of them, all of which is wholly inequitable.

42. (283) The Court erred in not holding that this suit cannot be maintained by complainant as one to enforce forfeiture nor to quiet title, as

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture had not been adjudicated by a court of law; and

)c) The defendant, railroad company, holds the legal title to and the possession of said granted lands; and

(d) Complainant having asked for forfeiture and in the alternative, for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance; and

(e) In view of specific performance, a decree quieting title in the Government, cannot be had.

43. (284) The Court erred in not holding that the Government was estopped to claim forfeiture of

the lands embraced within each and both of said land grants, as

(a) The Government in its bill of complaint bases its right to recover, upon the refusal of the railroad company to sell said lands to the interveners and cross-complainants and others similarly situated, and

(b) The Government in its bill of complaint prayed that these interveners and cross-complainants might be permitted to enforce their rights herein; and

(c) The Government having come into a court of equity, is estopped to claim forfeiture when equitable relief by performance can be had; and

(d) The Government is estopped to claim forfeiture in lieu of performance, since the interveners and cross-complainants have come into court upon the invitation of the Government and furnished the means whereby performance may be had.

44. (285) The Court erred in holding that the provisions in each and both of said land grants concerning sales to settlers, are negative provisions only, designed to prevent sales to others than settlers in quantities greater than one-quarter section to any one purchaser and at prices greater than $2.50 per acre;

and not positive provisions requiring sales to settlers in quantities not greater than one-quarter section to any one purchaser and at a price not greater than $2.50 per acre.

45. (286) The Court erred in not holding that the provisions of each and both of said land grants concerning sales to settlers were both positive and negative requiring the grantee to sell to settlers, who should apply to buy, not more than one-quarter section, at a price not greater than $2.50 per acre, and requiring said grantee to refrain from selling any of the granted lands to others than settlers or in quantities greater than one-quarter section or at a price greater than $2.50 per acre.

46. (287) The Court erred in holding that the provisions in each and both of said land grants, requiring sales to settlers, are not positive covenants, which may be specifically enforced.

47. (288) The Court erred in holding that the provisions in each and both of said land grants requiring sales to settlers, is a negative covenant only, which may be enforced by the Government only, and that the only means of such enforcement are by forfeiture for breach thereof.

48. (289) The Court erred in decreeing a forfeiture of those lands included in either or both of the

grants to the railroad company or which the interveners and cross-complainants had made application to purchase from and tendered to the railroad company the sum of $2.50 per acre and offered to become actual settlers on the lands so applied for, prior to the adoption by Congress of the joint resolution of April 30th, 1908, as

By so applying, tendering the purchase price and offering to become an actual settler upon the lands so applied for, each intervener and cross-complainant has acquired a vested interest in the land applied for, which cannot be divested by Congress, assuming that said provisions are conditions subsequent, and that the adoption of said joint resolution by Congress was a declaration of forfeiture for breach thereof.

49. (290) The Court erred in holding that although the provisions in each and both of said land grants were designated to devote the lands conveyed by said grants, to settlement and tillage and to prevent the monopoly of the land and that such grants were laws as well as grants, that notwithstanding the railroad company might defeat the purposes of the provisions requiring sales to settlers by themselves monopolizing and holding the lands and refusing to sell them at all, and by refusing to sell any of them ex-

cept to such persons and in such quantities as it saw fit within the price and terms provided in the grant.

50. (291) The Court erred in not holding that the purpose of the joint resolution of Congress of April 30th, 1908, was to authorize the enforcement of a forfeiture for any breach of an assumed condition subsequent in either of said land grants, as an alternative only, of the refusal of the railroad company to perform the covenants requiring sales to settlers, after such performaance had been decreed by the Court.

51. (292) The Court erred in not holding that the joint resolution of Congress of April 30th, 1908, authorized the enforcement of forfeiture for any breach of an assumed condition subsequent in either of said land grants, only in the event that specific performance of the covenants in said grants, requiring sales to settlers, could not be enforced.

52. (293) The Court erred in not holding that the joint resolution of Congress of April 30th, 1908, authorized a forfeiture of the legal title of the railroad company for breach of an assumed condition subsequent in either of said land grants, only as a means of carrying into effect the covenants in said grants requiring sales to settlers.

53. (294) The Court erred in holding that at the

time of the filing of the bill of complaint herein and ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company, did not have possession of said grants or either of them.

54. (295) The Court erred in not holding that at the time of filing of the bill of complaint herein, and ever since, and for a long time continuously next prior thereto the Oregon and California Railroad Company had legal title and the possession of all lands of which forfeiture is sought by said bill of complaint.

55. (296) The Court erred in holding that the United States, complainant herein, is the owner in fee simple or in possession of said lands or any part thereof or entitled to said lands or entitled to the possession of the same or any part thereof, which are sought to be purchased by these interveners and cross-complainants or any of them.

56. (297) The Court erred in holding that, as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the complainant was in possession of the said grants, or either of them, or any part thereof; and in holding that the Oregon and California Railroad Company did not have the possession of the same.

57. (298) The Court erred in holding as a foundation for a suit by complainant, to quiet its title to the said grants or either of them, or any part thereof, that the same had not been reduced to possession, and were unoccupied and vacant, and not in possession of said defendant, Oregon and California Railroad Company.

58. (299) The Court erred in not holding that the United States, complainant herein, is not the owner in fee simple, nor in possession of said lands or any part thereof, nor entitled to said lands nor entitled to the possession of the same or any part of the same, which are sought to be purchased by these interveners and cross-complainants or any of them.

59. (300) The Court erred in holding that the complainant is the owner in fee simple, or in possession of said lands or any part thereof, or entitled to the possession of the same or any part thereof.

60. (301) The Court erred in holding that as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant, Oregon and California Railroad Company did not have the legal title to such grants.

61. (302) The Court erred in holding that the title of the United States of America, of or in said lands or estates in lands sought to be purchased by these interveners and cross-complainants or any of them, be or is by said decree, quieted and confirmed, particularly as to any claim or claims of right, title and interest in, to or upon the same, in favor of these interveners and cross-complainants or any of them.

62. (303) The Court erred in holding that the lands and estates in lands in the said decree described, and which were sought to be purchased by the interveners and cross-complainants herein or any of them, either in whole or in part, now are forfeited to or that the title to or any part thereof, has reverted to and now is revested in the United States of America, or that the same or any part thereof, now are the absolute property of the United States of America, or are free from any and all claim or claims of right, title or interest or lien in, to or upon the same or any part thereof, by or in favor of these interveners and cross-complaints or any of them.

63. (304) The Court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them, respectively, upon the terms proposed by said

interveners and cross-complainants, and upon the terms provided in the act of July 25th, 1866, and the act of April 10th, 1869, amendatory thereof.

64. (305) The Court erred in not holding that the United States, complainant herein, was not entitled to an injunction restraining the defendants or any of them from conveying to these interveners and cross-complainants any of the lands sought to be purchased by them, respectively, upon the terms proposed by said interveners and cross-complainants and upon the terms provided in the act of July 25th, 1866, and the act of April 10th, 1869, amendatory thereof.

65. (308) The Court erred in holding that the United States, complainant herein, was entitled to any injunctive relief whatever as against these interveners and cross-complainants or any of them.

66(309) The Court erred in holding that the United States, complainant herein, was entitled to a decree restraining these interveners and cross-complainants, or any of them, from claiming or asserting any right, title, interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

67. (310) The Court erred in not holding that the United States, complainant herein, was not entitled to a decree restraining these interveners and

cross-complainants or any of them, from claiming or asserting any right title or interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

68. (311) The Court erred in holding that the title of complainant to the said lands, or any part thereof, should be quieted.

69. (312) The Court erred in holding that the United States, complainant herein, was entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

70. (313) The Court erred in not holding that the United States, complainant herein, was not entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

71. (314) The Court erred in holding that the proviso in the amendatory act of April 10th, 1869, was not a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the Oregon and California Railroad Company to accept and become vested with the title to the lands under the grant of 1866.

72. (315) The Court erred in holding that the word "provided", introducing the proviso contained

in the amendatory act of April 10th, 1869, imported a condition subsequent, as

(a) The word "provided" is as appropriate for the purpose of importing a condition precedent as a condition subsequent, and

(b) Said proviso is coupled with a clause in said act contained permitting the grantees to accept said grant one year after the passage of said amendatory act, and

(c) Said proviso is not coupled with and does not bear any relation to the granting clause in said act amended.

73. (316) The Court erred in not holding that the proviso in the amendatory act of April 10th, 1869 was and is a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the railroad company to accept and become vested with the title to the lands under the grant of 1866.

74. (317) The Court erred in refusing to direct and decree a specific performance on behalf of the United States, the complainant herein, and against the defendant, Oregon and California Railroad Company and the other defendants claiming by, through and under it, requiring said defendants to convey to

these interveners and cross-complainants, the lands sought to be purchased by each, respectively, upon payment of the purchase price therefor.

75. (318) The Court erred in not holding that the defendant, Oregon and California Railroad Company and other defendants claiming an interest in said land, be required to convey said land to the interveners and cross-complainants applying to purchase the same.

76. (319) The Court erred in holding that the defendant, Oregon and California Railroad Company and each and all of the other defendants claiming an interest in said land, should not be required to convey said lands to the interveners and cross-complainants applying for the same.

77. (320) The Court erred in holding that Congress did not intend by the act of April 10, 1869, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of July 25th, 1866, according to the terms of the proviso in said act of April 10th, 1869.

78. (321) The Court erred in not holding that Congress intended by the act of April 10th, 1869, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of July 25th, 1866, according to the terms of the proviso in said act of April 10th, 1869.

79. (324) The Court erred in refusing to direct and decree a specific performance on behalf of the interveners and cross-complainants and each of them, against the defendant, Oregon and California Railroad Company, and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by said interveners and cross-complainants, respectively, as prayed for in their several bills.

80. (325) The Court erred in holding that the provisions in each and both of said grants did not constitute contracts entered into by and between the Government and the railroad company, for the benefit of and enforcible by the interveners and cross-complainants.

81. (326) The Court erred in holding that the proviso in the amendatory act of April 10th, 1869, requiring sales to settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land, and to purchase the same in quantities and at prices provided by said amendatory act.

82. (327) The Court erred in not holding that the proviso in the amendatory act of April 10th, 1869,

requiring sales to settlers was a covenant to a use and impressed a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided by said amendatory act.

83. (330) The Court erred in holding that the railroad company was not constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent,* under the provisions requiring sales of lands to settlers, referred to, in that

(a) "The nature and quality of their interests are not specific and definite," and, in that

(b) "They are not susceptible of identification as such," and

84. (331) The Court erred in not holding that the railroad company, by the provisions in said grants contained, was constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent,* as

(a) The nature and quality of said interests under said grants are sufficiently specific and definite, and

(b) Their application to purchase and offer to settle upon the lands, is a sufficient identification.

85. (332) The Court erred in holding that the

offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, did not give to the respective interveners and cross-complainants a vested interest in said lands, in default of an acceptance of such offers and conveyances of said lands by the Oregon and California Railroad Company.

86. (333) The Court erred in not holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, gave to the respective interveners and cross-complainants, a vested interest in said lands, in default of an acceptance of such offers and conveyances by the Oregon and California Railroad Company.

87. (334) The Court erred in holding that the proviso in the act of April 10th, 1869, is not sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

88. (335) The Court erred in not holding that the proviso in the act of April 10, 1869, is sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

89. (336) The Court erred in holding that the

proviso in the act of April 10, 1869, requiring sales to settlers, is sufficiently definite and certain as a condition subsequent, to entitle the Government to a forfeiture for its breach, and that it is not sufficiently definite and certain to be specifically enforced as a covenant to a use, or as a covenant creating a trust.

90. (837) The Court erred in not holding that the proviso in the act of April 10, 1869, for the sale of lands to actual settlers was intended by Congress as and was and is a covenant to a use only, and not a condition subsequent, as

(a) Said proviso contains specific and direct commands which were assented to, and performance thereof promised, by the Oregon and California Railroad Company, and

(b) Said proviso does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

91. (838) The Court erred in holding that the proviso in the act of April 10, 1869 was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the

terms and under the conditions provided in said grant.

92. (339) The Court erred in not holding that the proviso in the act of April 10, 1869, was a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

93. (340) The Court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the East Side grant, or any part thereof, except as a settlor of the trust in said lands.

94. (349) The Court erred in holding that the United States, complainant herein, had any right, title or interest in and to the lands embraced within the East Side land grant, or any part thereof, which it could enforce in this action except such rights as it has as a settlor of the trust in said lands, to enforce the provision of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands, and

95. (350) The Court erred in not holding that this suit can only be maintained by complainant as one to compel the specific performance of a trust covenant, or to enforce a public policy, as

(a) Neither of said land grants contains a pro-

vision importing a condition subsequent, upon the breach of which, forfeiture could be had, and

(b) Congress has never declared a forfeiture of either of said land grants for breach of any condition subsequent, assuming that there is such condition in either of said land grants, and

(c) The fact of forfeiture has never been adjudicated by a court of law, and

(d) The defendant, Oregon and California Railroad Company, holds the legal title to and possession of said lands, and

(e) Complainant having asked for forfeiture and in the alternative for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance, and

(f) In view of specific performance a decree quieting title in the Government cannot be had.

96. (351) The Court erred in not holding, on the assumption that the said proviso in the act of April 10 1869, is a condition subsequent, for breach of which forfeiture might be had, that complainant elected, by filing its suit in equity, to waive forfeiture, and elected to specifically enforce said proviso as a covenant to a use only.

97. (358) The Court erred in holding that the

interveners and cross-complainants were not such actual settlers as were contemplated by the acts of April 10, 1869, and May 4, 1870.

98. (354) The Court erred in holding that these interveners and cross-complainants did not have vested interests in the lands sought to be purchased by them and each of them respectively, by reason of their various offers and tenders to purchase said lands upon the terms provided in the acts of April 10, 1869, and May 4, 1870.

99. (355) The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

100. (356) Th Court erred in not holding that the evidence in this cause is insufficient to support or sustain the decree rendered.

101. (357) The Court erred in holding that the evidence adduced in support of the complaint of the United States, complainant herein, was sufficient to entitle complainant to a forfeiture of the title to the lands sought to be purchased by these interveners and cross-complainants or any of them.

102. (358) The Court erred in not holding that the evidence adduced in support of the complaint of the United States, complainant herein, was not suf-

ficient to entitle complainant to a forfeiture of the title to the lands sought to be purchased by these interveners and cross-complainants or any of them.

108. (359) The Court erred in holding that the United States, complainant herein, was entitled to recover its costs and disbursements herein, or any costs or disbursements herein, against these interveners and cross-complaints of any of them, and that a decree should be entered to that effect.

ARGUMENT

We have omitted from our Statement and from the Assignmentof Errors all matters which alone relate to the "West Side Grant" for the reason that the clients which we represent are only interested in the so-called "East Side Grant."

CONDITIONS SUBSEQUENT COMPLAINT'S RIGHT TO FORFEITURE ASSIGNMENT OF ERRORS HEREIN NUMBERED 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 40, 47, 99 AND 100

The crucial question presented by the Assignment of Errors above enumerated is as to the intendment of Congress as expressed by the clause contained in the amendment of April 10, 1869, which is as follows:

"*Provided,* That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, or this amendment be construed to entitle more than one company to a grant of land."

"*And Provided, Further,* That the lands granted by the Act aforesaid shall be sold to actual settlers *only* in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

We do not believe that this proviso was intended by Congress as a condition subsequent, for the reasons:

(a) That the proviso is not coupled with and does not relate to the granting clause, or any habendum clause of the grant, and

(b) It does not contain, and is not coupled with any language importing the consequence or penalty of forfeiture for its breach.

(c) A provision for forfeiture would be both harsh and useless.

The Act of July 25, 1866, to which the Act of April 10, 1869, is amendatory, provided that the grantees should file their assent within one year after the passage of the act and complete the first twenty miles of railroad within two years, and the whole before July, 1875.

On June 25, 1868, this act was amended extending the time for building the road; on July 25, 1869, the amendatory act in question was passed.

It provides that Section 6 of the Act of July 25, 1866, be amended so that the railroad companies shall have one year from date of passage of the act to file their assent. * * * * * * * * *

> "*Provided,* That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land."
>
> "*And Provided, Further,* That the lands granted by the act aforesaid shall be sold to actual settlers only, etc."

Section 8 of the act of July, 25, 1866, provides that the title of the railroad companies to the land shall be forfeited, if *they shall fail to file their assent or to build said road* within the time allowed.

This Section 8 *was not amended by the Act of April* 10, 1869.

It seems apparent that if by the proviso in question, Congress had intended to engraft upon the title conveyed by the grant, a condition subsequent for breach of which, forfeiture might be had, it would certainly have amended Section 8 to so specifically provide. We contend that the rule *expressio unius est ex-*

clusio alterius should be applied in interpreting the grant; that the grant should be read and interpreted as though the amendment of April 10, 1869, were in fact a part of Section 6 of the original act, which in law it is.

U. S. vs. Macon County, 99 *U. S.* 582.

Johnson vs. So. Pac. Co., 117 *Fed. Rep.* 462.

The only thing there is in the grant or in this proviso which can be construed as importing a right of forfeiture by the Government is the word provided. This word provided does not always import a condition.

> " 'This word hath diverse operations. Sometimes it worketh a qualification or limitation, sometimes a condition and sometimes a covenant.' Co. Lit. 146 B., 203 B." Cyclopedic Law Dictionary 789.

See also *Stanley vs. Colt* 5 *Wall* (U. S.) 119.

And when this word imports a condition it does not always import a condition subsequent.

> "Domat says conditions are of three sorts, the first tend to accomplish the covenants, to which they are annexed. The second dissolve covenants, the third neither accomplish nor avoid, but create some change." Cyclopedic Law Dictionary, 184.

We contend that the proviso in question is a condition of the third sort which neither accomplishes a pre-existing convenant in the grant nor provides for its avoidance on breach, *but creates a change in the pre-existing covenant by requiring a certain disposal of the property conveyed.*

See *Stanley vs. Colt, supra.*

The words of the amending Act,

> "*Provided,* That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land",

cannot by any system of reasoning, be construed to import a Condition Subsequent; at most it can only be construed to be a proviso in the nature of a saving clause.

The words following in the same sentence, viz:

> "And provided further, That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre",

must be construed as the same sort of proviso, upon the theory that where a word is once used in a certain sense in a given context, that the second time it is used

in the same sentence, it shall be construed to have the same meaning.

This is embodied in the familiar maxim, *Noscitur a sociis.*

Am. & Eng. Encyc. of Law (2nd Ed.), Vol. 26, page 608.

Congress cannot have meant to do or authorize either a harsh or useless thing.

In Section 8 of the Act, there is a provision for forfeiture if the company should fail to accept the grant, or fail to build the road. The reasons for this proviso are obvious:

First, Forfeiture would be just and equitable for failure on the part of the railroad company to either accept the grant or build the road;

Second, Forfeiture would obviously be the only remedy the Government would have, as the railroad company could not be compelled to either accept the grant or build the road after acceptance.

That the Act does not provide for forfeiture for failure to sell, must be the result of specific design on the part of Congress that there should not be forfeiture for such cause, for the reason that,

First, forfeiture would be harsh and inequitable after the company had constructed its road, and

Second, a proviso for forfeiture would be useless for the reason that (a), in case of violation by the railroad of the proviso, by failure or refusal to sell within the terms of the grant, *specific enforcement* might be decreed, and (b), conveyances in violation of the restraint on alienation to others than settlers *would be void* and might be so decreed at the suit of the United States.

The Courts have frequently held that the Government may maintain a suit to promote the public welfare even though it had no pecuniary interest in the result of the litigation. In *re Debs*, 158 U. S. 584, the Court made use of the following language:

> "Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

To like effect are:

U. S. vs. Hughes, 11 How, (U. S.) 552.

U. S. vs. Minor, 114 U. S. 233.

U. S. vs. Jacinto Tin Co., 125 U. S. 273.
U. S. Am. Bell Tel. Co., 128 U. S. 35.
Heckman vs. U. S., 224 U. S. 413.

The Government might maintain this suit to compel performance without an Act of Congress specfically so authorizing.

To sustain this proposition we quote from the case of *Dugan vs. U. S.*, 3 Wheat. (U. S.) 131:

> "An intimation was thrown out that the United States had no right to sue in any case without authority of an Act of Congress for the purpose. On this point the Court entertains no doubt. In all cases of contract with the United States they must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own name, unless a different mode of suit be prescribed by law, which is not pretended to be the case here. It would be strange to deny them a right which is secured to every citizen of the United States."

But the Attorney General is expressly authorized by Congress in its resolution of April 30 1908, (35 Stat. 571) to maintain this action as an action to compel specific performance, in the following words:

> "That the Attorney General of the United States be and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate, to

enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following described Acts of Congress, to-wit:" etc.

The language of the Amendment, viz:

> "That the lands granted by the Act aforesaid shall be sold to *actual settlers only,* in quantities not greater than *one-quarter section* to one purchaser, and for a price *not exceeding* $2.50 *per acre",*

is not only a covenant which is enforcible specifically, but it is also a *restraint* upon *alienation of the lands.*

Any conveyance in violation of such a restraint is absolutely void and may be so decreed at the suit of the United States.

Heckman vs. U. S., 224 U. S., 413.
Rowling vs. U. S., 233 U. S., 528.
U. S. vs. Pelican, 232 U. S., 442.
U. S. vs. Sandoval, 231 U. S., 28.

IF PROVISO IS CONDITION IT IS CONDITION PRECEDENT

NO RIGHT OF FORFEITURE

ASSIGNMENT OF ERRORS 71 72 73

We maintain that the word provided does not import a condition subsequent, but that it does im-

port a covenant in the nature of a saving clause to be assented to by the grantees as a condition of their *right to take the grant.*

We maintain that this is apparent for the reason that this proviso is not coupled with the granting clause or any habendum clause of the Act, and no reference to the granting clause or habendum is made in this proviso, but the proviso is coupled with and contained in the same paragraph and sentence with the amendment of Section 6 of the Act extending the time for acceptance.

The word *provided,* therefore, if it imports a condition at all imports a *condition precedent.*

In this connection it will be noted that the Act of May 4, 1870, granting land to the West Side Company contained the following proviso:

> "Sec. 4. That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing grounds and other needful uses in operating the road, shall be sold by the company only to actual settlers in quantities not exceeding 160 acres or a quarter section to any one settler, or at a price not exceeding two dollars and fifty cents per acre."

It will be noted that this Act did not contain the word provided, neither is there in the Act any pro-

vision whereby the title will revert to the Government on breach.

While the Act of 1870 is not a part of the grant of 1866, its enactment is so closely associated with that grant that, as stated by the trial court, it should be considered *in pari materia.*

WHETHER PROVISO IS OR IS NOT A CONDITION IT IS A COVENANT

ASSIGNMENT OF ERRORS 44, 45, 46, 47 AND 49

This proviso requires the railroad company to sell the land to settlers. While it is negative in its form, it is also positive. The railroad company accepted the grant and agreed to be bound by its provisions.

If there is a doubt as to whether it is a condition subsequent or a covenant or both, the Court should construe it as a covenant.

> "It is not easy to say when a condition will be considered a covenant and when not, or when it will be holden to be both."
>
> *Bouviers Law Dictionary,* Vol. 1, p. 262.

In support of our claim that a condition subsequent and a covenant may be created by the same words, we cite:

Hall vs. Finch, 104 U. S. 261.

Platt on Covenants, 70, 71.

Elyton Land Co. vs. Smith, 100 Ala. 405.

Parmelee vs. Oswego, etc., R. Co., 6 N. Y. 80.

Country vs. Deek, 18 Abb. N. Cas. 111.

Paschall vs. Passmore, 15 Pa. St. 307.

Harting vs. Witte, 59 Wis. 292.

"The same words may be employed to create a covenant as to create a condition, and if there is any doubt regarding the intention of the grantor or devisor, courts will incline toward the former construction, for conditions, which tend to destroy estates are not favored, and are strictly construed."

6 *Amer. & Eng. Ency. of Law,* 2nd Ed., p. 502, and note 9 citing many cases.

But the court has held in this case that the *proviso* is not *positive* but *negative;* that it does not *require* the railroad company to sell the land to settlers, but that it requires it to *refrain from selling* the land to others than settlers and to refrain from selling it in quantities greater than one quarter section.

We insist that this holding cannot bear the light of reason. We contend that the purpose of Congress was to compel the railroad company to sell the land to settlers in small quantities.

Even if the words of the proviso were not suf-

ficient to show this purpose, the purpose of Congress may be shown by the words and acts of Congress, *in pari materia.*

U. S. vs. Union Pacific R. R. Co., 91 U. S. 72.
Holy Trinity Church vs. U. S., 143 U. S. 457.

In the latter case the court said:

> "Another guide to the meaning of a statute is found in the evil which it was designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body."

Mr. Julian, who procured the adoption of the proviso in question, as an amendment to the Act of April 10, 1869, a short time before said Act was adopted in explaining to Congress the purpose of an amendment to another act, in exactly the same language, said: "This will avoid the complete mononopoly of the lands, as sanctioned by the old system of land grants, and at the same time devote to settlement and tillage the odd numbered sections," etc.

If the proviso were to be construed only as a negative covenant, it is apparent that the railroad company might monopolize and hold these lands indefinitely and the purpose of Congress *to devote it to settlement and tillage* would be as completely frus-

trated as though the railroad company had sold to one person the entire grant.

That the Government may specifically enforce such a covenant we have heretofore shown.

AS TO THE PURPOSE AND EFFECT OF JOINT RESOLUTION OF CONGRESS OF APRIL 30, 1908

ASSIGNMENT OF ERRORS HEREIN NUMBERED 39, 50, 51 AND 52

In the resolution adopted by Congress April 30, 1908, Congress expressly declared that it was not intended thereby to determine "the right of the United States to a forfeiture." By this resolution Congress not only *did not declare a forfeiture, but expressly stated that it did not even intend by the resolution to determine its right to do so.*

The Attorney General could not declare a forfeiture. The legislative body alone can do so.

> *State of Minn. vs. Duluth & I. R. R. Co.*, 97 Fed Rep. 353.

A legislative declaration of forfeiture to be effective must be clear and unambiguous.

> *State of Minn. vs. Duluth & I. R. R. Co., Supra.*

AS TO THE JURISDICTION OF THE COURT TO DECLARE OR DECREE FORFEITURE

ASSIGNMENT OF ERRORS HEREIN NUMBERED 35 36, 37, 64, 65, 66 AND 67

Equity will not lend its aid to enforce a penalty or forfeiture or to divest an estate for breach of a condition subsequent.

Smith vs. Jewett, 40 N. H. 530.
Chute vs. Washburn, 44 Minn. 312.
46 N. W. 555.

Vicksburg, etc., R. Co. vs. Ragsdale, 54 Miss. 200.

This maximum is as true and applicable where the Government is a party as in case of a private suitor.

Brent vs. Washington Bank, 10 Peters (U. S.) 596.

U. S. vs. U. P. R. R. Co., 105 U. S. 268.

The only exception to this rule is where Congress has declared a forfeiture, and a suit is brought in equity for the purpose of quieting in the Government the title to the forfeited lands.

Atlantic & Pacific R. R. Co. vs. Mingus, 165 U. S. 413.

U. S. vs. N. P., 177 U. S. 435.

Farnsworth vs. Minn., 92 U. S. 49.
U. S. vs. O. & C. R. R. Co., 164 U. S. 526.
U. S. vs. Tenn., etc., R. Co., 176 U. S. 242.

IF JURISDICTION INHERED THE DECREE IS INEQUITABLE

ASSIGNMENT OF ERRORS 41, 42, 43 AND 96

Assuming for the purpose of the discussion that the proviso is in form a condition subsequent, still forfeiture is inequitable for the reasons:

(a) It divests the railroad company of its vested interest to the extent of $2.50 per acre in the land.

(b) It deprives the interveners of their just rights and divests their vested interests.

(c) It frustrates the purpose of the grant.

In the suit at bar the court had the means at hand to carry into effect every provision of the law and do equity between all parties, wihout lending its aid to forfeiture.

A provision in the form of a condition may be specifically enforced as though it were a covenant without forfeiture, and its performance is in fact the very reverse of a forfeiture.

Pomeroy's Equity Jurisprudence, Vol. 1, 50, note 2.

Livingston vs. Sickles, 8 Page 398; 7 Hill 253.

Carpenter vs. Callin, 44 Barb. 75.
Leach vs. Leach, 4 Ind. 628.

And in order that a forfeiture may be avoided and justice promoted, equity will frequently regard a condition subsequent as a trust and specifically enforce it for the benefit of third persons.

Tiffany on Real Prop., Vol. 1, p. 185, and note.

Tomlin vs. Blunt, 31 Ill. App. 284.
Smith vs. Jewett, 4 N. H. 530.
1 *Smith's Leading Cases,* 142.
West vs. Bescoe, 10 Md. 460.

The case of *Smith vs. Jewett, supra,* was one in which land was devised by will to the widow upon the condition subsequent, that the widow support two daughters of the testator.

Upon condition broken the heirs brought suit in equity for a forfeiture, also praying for other relief. The widow admitted in her answer that she had broken the condition in the will. The court, however, refused to entertain suit for forfeiture, but suggested that if the parties saw fit to so frame their pleadings that specific performance might be decreed to compel the

widow to maintain the daughters, such relief might be granted.

The theory upon which courts of equity specifically enforce a condition subsequent as a covenant is that the language of the condition imports a covenant as well, and to avoid a forfeiture of the condition they specifically enforce the covenant.

The maxim "he who seeks equity must do equity" has been held specifically applicable to the United States when a suitor.

> *Brent vs. Washington Bank,* 10 Pet. (U. S.) 596.

TRUST RELATIONSHIP—VESTED RIGHTS —EQUITY IN INTERVENTION BILLS ASSIGNMENT OF ERRORS HEREIN NUMBERED 1 TO 24 INCLUSIVE, 48, 74 TO 77 INCLUSIVE, 79 TO 95 INCLUSIVE, 97, 98, 101, 102 AND 103

The proviso in the amendment of April 10, 1869, is in the following language:

> *"And Provided, Further* That the lands granted by the Act aforesaid, shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

This proviso is, of course, primarily a law, and should be carried into effect according to the intent of Congress, as heretofore shown. This being true, it would be unnecessary to determine what kind of conveyance it is, according to the common law classification, but for the fact that we must, of necessity, do so in order to determine what it does.

The only theory upon which a law can operate to convey an estate in property is, that the proposal in the law is a promise or covenant. The promise or covenant may be of such nature, that he who brings himself within the provision of the law, becomes seized of a legal estate in the lands proposed by the law to be conveyed, or it may be of such a nature that he who brings himself within the provision of the law becomes vested with an equitable estate to which another is conveyed a legal estate for his benefit.

Whether or not this proviso is, or is not, in the form of a condition subsequent, or whether it could or could not, under proper circumstances and in a proper case, operate to defeat the title of the railroad company, is not, as we have heretofore shown, material in the consideration of this appeal.

Then interveners have secured vested rights by the operation of the same law that gave the railroad

company title to the land, and the court has, by its orders and decrees, deprived them of these rights.

That a vested interest in property conveyed by a public grant may be acquired by a grantee, by bringing himself within the purview of the law, after its enactment, has been very frequently held.

> 26 *Am. & Eng. Ency. of Law,* 221 and note 2, citing many cases decided by the United States courts, and many of the state courts.

That the proposals in the law when accepted become contracts and within the protection of the Federal Constitution, has also been frequently held.

> 26 *Am. & Eng. Ency. of Law* (2nd Ed.) 222; note 1.

The grant in the case at bar is a three party contract between the Government, the railroad company and the interveners.

It is well established that where a grant is made charged with a trust, the interest which the *cestui que trust* has under the grant may sustain it against legislative interference, a vested equitable interest being property in the same sense and entitled to the same protection as a legal interest.

> *Cooley on Con. Lim.,* 344, note 1. Also page 333 and cases cited note 1.

Trustees of Dartmouth College vs. Woodward,
4 Wheaton (U. S.) 518.

It has been frequently held that where one who had a right to acquire property by performing certain acts as provided by law, had tendered performance and performed as far as permitted, he acquired a vested interest in the property.

Beaty vs. Sale, 92 Am. Dec. 128.
Claimants vs. Warner, 24 How. 394.
Gaugh vs. Dorsey, 27 Wis, 119.
Shipley vs. Cowan, 91 U. S. 330.

In the last case above cited, the plaintiff had settled upon and applied to purchase a pre-emption claim, but the officers of the land office declined to accept proofs on the grounds that the land had been reserved for another.

The court held that the plaintiff had vested rights which were not and could not be defeated by the refusal of the officers to recognize them.

These interveners claim that they have vested interests in the real estate applied for by them, respectively, which Congress itself could not by act of forfeiture or otherwise, lawfully divest, and that the orders and decrees herein appealed from infringes these rights.

A vested right is an immediate fixed right of present or future enjoyment.

6 *Am. & Eng. Ency. of Law* 956.
Kent's Com., 202.

It is also defined as a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

Cooley on Const. Lim., 438.

A vested right of action is property in the same sense that tangible things are property.

Cooley on Const. Lim., 343.

That the proviso is in fact a covenant, which gives rise to a trust, and that the interveners, by offering to comply with, and in so far as they are permitted, complying with, the law, have brought themselves into relation therewith as *cestuis que trustent*, and as such, have vested interests in the various tracts of land for which they have, respectively, applied for we shall now proceed to show.

> "A trust may be defined as an obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 858.

This is in the nature of a public trust and the railroad company holds title for the benefit of a particular class of people.

> "A public, or charitable, trust is one constituted for the benefit of the public at large or of some considerable portion of it answering a particular description."
>
> 28 *Am. & Eng. Ency. of Law* (2nd Ed.), 855.

We have, in the present case, all of the circumstances which give rise to a valid trust.

> "For the creation of a valid trust, three circumstances must occur: first, a definite subject-matter within the disposal of the settlor; second, a lawful definite object to which the subject-matter is to be devoted; third, clear and unequivocal words or acts, devoting the subject-matter to the object of the trust."
>
> 28 *Am. & Eng. Ency of Law* (2nd. Ed.), 865, 866.

The definite subject-matter within the disposition of the settlor—the Government—is the land within the grant; the lawful, definite object to which the land the subject-matter is to be devoted, is settlement and ownership by settlers, in small quantities; the words and acts devoting the subject-matter to the lawful object are the words in the proviso in question, viz:

"That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

We claim that these words are sufficient to create a trust.

"The creation of a trust requires no prescribed form of words, and any expression which evinces the settlor's present intention to place his beneficial interest in specified property absolutely beyond his control, for the benefit of some person or object, is enough, and even precatory words, if, as a whole, the intention appears that they are intended as imperative, will create a valid trust."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 866.

But, even if the words of the proviso were not sufficient to show this purpose, the purpose of Congress may be shown by words and acts of Congress, *in pari materia.*

U. S. vs. Union Pacific R. R. Co., 91 U. S. 72.

Holy Trinity Church vs. U. S., 143 U. S. 457.

In the latter case the court said:

"Another guide to the meaning of a statute is found in the evil which it was designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed and as it was pressed upon the attention of the legislative body."

As we have heretofore said, Mr. Julian, who procured the adoption of the proviso in question, as an amendment to the Act of April 10, 1869, a short time before said Act was adopted, in explaining to Congress the purpose of an amendment to another act in exactly the same language, said: "This will avoid the complete monopoly of the lands, as sanctioned by the old system of land grants, and at the same time devote to settlement and tillage the odd numbered sections," etc.

If the purpose of Congress was to "devote to settlement" the land conveyed by the grant, a trust was in fact created.

> "If a contract creates interests distinct from the legal ownership of the property involved, or if a contract, being lawful and enforcible, is made with the intention of devoting specific property to specific purposes, equity, in order to give effect to the rights created or to the intention of the parties, will raise a trust in the property enforcible against the holder of the legal title and those claiming under him voluntarily or with notice."
>
> 28 *Am. & Eng. Ency. of Law* (2nd Ed.) 904-5.

But the trial court has held that this proviso cannot be enforced as a trust because the language is too meager.

"Where the language states in general terms the purpose of the grantor to have the grantee do some act for the benefit of a third party, it is sufficiently definite and will be enforced."

In *re Smith's Estate,* 144 Pa. 428.

The court held also that even though the proviso reflects the general purpose of Congress that it cannot be enforced as a trust for the reason that the beneficiaries are not pointed out with sufficient certainty.

We assert that the people to be benefited by this Act are sufficiently defined.

In the case of *ex parte Lindley,* 32 Ind. 367, the following was held sufficiently definite:

"A devise to the education of the colored children in the State of Indiana."

In the case of *Chapin vs. School Dist.,* 35 N. H. 444, the following language was held sufficiently definite:

"The inhabitants of the second school district in Winchester."

In *Perrin vs. Carey,* 65 U. S. 465, the following was held to be sufficiently definite:

"To the support of the poor white male and female orphans neither of whose parents are living."

In *Jones vs. Habershaw,* 107 U. S. 174-191, the following was held sufficiently definite:

> "To one or more Presbyterian or Congregational churches in the State of Georgia in such destitute and needy localities as the proper officers of said independent church may select, so as to promote the cause of religion among the poor and feeble churches of the state." * * * "For the relief of distressed widows, and the schooling and maintaining of poor children." * * * "For the relief of indigent widows and orphans in the City of Savannah."

In the case of *Vidal vs. Gerards,* Exec., 2 How. (U. S.) 125, the following was held sufficient:

> "As many poor white male orphans between the age of 6 and 10 years as the income shall be adequate to maintain."

In *Trustees of Dartmouth College vs. Woodward,* 4 Wheat. (U. S.) 512, the following:

> "To the students who should attend the college."

In the case of *Tomlin vs. Blunt et al.,* 31 Ill. App. 234, the following was held sufficient:

> "Evangelical Order of Christians."

In view of the fact that forfeitures are never favored and are only granted even in courts of law, when the right thereto is definite and certain, and

that trust covenants should be interpreted and enforced to effectuate their purpose it seems strange to us that the trial court could find that this proviso was sufficiently definite so that a forfeiture might be had for its breach, and yet not sufficiently definite to enforce specifically.

In other words, was not the trial court first required to determine, and did he not determine, what the railroad company should do before he could determine or did determine that it had breached the covenant in the grant? And if the language of the grant is sufficiently definite so that he could determine what it should do to comply with the grant, could he not as well have required the company so to do, as to divest it of title for breach?

The Oregon and California Railroad Company by accepting and agreeing to be bound by the Act of July 25, 1866, and the amendments thereto, and stating in its articles of incorporation and the conveyance by which it acquired title from the Oregon Central Railroad Company to the grant, that it was organized for the express purpose and with the express intention of complying with the terms of the grant *and amendments thereto,* impressed upon the granted lands a trust which may be enforced by these interveners, independent of any right which the Government might have to enforce the terms of the grant.

"The settlor may, without parting with the possession of the subject-matter of the trust, himself assume the character of trustee, with respect to property already owned by him, or upon the acquisition of property in pursuance of a previous agreement. *It is not necessary that this be done in express terms,* but in the absence of statutory requirements *any words or acts are sufficient which clearly denote his intention* to relinquish his beneficial interest in the property in presenti and to hold it for the benefit of another, and this without regard to whether the property is equitable or legal or whether it is capable or incapable of transfer at law."

28 *Am. & Eng. Ency. of Law* 898, and Note 11, citing cases from England, U. S., Alabama, California, Connecticut, Georgia, Illinois, Kentucky, Maine, Maryland, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina and Vermont.

And

"If a trust has been once perfectly created with an intelligent comprehension of the nature of the act, it is irrevocable, even though it be voluntary, and the subsequent acts of the settlor or the trustee cannot affect it."

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 899 and Note 7, citing many cases from England, Canada, United States, California, Illinois, Indiana, Kentucky, Maine, Mary-

land, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island South Carolina, Vermont and West Virginia.

And equity will aid a volunteer beneficiary in enforcing his trust even though the settlement of the trust were gratitous.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 889-90, and Notes 1 and 2.

And the settlor of the trust may himself compel specific performance in a court of equity.

Chapman vs. James, 4th Ore. 362.
Warren vs. The City of Lyons, 22 La. 357.
Abbott vs. Gregory, 39 Mich. 68.
Gressom vs. Hill, 17th Ark. 483.

And the trust may be declared by a separate instrument from the one conveying or describing the estate.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 900.

And where the trustee refuses or neglects to carry out the terms of the trust the beneficiary may compel performance.

28 *Am. & Eng. Ency. of Law* (2nd Ed.), 1121, and Note 7, citing many cases.

As we have heretofore shown, the declaration

of trust is sufficient if it shows the intention of the settlor.

28 *Am. & Eng. Ency of Law* (2nd Ed.), 866.

We insist, therefore, that this trust should be construed as an executed trust, that is, as sufficiently defining the right of the *cestuis que trustent* and the responsibility of the trustee, when the intent and purpose of Congress, gleaned from its acts and proceedings *in pari materia,* are considered in connection with the words of the proviso.

The intent and purpose of Congress was, no doubt, as heretofore shown, that the settler should have the right to settle upon the land and purchase any amount that he saw fit, not to exceed one-quarter section, by paying to the railroad company the largest amount which the railroad company had a right to charge for the land.

To construe the law otherwise would be, to make it ineffectual to accomplish the purpose for which it was designed, and would not "avoid the complete monoply" of the lands. For if the railroad company had a right to refuse to sell to A, it would likewise have a right to refuse to sell to B and C, and so on *ad infinitum.* Likewise if it had a right to refuse to sell 160 acres, it would have a right to refuse to sell 80 acres or 40 acres or any other given

amount, and would have a right to refuse to sell any land whatever.

Therefore, the purpose and intention of Congress can only be made effectual, and the complete monopoly of the lands avoided, only, by giving the settler the right to purchase the largest amount by tendering the highest price within the limits of the law.

The trust instrument must be construed to carry into effect the purpose of the settlor of the trust.

> "In construing instruments creating or declaring trusts, the rule is that the intent of the parties controls and that the substance and effect of the instrument as a whole must be considered and its mere form will be disregarded."
>
> 28 *Am. & Eng. Ency. of Law,* 910, and Note 10.

As we have heretofore shown, this is especially true where the trust is created by a congressional grant as the grant is a law as well as a conveyance, and must be so construed, solely with a view to promote the purpose of Congress.

And where the instrument is susceptible of two constructions, the construction which will best carry out the general scheme of the trust, will be adopted.

> *Dexter vs. Episcopal City Mission,* 184 Mass. 394.

But if the court should construe the law otherwise and hold that the trust was an executory trust which gave the railroad company the right to exercise a discretion as to the amount of land within the quantitative limit fixed by the law, which it should sell to each settler, these interveners would still have a standing before this court, and would be entitled to the relief asked.

> "A court of equity has inherent power to take upon itself, through its officers or agents, the execution of the powers and duties of a trust, upon the failure or refusal to act of the duly appointed trustee," etc.
>
> 28 *Am. & Eng. Ency. of Law,* 1098-99.
>
> "When the court is called upon to execute the trust, it will not generally attempt to exercise discretionary powers conferred upon the trustee. But it may, in a proper case, order a reference to determine what course of action will be beneficial to all parties interested."
>
> 28 *Am. & Eng. Ency. of Law,* 1098.

And it has been held that when a trustee of an executory trust refuses to exercise the discretion with which he is vested, in bestowing the benefits of the trust upon the *cestui que trust,* he will be compelled to bestow the largest benefit permitted by the terms of the trust.

Young vs. Young, 1 Jurist 840.

The defendant railroad company contends that the proviso requiring the railroad company to sell the land to settlers for $2.50 per acre, in quantities not greater than one-quarter section, being a covenant, is "unenforcible by the cross-complainants and interveners because they are third parties to it."

A person for whose benefit a covenant is made may enforce the same, though not a party to the agreement.

11 *Cyc.*, 1095, and Note 37.

And he may do this though there may be no provision of the code expressly authorizing such action.

Douglass vs. Mobile Branch Bank, 19 Ala. 659.

Duncan vs. Moon, Dudley (S. C.) 382.

Johnson vs. McClung, 26 W. Va. 659.

But Section 27 of Chapter 3 of the Code of Oregon, expressly providing that "actions shall be prosecuted in the name of the real party in interest," authorizes any person for whose benefit a contract is made, to sue thereon.

Hughes vs. O. R. & N. Co., 11 Oregon 489.

Baker vs. Elgin, 11 Or. 333.

Chrisman vs. State Ins. Co., 16 Or. 388.

Strong vs. Kamm, 18 Or. 172.

Feldman vs. McGuire, 34 Or. 311.

And the beneficiary may sue even though he was not informed of the contract until after it was made.

Schneider vs. White, 12 Or. 508.

And the real party in interest may enforce his rights though he has acquired his rights without consideration.

Gregoire vs. Rourke, 28 Ore. 275.

And it has been frequently held that codes of a state conferring right of action, might be taken advantage of in suits in the federal courts within the state.

Holland vs. Challen, 110 U. S. 15.
Wehman vs. Conklin, 155 U. S. 314.

That the interveners are real parties in interest, we have heretofore shown.

For the foregoing reasons these interveners maintain that the orders and decrees heretofore entered against them should be reversed and set aside, and that they should be given the relief prayed for in their bills.

Respectfully submitted,

JNO. MILLS DAY,
M. E. BREWER,

Attorneys for Interveners-Appellants.

United States Supreme Court
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JAMES D. MA
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No. 679

In the Supreme Court of the United States

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT.

OREGON AND CALIFORNIA RAILROAD COMPANY, A Corporation, *et al.*,
Defendants and Appellants
JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants,
WILLIAM F. SLAUGHTER, *et al.*,
Interveners and Appellants,
vs.
THE UNITED STATES OF AMERICA,
Appellee.

Brief for Interveners and Appellants, Frank Terrace and each and all of the persons whose names are specifically set forth in the title to this cause, commencing with and including the said Frank Terrace, down to and including John Zoffi, being all of the persons who, by leave of Court, filed their joint complaint in intervention in this cause on the second day of December, 1908.

CHARLES E. SHEPARD,
Solicitor for Interveners and Appellants, Frank Terrace and others.

613-615 New York Building,
Seattle, Washington.

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STATEMENT OF FACTS.

(In explanation of the tardy date of serving and filing this brief in behalf of a large number of interveners, it is to be said that the undersigned for his clients concurred in the application of the United States, the complainant, to this Court to order the whole record sent up; but he received no information that such order was made, nor that the cause was advanced on the calendar for an early hearing, until the 27th day of last March. Under the circumstances, there was nothing to do but to reprint with slight changes the brief for said interveners, which was served and filed in the Circuit Court of Appeals, and to pray the indulgence of this Court for late filing.)

On July 25, 1866, there was passed by Congress and approved by the President of the United States, an act entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon," which act thereupon became operative and whereby it was enacted in substance and legal effect that the "California and Oregon Railroad Company," a corporation organized under an act of the state of California,

and such company organized under the laws of Oregon as the legislature thereof should thereafter designate, were authorized to locate, construct and maintain a railroad and telegraph line between Portland in Oregon and the Central Pacific Railroad in California; and there was to be granted to said companies for the purpose of aiding in the construction of said railroad and telegraph line every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; that there was to be granted to said companies a strip of land 100 feet in width on each side of said railroad track where it passes over the public lands, including all necessary grounds for stations, buildings, etc.; that whenever said companies or either of them should have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for service, the same having been completed and equipped as provided in said act, then patents should issue to said companies or either of them, for the lands therein granted to the extent of and co-terminous with the completed section of said railroad and telegraph line, and so on in like manner as sections of twenty miles or more should have been completed and equipped, until the entire railroad and telegraph authorized by said act should have been

constructed and the patents of the lands therein granted issued; said companies should file their assent to said act in the Department of the Interior within one year after the passage thereof, and should complete the first section of twenty miles of said railroad and telegraph line within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, 1875; that in case said companies should fail to comply with such conditions by not filing their assent thereto of said act, or by not completing the same as therein provided, then that such act should be null and void and all lands not conveyed by patent to said company or companies, at the date of such failure should revert to the United States; that the said companies should obtain the consent of the legislatures of their respective states and be governed by the statutory regulations thereof in all matters pertaining to the right of way when not passing through the public lands of the United States (14 U. S. Statutes at Large, p. 239). Said Act of Congress is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 6-13).

On or about June 25, 1868, said last described Act of Congress was amended by an Act of Congress entitled, "An act to amend an act entitled, 'An act granting lands to aid in the construction

of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon,'" which said amendatory act provided in substance that Section Six of said former act be so amended as to provide that instead of the time fixed in said section, the first section of twenty miles of said railroad and telegraph line should be completed within eighteen months from the passage of said amendatory act, and at least twenty miles in each two years thereafter, and the whole on or about the first day of July, 1880 (15 U. S. Stats. at Large, p. 80). Said Act of Congress is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 13, 14).

On or about April 22, 1867, at Salem, Oregon, certain persons, designing to secure the several grants, franchises and other benefits of said Act of Congress, approved July 25, 1866, organized under the general incorporation laws of the State of Oregon, a corporation known as "Oregon Central Railroad Company," having its principal place of business at Salem, Oregon. Said corporation became known as the "East Side Company," and its line of railroad became known as the "East Side Line," and said company and said line of railroad are so designated throughout this record.

On October 20, 1868, said East Side Company, in furtherance of its aforesaid design, procured a joint resolution to be adopted by the Legislature of the State of Oregon, providing in substance that the Oregon Central Railroad Company, a corporation organized on the 22d day of April, 1867, under and pursuant to the laws of the State of Oregon, be and the same was thereby designated as the company entitled to receive the lands in Oregon and the benefits and privileges conferred by said Act of Congress of July 25, 1866; said joint resolution is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 17, 18). The time within which to file an assent had expired long prior to the designation of said East Side Company by the Legislature of the State of Oregon on October 20, 1868, as aforesaid. The East Side Company applied to Congress during the session commencing in December, 1868, for an extension of the time within which to file its assent.

On the 10th day of April, 1869, there was passed by Congress an act entitled, "An act to amend an Act entitled 'An act granting lands to aid in the construction of a railroad and telegraph

line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-fifth, eighteen hundred and sixty-six," in terms as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section six of an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said Act, to file its assent to such Act in the Department of the Interior within one year from the date of the passage of this Act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act: *Provided*, That nothing herein shall impair any rights heretofore acquired by any railroad company under said Act, nor shall said Act or this amendment be construed to entitle more than one company to a grant of land. *And Provided, Further*, That the land granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre" (16 U. S. Statutes at Large, p. 47).

On June 8, 1869, said East Side Company, through its board of directors, adopted a resolution providing in substance that such company, the Oregon Central Railroad Company, of Salem, Oregon, incorporated at Salem, Oregon, April twenty-second, 1867, by such resolution accepts all of the provisions, rights, privileges and franchises of said Act of July twenty-fifth, 1866, and of all acts amendatory thereof, and upon the conditions therein specified, and that such company by such resolution, gives its assent thereto and providing for the notification of the United States through its Secretary of Interior at Washington, of the giving of such assent; said resolution is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 21-23).

On or about the 30th day of June, 1869, said East Side Company filed in the office of the Secretary of the Interior of the United States a certified copy of said resolution last herein set forth.

On or about the 29th day of October, 1869, said East Side Company filed in the office of the Secretary of the Interior of the United States, a map of survey and location of the first sixty miles of its projected line of railroad.

On December 24, 1869, said East Side Company completed the construction of the first twenty miles

of its aforesaid line of railroad, commencing at the City of Portland, and on the 31st day of December, 1869, the same was examined and approved by commissioners appointed therefor pursuant to the provisions of Section Four of said Act of Congress, approved July 25, 1866.

On or about the 17th day of March, 1870, the promoters, officers and stockholders of said East Side Company, did organize the appellant (defendant) Oregon and California Railroad Company, under the general incorporation laws of the State of Oregon. The principal object of said corporation, as stated in its articles of incorporation, was to become the successor of said East Side Company, and as such, to receive and exercise the grants, franchises and privileges of said Act of Congress approved July 25, 1866, and the aforesaid acts amendatory thereof; said articles of incorporation are set out in full in Complainant's Bill as "Exhibit A" (Transcript, Vol. I, pp. 89-92).

On or about March 29, 1870, said East Side Company did execute and deliver to said defendant Oregon and California Railroad Company a certain instrument in writing, purporting to assign, transfer and convey to said defendant Oregon and California Railroad Company all of the property of said East Side Company in and to the

grants, franchises and other benefits of said Acts of Congress approved July 25, 1866, and the aforesaid Acts amendatory thereof; said instrument in writing is set out in full in Complainant's Bill as "Exhibit B" (Transcript, Vol. I, pp. 93-125).

On said 29th day of March, 1870, said East Side Company, by action of its board of directors and its stockholders, became and was dissolved and since last mentioned date, no corporate powers or franchises have ever been exercised by, or in the name of, said East Side Company.

On the 4th day of April, 1870, the defendant Oregon and California Railroad Company, through its board of directors, adopted a resolution providing in substance that said Company do accept the grant conferred by such Act of Congress of July 25th, 1866, and all amendments thereof, and all the benefits and emoluments therein or thereof granted, upon the terms and conditions therein specified; also that such acceptance and assent be filed in the office of the Secretary of the Interior, together with a copy of the deed of assignment from said Oregon Central Railroad Company; said resolution is set out in full in Complainant's Bill (Transcript, Vol. I, pp. 26, 27).

On or about April 28th, 1870, the defendant, Oregon and California Railroad Company, filed in

the office of the Secretary of the Interior of the United States an authenticated copy of said last described resolution, and a certified copy of said instrument dated March 29, 1870; and at all times thereafter said defendant, Oregon and California Railroad Company, has assumed and still assumes, to be the successor of said East Side Company and of all of its rights under said Acts of Congress.

During the period from about the year 1870 until on or about the month of January, 1873, said East Side Line was constructed and extended from said City of Portland, in the State of Oregon, to a point near Roseburg, a distance of approximately one hundred ninety-seven miles (including said first section of twenty miles theretofore constructed, as hereinbefore referred to).

On or about June 2nd, 1881, the defendant, Oregon and California Railroad Company, executed and delivered to Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, as trustees for the owners and holders of preferred stock, so called, of said Company, a deed of trust purporting to convey all of the lands of said grant of July 25, 1866. Said deed of trust is set out in full in Complainant's Bill as "Exhibit D" (Transcript, Vol. I, pp. 134-165); the defendant, Stephen T. Gage, is

now the sole surviving trustee under said deed of trust.

In or about the month of June, 1881, the work of constructing said East Side Line was resumed, and thereafter was continued until in or about the month of January, 1884; during said last mentioned period of construction said East Side Line was constructed and extended from said Roseburg to a point about one and one-quarter miles southerly from Ashland, in the State of Oregon, a total distance of approximately one hundred forty-five miles.

On or about the 12th day of May, 1887, the defendant Southern Pacific Company acquired and thereafter exercised, ownership and control of the said defendant, Oregon and California Railroad Company, pursuant to a certain contract in writing, entered into between said defendants on or about the 28th day of March, 1887; said contract is set out in full in Complainant's Bill as "Exhibit E" (Transcript, Vol. I, pp. 166-184).

On or about August 1st, 1893, the defendant Southern Pacific Company, and the defendant, Oregon and California Railroad Company, entered into a contract of lease in writing, whereby all of the railroad and telegraph lines and other property

of the defendant, Oregon and California Railroad Company, were leased to the defendant, Southern Pacific Company, for the term of thirty-four years, which lease is still in full force; said lease is set out in full in Complainant's Bill as "Exhibit G" (Transcript, Vol. I, pp. 189-196).

During the year 1887, the last section of said East Side Line, extending from Ashland to the southern boundary of Oregon, was constructed.

On the 1st day of January, 1903, there remained unsold of said granted lands about 2,373,000 acres, of which 2,080,000 acres have been patented, and 293,000 acres have not been patented.

Prior to the 1st day of January, 1903, the defendant, Oregon and California Railroad Company, had sold certain of the lands granted under said Acts of Congress, in violation of the terms of the proviso contained in the Amendment of April 10, 1869.

Since on or about the 1st day of January, 1903, the defendant, Oregon and California Railroad Company, have refused to sell any of said lands remaining unsold, in accordance with the terms of said grant, or to any persons, upon any condition whatsoever.

Since the 1st day of January, 1903, and prior to the commencement of this suit, each of these

interveners has applied to the defendant, Oregon and California Railroad Company, to purchase one-quarter section of said unsold land, as provided by said Act of April 10, 1869, and has tendered full performance of all of the requirements of said Act, each and all of which tenders, offers and applications have been refused by said defendant.

On the 30th day of April, 1908, Congress, by joint resolution, authorized and directed the Attorney General of the United States to institute this proceeding.

On the 25th day of May, 1908, the complainant, the United States of America, filed its bill of complaint in the Circuit Court of the United States for the District of Oregon, setting forth in substance the foregoing facts, and praying as follows:

First. That all of the lands in said grant, remaining unsold, be forfeited to the United States, and its title thereto quieted; or

Second. That all of said unsold lands are subject to purchase by actual settlers, in accordance with said Acts of Congress, and that receivers be appointed and invested with title thereto, and directed to convey said lands, as required by said Acts; or

Third. That a mandatory injunction issue, commanding and requiring the defendant, Oregon and California Railroad Company, to offer for sale, sell and convey said unsold lands, in accordance with said Acts of Congress.

The complaint further prays for other equitable relief (Transcript, Vol. I, pp. 1-540).

On the 2nd day of December, 1908, under leave of Court, these interveners filed their bill of complaint in intervention, alleging in substance the foregoing facts, and praying as follows:

First. That complainant and defendants be ordered to enter an appearance to said bill, and to answer the same;

Second. That a decree be entered, awarding to each of said interveners the land applied for by him, and requiring the defendant, Oregon and California Railroad Company, to execute and deliver to each of said interveners deeds of conveyance of said lands so applied for, upon compliance by said interveners with the requirements of said Acts of Congress, and quieting the title to said land in said interveners, as against all of the defendants;

Third. That the defendants be enjoined from exercising any acts of ownership over said lands pending this suit;

Fourth. That neither the complainant nor any of the defendants herein, recover any of the lands involved herein and applied for by these interveners;

Fifth. For general equitable relief.

On the 2nd day of March, 1909, the interveners, B. W. Nunnally and others, leave of Court being first therefor duly obtained, filed herein their petition in intervention, alleging substantially the same facts as set forth in the bill of complaint in intervention theretofore duly filed by these interveners, as aforesaid, and praying for substantially the same relief as is prayed for in the bill of complaint in intervention of these interveners (Transcript, Vol. II, pp. 541-639).

On the 14th day of March, 1914, there was filed herein a stipulation entered into between complainant and defendants, defendants-cross-complainants and defendants-interveners; by the terms of said stipulation it was stipulated and agreed, among other things, that it should not be necessary to include in the printed record of this cause any of the papers or proceedings pertaining to any of the interveners, other than B. W. Nunnally and others (Transcript, Vol. XVI, pp. 8652-8664). For this reason, the complaint in intervention of these interveners is not set out in the transcript.

On the 7th day of April, 1909, there was filed the joint and several demurrer of the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to the bills in intervention of all of the interveners herein, including these interveners, upon the grounds:

First. That the bill does not show that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars;

Second. That said bill does not show any cause or equity entitling the interveners to maintain their suit;

Third. That the bill does not show that the interveners are entitled to a discovery:

Fourth. That the bill does not show that the interveners are entitled to any relief (Transcript, Vol. II, pp. 685-687).

On the 24th day of April, 1911, said demurrers were duly presented and sustained by the Court (Transcript, Vol. II, pp. 694, 695).

On the 9th day of June, 1913, the complainant filed its several motions to dismiss the bills of complaint in intervention of all of said interveners, including these interveners, for want of equity in such

bills, and said motions were, on the 1st day of July, 1913, sustained by the Court (Transcript, Vol. III, pp. 1286, 1287).

On the 23rd day of June, 1913, the Union Trust Company, individually and as trustee, filed its motion to dismiss the complaints in intervention, including the complaint of these interveners, and said motion was, on the 25th day of June, 1913, sustained by the Court (Transcript, Vol. III, pp. 1290-1292).

On the 1st day of July, 1913, the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, filed their motion to dismiss the bills in intervention of the interveners, including these interveners, and on the 10th day of November, 1913, said motion was sustained by the Court (Transcript, Vol. III, pp. 1293-1295).

On the 1st day of July, 1913, the complainant and defendants having adduced their evidence, a decree was entered by the Court, forfeiting all the lands involved in this proceeding, including the land claimed by these interveners, to the United States of America, and quieting the title to the same in the complainant, and enjoining these interveners and all other parties herein from claiming any interest therein.

From the orders and decrees entered in favor of complainant, all of the defendants, cross-complainants and interveners prosecuted a joint appeal, and from all orders and decrees entered in favor of the defendants against the cross-complainants and interveners, the cross-complainants and interveners prosecuted a joint and several appeal. These appeals were argued before the Circuit Court of Appeals for the Ninth District in May, 1914; and that Court decided to certify to this Court certain questions. In December, 1914, the United States, Complainant, with the concurrence of all other parties concerned, moved that the entire record be ordered up, pursuant to statute, and later that the cause be advanced on the calendar for an early hearing. Both of these applications were granted.

ASSIGNMENT OF ERRORS.

(Numbers in parentheses are the numbers of said assignments as they appear in the Transcript, Vol. XV, pp. 8283-8391).

1. (51) The court erred in sustaining the demurrer of the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to the bill of intervention of the intervener, Frank Terrace, and the other interveners with him in his said bill joined, for want of equity in said bill.

2. (52) The court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as trustee, to the bill of intervention of said interveners. for want of equity in said bill.

3. (53) The court erred in sustaining the motion of the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to strike the bill of intervention of said interveners, for want of equity in said bill.

4. (54) The court erred in sustaining the motion of the defendant, Union Trust Company,

individually and as trustee, to strike the bill of intervention of said interveners, for want of equity in said bill.

5. (55) The court erred in sustaining the motion of the complainant for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill.

6. (56) The court erred in not requiring the Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, to answer said bill in intervention.

7. (57) The court erred in not requiring the Union Trust Company, individually and as trustee, to answer said bill in intervention.

8. (58) The court erred in not requiring the complainant to answer said bill in intervention.

9. (59) The court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively in said bill.

10. (60) The court erred in not granting to said interveners or any of them, any equitable relief;

As said bills of intervention contain allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners, and each of them to the relief prayed for by them and each of them respectively in said bill.

11. (251) The court erred in holding that these interveners and cross-complainants were not entitled to the relief prayed for by them and each of them respectively.

12. (254) The court erred in holding that none of these interveners and cross-complainants were entitled to any relief;

As their said bills of intervention and cross-complaint and each of them contain allegations and matters entitling these interveners and cross-complainants and each of them, to equitable relief; and

Said bills of intervention and cross-complaint and each of them contain allegations and matters entitling the interveners and cross-complainants and each of them, to the relief prayed for by them and each of them, respectively, in their said bills.

13. (255) The court erred in holding that the United States, complainant herein, was entitled to a forfeiture of the lands or any of the lands

sought to be purchased by the interveners and cross-complainants herein or any of them.

14. (259) The court erred in holding that the lands or any thereof sought to be purchased by these interveners and cross-complainants, or any of them, described in said decree, were and had been forfeited to the United States, complainant herein, and that a decree be entered forfeiting said lands or any thereof to the complainant.

15. (269) The court erred in holding that the proviso in the said act of April 10, 1869, was a condition subsequent.

16. (261) The court erred in holding that the proviso in the amendment of April 10, 1869, requiring the sale of lands to actual settlers only, in quantities not exceeding one-quarter section to any one purchaser and at a price not to exceed $2.50 per acre, was or is a condition subsequent, the breach of which entitled the United States, complainant herein, to a forfeiture of the lands covered by said land grant.

17. (272) The court erred in holding that there was jurisdiction in the court on the equity side to decree a forfeiture of the title of the defendants to the lands embraced in and covered by the East Side grant, for breach of an assumed condition

subsequent in the proviso contained in the Act of April 10, 1869.

18. (277) The court erred in holding that by its joint resolution of April 13, 1908, the Congress of the United States forfeited or intended to forfeit, or authorized the forfeiture by the Attorney General or intended to authorize the forfeiture by the Attorney General, or authorized or intended to authorize or empower the court to forfeit or decree a forfeiture of the lands embraced within the East Side grant, for or on account of any assumed breach of conditions of the proviso of the Act of April 10, 1869.

19. (287) The court erred in holding that the provisions in each and both of said land grants, requiring sales to settlers, are not positive covenants which may be specifically enforced.

20. (296) The court erred in holding that the United States, complainant herein, is the owner in fee simple or in possession of said lands or any part thereof or entitled to said lands or entitled to the possession of the same or any part thereof, which are sought to be purchased by these interveners and cross-complainants or any of them.

21. (304) The court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any

of them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the Act of July 25, 1866, and the act of April 10, 1869, amendatory thereof.

22. (316) The court erred in not holding that the proviso in the amendatory act of April 10, 1869, was and is a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the railroad company to accept and become vested with the title to the lands under the grant of 1866.

23. (317) The court erred in refusing to direct and decree a specific performance on behalf of the United States, the complainant herein, and against the defendant, Oregon and California Railroad Company and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by each respectively, upon payment of the purchase price therefor.

24. (318) The court erred in not holding that the defendant, Oregon and California Railroad Company and other defendants claiming an inter-

est in said land, be required to convey said land to the interveners and cross-complainants applying to purchase the same.

25. (324) The court erred in refusing to direct and decree a specific performance on behalf of the interveners and cross-complainants and each of them, against the defendant, Oregon and California Railroad Company, and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, respectively, as prayed for in their several bills.

26. (325) The court erred in holding that the provisions in each and both of said grants did not constitute contracts entered into by and between the government and the railroad company, for the benefit of and enforcible by the interveners and cross-complainants.

27. (326) The court erred in holding that the proviso in the amendatory act of April 10, 1869, requiring sales to settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those who in good faith should apply to make settlement upon said land, and to purchase the same in quantities and at prices provided by said amendatory act.

28. (331) The court erred in not holding that the railroad company, by the provisions in said grants contained, was constituted a trustee for the benefit of the interveners and cross-complainants as *cestuis que trusent*, as

(a) The nature and quality of said interests under said grants are sufficiently specific and definite, and

(b) Their application to purchase and offer to settle upon the lands, is a sufficient identification.

29. (332) The court erred in holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, did not give to the respective interveners and cross-complainants a vested interest in said lands, in default of an acceptance of such offers and conveyances of said lands by the Oregon and California Railroad Company.

30. (334) The court erred in holding that the proviso in the Act of April 10, 1869, is not sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

31. (337) The court erred in not holding that the proviso in the Act of April 10, 1869, for

the sale of lands to actual settlers was intended by Congress as and was and is a covenant to a use only, and not a condition subsequent, as

(a) Said proviso contains specific and direct commands which were assented to, and performance thereof promised, by the Oregon and California Railroad Company, and

(b) Said proviso does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

32. (338) The court erred in holding that the proviso in the act of April 10, 1869, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

33. (340) The court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the East Side grant, or any part theerof, except as a settlor of the trust in said lands.

34. (348) The court erred in holding that the United States, complainant herein, had any right, title or interest in and to the lands embraced within the East Side land grant, or any part thereof, which it could enforce in this action, except such rights as it has as a settlor of the trust in said lands, to enforce the provision of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands.

35. (350) The court erred in not holding that this suit can only be maintained by complainant as one to compel the specific performance of a trust covenant, or to enforce a public policy, as

(a) Neither of said land grants contains a provision importing a condition subsequent, upon the breach of which, forfeiture could be had, and

(b) Congress has never declared a forfeiture of either of said land grants for breach of any condition subsequent, assuming that there is such condition in either of said land grants, and

(c) The fact of forfeiture has never been adjudicated by a court of law, and

(d) The defendant, Oregon and California Railroad Company, holds the legal title to and possession of said lands, and

(e) Complainant having asked for forfeiture and in the alternative for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance, and

(f) In view of specific performance a decree quieting title in the government cannot be had.

36. (353) The court erred in holding that the interveners and cross-complainants were not such actual settlers as were contemplated by the acts of April 10, 1869, and May 4, 1870.

37. (354) The court erred in holding that these interveners and cross-complainants did not have vested interests in the lands sought to be purchased by them and each of them respectively, by reason of their various offers and tenders to purchase said lands upon the terms provided in the acts of April 10, 1869, and May 4, 1870.

38. (355) The court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

39. (359) The court erred in holding that the United States, complainant herein, was entitled to recover its costs and disbursements herein, or any costs or disbursements herein, against these interveners and cross-complainants, or any of them, and that a decree should be entered to that effect.

ARGUMENT.

THE ACT OF APRIL 10, 1869, BY THE TERMS OF THE PROVISO RESTRICTING SALES CREATED A TRUST.

Due regard to the rights of the interveners whom we represent does not require us to follow step by step the elaborate course of reasoning employed in behalf of the Government by its counsel. With a large part of that reasoning and of the discussion of the land grant policy of the United States, its origin and history, and of the discussion of statutory construction in general, we cordially agree. Indeed, it is only when the counsel for the Government reaches the point of arguing that the proviso created a "*condition subsequent*," entailing forfeiture of the title of all lands not previously sold within the terms of the proviso, that we part company with him. Of course this acquiescense up to that point in the Government's contention, is in view of its briefs in the courts below. What other or different view, what other or different reasoning, authorities or conclusions its brief in this court may set forth we have no means of knowing at present.

We agree, then, with the learned counsel for the Government that the Act of April 10, 1869, in

general, and its additional proviso amendatory of the Act of July 25, 1866, in particular, expressed a definite intention and policy of Congress; that they were meant to effectuate that intention and policy; that the amendatory proviso was not a mere "unenforcible, directive, regulative covenant;" that it was not a bare *brutum fulmen* of that character, not a counsel of perfection or ethical admonition to be good addressed to a group of selfish promoters more intent on gain than on settlement of the wild country which their railroad was to open up—in short, that the statute and the proviso *meant something*. The sole questions between us and the Government are: What did they mean? And, How is that intent to be realized in act?

Notwithstanding the abundant litigation over land grants and the titles derived from them, lawyers and judges schooled in the common law are very apt to approach a case involving estates and rights originating in a public land grant with the prepossessions derived from the technical logic of the common law. A remarkable instance of that mental attitude is shown in the laborious argumentation as to the construction of the proviso herein as a "condition subsequent." In reading the alleged "demonstration" that it is a "*condition subsequent*", and is and can be nothing else, we are

transported into the atmosphere of the courts when Coke and Holt and Hale sat on the bench, when the feudal law of land was the sole guide to litigants, and before Mansfield had opened the windows and let in the daylight and fresh air of the modern world. And yet the whole law of land grants—a large and important branch of our public land law—is based on a departure from the old common law of estates, with its feudal rigidity of logic and technicality of terms. For its cornerstone is the doctrine of a grant *in praesenti* of vast tracts indefinite in location and area—*a "float"*—which by later relation becomes defined—the "float" gets anchored—by the co-operating yet independent acts of the railroad surveyors in locating and mapping the road, the federal surveyors in running out the public survey lines on the face of the globe, and the department officers in issuing the patents. Anything so vague, so absolutely indeterminate as an estate of many thousand acres, of not one square rood of which could it be said at the date of the grant, "this is a part of it", would have been scouted in any common law court as void for uncertainty. Without this liberal and modern view of the land grant acts, treating them not only as statutes but as conveyances of a floating estate to be afterwards tied down to a local habitation, we should

have had (on strict common law principles) only a statute inoperative, hence void, *as a grant*, and later sundry patents which would have been the real and only source of title. And these patents, containing no restrictions in terms of the patents, would necessarily vest an unrestricted estate in fee simple in the grantee railroad company. Hence it is only by virtue of the modern doctrine that the land grant act is a floating conveyance, to be later made definite, that the learned counsel is able to tie the "condition subsequent" to the estate as a qualification of the fee. He stands, then, with one foot on the modern land grant doctrine to get his *pou sto*—his foothold to argue that there is any limitation on the estate; and having got that, he shifts to the other foot and stands on the most rigid construction of this proviso as a condition subsequent, in order to defeat the granted estate.

Nor does the inconsistency of the complainant's case end here. For it comes into a court of equity to enforce the technical construction of a clause of ambiguous meaning. Now no one doubts that courts of equity in the cases cited in the Government's brief and in other cases have enforced forfeitures. Nevertheless, it is a commonplace that equity abhors forfeitures. Whether in a given instance equity will permit or refuse a forfeiture

depends not so much on general doctrines as on the circumstances, as they appeal to the chancellor's conscience or repel it. In many cases, the court has said it will leave the complainant to his legal remedies; in others, that it will grant the forfeiture. On what does the difference depend? How is this wide judicial discretion to be guided? The difference depends on other fundamental notions of equity, such as: "He who seeks equity must do equity", and "Equity will protect the rights of all and do complete justice", and "Equity favors the diligent". And the chancellor's discretion is to be guided by the light thrown by the conduct of the parties, their rights and wrongs, the mischiefs and losses that will be avoided or caused by the one or the other ruling. It cannot, then, be said in a court of equity, as in one of law, that (granting the technical elements of a forfeiture), the forfeiture will be enforced as of course. "It all depends."

We must approach the subject of the proper construction of the proviso, bearing in mind that we are not dealing with the technical purport of a clause in a common law conveyance, but with the true intent and effect of an integral part of a scheme of disposing of vast areas of public lands in an uninhabited wilderness; that such scheme and every part of it must be viewed in the light of the

history of a half century of legislation by Congress and of settlement of the "great West"; that while the words are those of Congress, their intent and effect are what the court can say they are, and the court is not to abnegate its function and accept what this committee may have reported or that congressman—even an able land lawyer—may have said they are. And above all we are to remember that this is only a single instance in a great land system which was utterly severed from the technical doctrines of common law estates by the doctrine of a "float" which this court worked out *and which is the foundation stone of all land grant estates*, and that *in this court* we are to seek not the *rigor and vigor* of legal terms, conditions and estates, but broad equity and complete justice among all parties.

We maintain, then, *that the proviso in the Act of* 1869 *created a trust.*

What are the elements of the trust?

They are all contained within the terms of the land grant in the Act of July 25, 1866, as qualified by the amendatory proviso in the Act of April 10, 1869:

> "Provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only in quantities not exceeding one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre."

"The act aforesaid" means the Act of July 25, 1866.

Since there are no express words of trust, this is *an implied trust.*

1 *Perry on Trusts* (6th Ed.), Secs. 24, 25, 112.

Lane vs. Lane, 8 Allen, 350.

No particular form of words is required to create a trust. As to express trusts, "there is no particular formality required or necessary in the creation of a trust."

1 *Perry on Trusts* (6th Ed.), Sec. 82;

Tyler vs. Tyler, 25 Brad. (Ill.) 339;

O'Rourke vs. Beard, 151 Mass. 9;

Gisborn vs. Charter Oak L. Ins. Co., 142 U. S. 326.

"Implied trusts are those that arise when trusts are not directly or expressly declared in terms, but the courts, from the whole transaction and the words used, *imply* or infer that it was the intention of the parties to create a trust. *Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used as the intention of the parties, the intention will be executed THROUGH THE MEDIUM OF A TRUST.*"

1 *Perry on Trusts* (6th Ed.), Sec. 112;

Lane vs. Lane, 8 Allen, 350.

> "Courts of equity will imply a trust from the contracts of parties, *although there are no words of trust in the instrument;* as if a person for a valuable consideration agrees to settle a particular estate upon another, *or if he agrees to sell an estate to another,* the settler or vendor becomes a trustee of the fee for the purposes of the settlement or for the purchaser."
>
> *Perry on Trusts* (6th Ed.), Sec. 122.

The creation of a trust may be shown by the correspondence and agreements of the parties.

Loring vs. Palmer, 118 U. S. 321;

Dorr vs. Clapp, 160 Mass. 542;

Hutchins vs. Van Vechten, 140 N. Y. 119;

Gates vs. Avery, 112 Wis. 277.

And it has been expressly held by this court that no technical language is necessary to the creation of a trust; and a devise accompanied by words imperative, expressing a wish or recommendation that the devisee will apply the property to the benefit of others, may create a trust.

Colton vs. Colton, 127 U. S. 300.

See, also,

Russell vs. U. S. Trust Co., 127 Fed. 446;

McDuffie vs. Montgomery, 128 Fed. 108;

Burnes vs. Burnes, 137 Fed. 793;

Collister vs. Fassit, 163 N. Y. 289.

Nor can there be any doubt that the United States can create a trust—as indeed it has often

done. As an incident of its sovereignty, it can dispose of its property in any mode which the Congress in the exercise of its legislative judgment may deem for the public interest; and it can attach to its gift or sale of the public lands any legal or equitable qualification which it chooses to impose. Therefore, "the state itself by its legislation, or by its public officers duly authorized, can create a trust, convey property, and appoint trustees; and such trustees are equally amenable to the jurisdiction of chancery."

1 *Perry on Trusts* (6th Ed.), Sec. 30;
Buchanan vs. Hamilton, 5 Ves. 722;
Comrs. vs. Walker, 6 How. (Miss.) 143; 38 Am. Dec. 433.

Sundry instances of such federal grants of public lands in trust exist, of which we cite only two as illustrations.

The sixteenth section in every township, not sold or otherwise disposed of, and in such case other land in lieu thereof, was granted to the future State of Wisconsin in the enabling act.

Beecher vs. Wetherby, 95 U. S. 517.

Certain public lands were granted to the future State of Montana for a normal school, in the enabling act.

Montana ex rel. Haire vs. Rice, 204 U. S. 291.

In each case the grant was treated as a trust, although when the act was passed the state had not come into existence.

We have, then, a competent creator or "settlor" of a trust; and it is immaterial whether such creator is to be considered as a donor or a vendor of the property conveyed, because it was vested with the sovereign power either to give or to sell its own. And we have a form of words—a phraseology—which can be construed as creating a trust if the court finds in the words and the concomitant circumstances the intent—since no technical or precise form of words was required, and the whole case turns on the question of intent. We freely admit that it is also possible to extract the legal essence of a "condition subsequent" from the same words—the proviso—because the very question before the court, and the only question on which the interveners' rights depend is: Was the proviso a *condition subsequent* or a *trust?*

The Supreme Court of New Hampshire, after stating a case involving a donation to a city "upon condition" of a certain perpetual use of the premises, said:

> "It would seem, therefore, that the question whether the conveyance was upon condition subsequent or not was wholly *one of construction*, and that its answer was to be found in *the ascertainment of the intention of the parties* as expressed in the deed and the contract in pursuance of which the conveyance was made."
>
> *Ashuelot Nat. Bk. vs. Keene*, 74 N. H. 148; 65 Atl. 826.

The exact situation here could not be more clearly or tersely put.

It will, no doubt, be argued by opposing counsel for both the Government and the railroad company that the fact that the Congress can create a trust and that it adopted a form of words which are capable of construction to that result is very far from showing that a trust did ensue. We readily admit it; all we have said hitherto is only preliminary, and goes to show that the circumstances do not debar that conclusion.

Naturally, the learned counsel for the United States spent by far the larger and stronger part of his brief in the District Court on his attack on the railroad company's position that the proviso was only "an unenforcible, directive, regulative covenant." Inevitably so; for if the court adopted the company's theory, the company would remain sole master of the field, and neither the Government

nor the interveners would retain any standing in court of any enforcible rights. The Government's argument against the covenant theory is therefore in our interest as well as its own. But its counsel paused in his attack on the covenant theory long enough to criticize the trust theory, because of the proviso's "restraint upon a distrusted grantee having an adverse interest," indefiniteness of the beneficiary, and uncertainty of the terms of the supposed trust.

With the possibility of a trust, therefore, in the existence of a competent settlor and an instrument construable as creating a trust, we proceed to consider whether that construction can and should be placed on the instrument—the Act of 1869—or in other words, whether the other elements of a trust are found therein.

What are those other elements of a trust? They are:

1. A trustee.
2. A trust fund or estate.
3. Beneficiaries.
4. A duty of the trustee as to the trust estate.

1. *A Trustee.* It will not be disputed that we have here a corporation competent to take and act as trustee. Any legal person capable of receiving the legal title may be made a trustee.

1 *Perry on Trusts* (6th Ed.), Secs. 39, 42, 43;

Jones vs. Habersham, 107 U. S. 174.

Judging from the briefs of counsel for the Government in the courts below, the only points that will be made in this court on the capacity of the railroad company to act as trustee are that, being entitled to retain for its own uses in the construction of the railroad the proceeds of sales up to $2.50 per acre, it could not be both trustee and beneficiary; and that its interest was adverse and it was therefore distrusted by Congress.

If the railroad company were to be the sole beneficiary of the trust, the inference of a trust from other facts would fail, because by the instant union of the legal and equitable estates when the title in the fee vested in the company the trust would never come into being.

1 *Perry on Trusts* (6th Ed.), Sec. 347.

But this rule is limited to instances of exact identity of the entire estate meeting simultaneously in both trustee and *cestui;* and one *cestui* out of a number or a multitude who are to benefit from the trust estate may be the trustee for himself and for all the others without impairing the trust.

Burbach vs. Burbach, 217 Ill. 547;

Nellis vs. Rickard, 133 Cal. 617;
Story vs. Palmer, 46 N. J. Eq. 1;
Robertson vs. De Brulatour, 188 N. Y. 301;
Losey vs. Stanley, 147 N. Y., 560.

See,

1 *Perry on Trusts* (6th Ed.), Secs. 59, 297, 347.

2 *Id.*, Sec. 476*a*.

There is, then, no inherent incapacity of the company to act as trustee, and no consequent invalidity of the trust, arising from the fact of the company's beneficial interest, viz: its right to retain the entire proceeds of sales made under the terms of the proviso.

But it has also been argued below and will be argued again at this bar, that Congress cannot have intended a trust, because it had no confidence in its grantee, the railroad company; that previous experience with railroad land grants and their grantees had been unfortunate and destructive of public confidence in the good faith and honor of the promoters of such enterprises; and that since the company had an adverse interest the Congress would not entrust to it an imperial grant under the terms of a *trust*, but would do so under pain of a *total forfeiture* if it broke the terms of the grant.

Now there is not the least evidence of any distrust in Congress of this particular company. It is quite true that by 1869 experience with the railroad land grants, especially the transcontinental ones, had shown that the earlier legislation had not sufficiently hedged about their disposal so as to insure their two main objects—the construction of the roads and the settlement of the country. But it must be borne in mind that at that time the railroads which were opening the great western country, and abolishing the perils, losses and expense of overland or ocean travel to the Pacific Coast were regarded as public benefactors, not public enemies; and that the recent baiting of all public service corporations had not become the vogue. A wise caution to safeguard a grant, not a deep distrust of the grantee as a villain, was therefore the rational attitude of the Congress and the nation; and all the circumstances must be looked at in that *natural* light; not in the recent lurid light of the fires of political frenzy. That, indeed, is one of the primary rules of construction of transactions many years past, because it is a primary rule of historical criticism—to view the case by the light of *that* time, not of *another* time. So viewed, we can see that if the Congress distrusted the company so deeply as the Government's counsel would make it

appear, that was the strongest reason for refusing the grant *in toto*, not for granting it on penalty of loss. For if the company could not be trusted at all and if it violated the condition, it would be sure to lose the grant sooner or later; and thus the very thing that the counsel puts forward as the primary object and motive of Congress—the settlement of the country in small tracts for agriculture—would fail. This vast grant, or some large part of it would thus be thrown back into the general domain of the public lands without the advantage of segregation and improvement as farms, and of promotion of the same diverse ownership of the alternate government sections. And, moreover, the other main object of the land grant—construction of the road—to the extent of a forfeiture would fail or at least be crippled. Such distrust, then, as is now asserted, if expressed in the form of a condition subsequent would defeat the very objects that inspired the grant. On the other hand, the company's interest in the proceeds, its right to retain them for building the road, would no more militate against *entrusting* the grant to the company, than against a pure and unhampered donation of it, as in the Union Pacific and other grants. Many instances have occurred, many must have been known to the lawyers then in Congress, where a distributive part

of a trust fund or income went to one or more trustees. The authorities above cited show there is nothing inherently vicious or fatal to the idea of a trust in participation by a trustee in its benefits. That fact of itself, then, did not hinder Congress from creating a trust, and it does not forbid the construction we contend for. It leaves the subject, as before, open to the construction demanded by all the circumstances.

But the Government's counsel argues that it could not have been the purpose of the Congress to commit to a party having a known adverse interest the discharge of a trust involving several million acres of public lands, and to do so in the form of a restraint.

The fallacy in this argument lies in assuming that the company's interest was adverse in the sense intended; and then on the basis of this assumed hostility, which negatives a relation of confidence, in arguing that a trust cannot be inferred from words of restraint. In a bargain of sale the interests of vendor and vendee are so contrary that they are commercially hostile. And in fiduciary relations generally the law will not permit one to act where his self-interest conflicts with his fiduciary duty and interest. But we have no such case here. The situation was this: vast tracts of wild land,

almost every acre owned by the Government; pressing need of a railroad as the only effective means of opening and settling the region within reasonable time; a prior land grant in aid of the railroad offered but lapsed; and a new applicant for the grant. Thereupon the Congress says to the applicant: "The country needs the railroad; we want to help you build it so as to induce sales to actual settlers on both what we give away and what we keep. We will give you one-half the land for twenty miles on each side if you will build the road and will sell the land to actual settlers in quarter section tracts or less at not over $2.50 per acre. You are to keep the money and use it to build the road." The company then said: "Agreed. We will accept your deed on those terms, and will sell the land thus and so." The Government had three distinct motives or interests: (1) To get the road built as the only feasible means to its two ultimate ends, viz: (2) To get the country opened and cultivated by actual settlers on the railroad land, which would aid it (3) To sell its own land at like reasonable prices to actual settlers. The railroad company had three distinct motives or interests: (1) To get the aid of the land grant; (2) To convert the land into cash in order to build the road; and (3) To get the country settled—both the granted lands and the

reserved public lands—in order to increase railroad traffic. None of the company's motives antagonized any of the Government's, nor *vice versa;* on the contrary, they largely concurred. Fidelity to each interest of its own by each party promoted the success of the other interests of itself and of the other party. The fact that the company was limited as to sales did not create any antagonism or inconsistency with a trust. Restraint does not spell hostility. In the vast majority of trusts there is some limitation of the trustee's powers, either as to the fund, its use, sale, etc., or as to the *cestui,* when and how he is to receive the benefit, etc. There is a positive and a negative side to every direction to a trustee. A provision that the income be paid to A annually forbids it to be paid to B at all, or to A quarterly. A provision (or "command" if the Government's counsel prefer the word) that land be sold only to actual settlers in quarter-sections or less at not over $2.50 per acre, is a prohibition not to sell to non-settlers in township tracts at $5.00 per acre—or for that matter at ten cents an acre. The fact that the positive term has a negative obverse does not debar the transaction from being a trust. For if that were the case most trusts would fail, and become strict estates on condition, by parity of reasoning. And

the restraints drawn in three directions leave ample liberty in the trustee *in the very line of both its own and its grantor's interest.* For the maximum price limit was the same as the maximum price of Government lands to settlers then; and the maximum quantity was the limit of agricultural lands under homestead or pre-emption lands; and actual *bona fide* settlers were the only class allowed by law to acquire public lands. Hence there was no restraint that would hamper the railroad in attracting buyers, or would drive incoming settlers to take up public lands in preference. Quite the contrary, the company had the advantage, in that it was free to bargain for a less price and to sell parcels irrespective of lines of public survey; while the Government land officials were bound by the cast-iron rules of the statute and the land office. The limits drawn were reasonable *and tended to realize the interests of both parties.* They were elastic and left a wide discretion to the grantee in trust. They were practical as based on previous experience in settling public lands, and yet preventing a dishonest diversion by sales to syndicates and "rings" and by withdrawal from the market. Every sale made within the terms furthered all of the interests of both the creator and the trustee of the trust. Any refusal to sell on

those terms, any sale in breach of these terms ran counter to all those interests. Therefore the interests of both parties co-operated in a faithful performance of the trust; and there was no antagonism unless every trustee is *ipso facto* an enemy of the settlor of the trust.

2. *A Trust Fund or Estate.*
3. *Beneficiaries.*

In view of the objection of indefiniteness to the trust theory, we deem it best to discuss these two elements of a trust together.

The objection that the fund or estate was too indefinite to become the subject of a trust when the Act of April 10, 1869, was enacted, and hence the trust did not come into existence and attach itself to the land, will probably not be seriously pressed. For, to urge that point on the part of either the Government or the railroad company would cut the ground from under the objector's feet. On the part of the Government, because, as we have already shown, it gets its standing to argue the condition subsequent theory only by virtue of the doctrine of a grant *in praesenti* in the Act of 1869 to which the proviso attached itself as a condition, although the land was not yet identified. And on the part of the company, because it applied for and obtained pat-

ents years later by virtue of that same act when the progress of construction had identified the lands as due to it. Yet we may pause a moment or two to consider the bearing of that *in praesenti* doctrine as fixing by relation a floating grant. For it is so utterly abhorent to all common law doctrine of estates, that the two cannot stand in any harmonious relation. The feudal law of estates grew up in a land where boundaries, estates and titles were settled, and no public land in our sense existed; the doctrine of a floating grant had to be contrived, without precedent, to meet the novel situation of a country with vast tracts of wild lands, unsurveyed, unsettled, in a legal sense without a past. That doctrine bears the signs of an equitable rather than a legal origin. Like many doctrines and remedies invented by the English chancery it sprang from the necessity of the case to supply a defect of the law in a novel state of facts. The "relation" between the later patent and the earlier grant is simply the maxim, "Equity will regard that as done which ought to be done" put into effect. Now this equitable origin of a settled rule of our public land law makes it easy to see that the same result should ensue as to a trust in a floating land grant. For by parity of reasoning the trust is a "float" as to the precise land it covers so long as the subject of the

grant remains indefinite; and as soon as that becomes defined by approved lists in the General Land Office, or by patents issued therefrom, the floating trust, like the floating fee, becomes attached to the land.

This explication is perhaps unnecessary for the sake of the conclusion, which will hardly be denied, that the trust becomes definite, and relates back to its origin, as soon as the grant becomes definite. But it is of value as showing that not only as to the legal fee, but as to the equitable estate and all the incidents of a trust, we are on another plane, we breathe another air, we have different criteria from those of the older estates and the stricter trusts pertaining to them.

For if grants of such magnitude, under such novel circumstances, must be dealt with more liberally, freed from technical rigor of the common law, surely in a court of equity, on a subject solely of equitable origin—a trust—we may apply the same liberal notions.

With this standard of criticism we can now take up the objections to the indefiniteness of the beneficiaries, and of the beneficial interest created in them.

It cannot be denied that in ordinary private trusts the beneficiary must be definitely identified

by the terms of the trust, while in charitable trusts the opposite holds—the trust instrument must indicate not individuals but classes, and all those who fall within the class are beneficiaries, entitled to partake. But just as with the floating grant, as a title in fee, so this provision that the lands *"shall be sold to actual settlers"* creates a novel kind of trust, neither private nor charitable, but in the nature of each. Like a private trust, it is not actuated by motives of sheer philanthropy, religion or benevolence. Like a charitable trust, it is offered to all who can bring themselves within the class named. To avail oneself of it is optional, but anyone who becomes or is ready to become an actual settler, when the railroad company will let him go on the land, thereby identifies himself as a beneficiary. "That is certain which can be made certain." Such an one is a person pointed out by the statute as one to whom the land "shall be sold." There is, then, a definite beneficial interest fixed in a designated *locus*, parcel of the granted estate, and inhering in a definite person as soon as he by proper acts of selection, tender of cash and offer to settle brings himself within the class. The very fact that any one whosoever (having the proper qualifications), so to speak, can precipitate upon himself this inchoate or floating right, and make it fixed

and vested in him, shows "an intention to create a beneficial interest." That the Congress held out the offer and required the company in accepting the grant to hold out the offer to anyone to bring himself within the favored class proves that the Congress meant to attract takers, and to give them the right to insist on taking the prize. The company, therefore, received and held the prize, be it worth more or less, for those who proved the right to take it. *In short, it held it in trust for them.* The so-called "restraint" on the company was not so much that as it was a limitation of the class of individuals to whom the offer was open. It was just like the analogous terms of the pre-emption and homestead laws. All who choose, and who meet certain tests and do certain things, can acquire so much land where they choose. When one meets the tests and does the things he gets a vested right —*an equitable title in fee*—and the federal judiciary will protect it against the whole power of the General Land Office or of the Congress.

When a given thing is the subject of sale but the owner has the option to say whether he will sell it to a given person or to any one of a given class, or at all, he cannot be said to hold it in trust for one who offers to buy and tenders the price. But if the option is in one of a given class to buy

at a named price, and the owner has agreed to sell at that price to him who tenders it, he has put himself under bonds to sell. He holds in trust for the proposed vendee.

If he is forbidden to sell to any other one, or to one not of a named class, *it is only that he may hold the trust estate for him who fastens thereon his equitable right to it.* This is no more than the commandment expressed or implied in every trust, *that the trustee shall hold the fund for, and not divert it from, the uses of the trust.* The absolute owner is free to sell or not at his own choice. The owner under terms to sell to certain persons named or to be named is bound to sell accordingly; and that is a trust.

So much for the clause (or "restraint," if you will) as to "actual settlers." The other two clauses about quantity and price need not detain us long.

The elastic or discretionary range of area and compensation seems to the counsel for the United States inconsistent with the idea of a trust. The objection comes with ill grace from one who has labored the point that a restraint within a class, or a prohibition to sell outside of a class, does not consist with a trust. He first says it is not a trust because the company cannot sell to any one it chooses, and next he says it is not a trust because

the grantee can sell to A one parcel of ten acres at $2.50, and to B another parcel of one hundred sixty acres at $1.75, if it thinks those are the best prices it can get for those particular parcels. But no inconsistency exists. Each limitation in class, area and price only aids the object of the Congress to get the road built and the land occupied. As to the *class*, there must be an inflexible rule. No gradation can exist. Settlers do not shade off into near-settlers, part-settlers, and so on. A man and his family are either "actual settlers" or absentee owners. And the very thing that costly experience had shown was that absentee ownership was fatal to the whole scheme of development by railroads and land sales. But as to *area* and *price*, it is quite otherwise. Infinite gradations are inherent in their nature; they have been potentialities in numberless land sales ever since Abraham bought the cave of Macpelah for a family burial lot. The final result is a balance between the needs and wishes of the seller, and the means and wishes of the buyer, influenced by soil, climate, population, intended use, access, markets—by an infinity of circumstances. In the nature of things, where the owner was bidden *and bound* to sell, but the applicant was *not bound but merely allowed* to buy, a minimum limit of area or price was not needed—indeed would have been

absurd. The self-interest of the one would of itself fix a limit of price below which it would not sell, and that of the other a limit of area below which he would not buy.

Otherwise as to maximum limits. Unless a *maximum limit of area* for sale to one person were set, the company could wreck the congressional policy of inducing abundant immigration, and even fraudulent evasion of the settler clause would be facilitated. But also, unless the applicant and intending "actual settler" had a right, of his own choice, to buy a quantity sufficient for profitable settlement and use, the company could prohibit settlement. It could say: "We will sell you one acre." The limit of area was therefore essential as a *restriction* on the company and a quantity, compulsory on the company while optional on the applicant, *below which the former could not depress the latter's demands.* That of itself proves that the Congress created in the intending settler *a beneficial interest* to a definite amount at his option. Looked at in one way it is a restraint on the grantee of the Congress. Looked at in the other way, it was an instruction to a trustee to dispose of the trust estate under limitations promoting the policy of the Congress, and ensuring the rights of its beneficiaries against any arbitrary control by the trustee.

Likewise with the *maximum limit of price.* Obviously, unless that too were fixed, the company could set a price of $100 per acre for any quantity up to the limit of area. It would be as easy to nullify the policy of the Government by a prohibitive price as by a minute area. In the nature of things, there must be control over the action of every trustee, to exclude sinister motives and secure good faith. If such requirements betoken distrust, then every trustee is feared and distrusted. Just as with the area, there was a price limit past which the company could not force the buyer, but a range of price up to that limit open to negotiation as usual. And just as with the area, that gave the buyer an optional power to compel a sale to him at that price, if he could do no better and was willing to pay that for the parcel he wanted. And similarly that gave him *a beneficial interest* in the trust estate, which became a fixed right to a definite parcel when it was selected; and therefore it became a *vested equitable right in that parcel.*

4. *The duty of the trustee.*

All these limitations in the proviso are instructions to the company what to do or not to do. They are the contents of the trust. A trust without instructions, express or implied, is unthinkable. If it is an express trust, the words of the document

lay down the instructions. If an implied trust, the court infers the instructions—and the limitations not to do otherwise, which are the negative side of the instructions. The counsel for the Government argues that there is no trust because of lack of definite orders to the grantee what to do. But we have shown that there are either in words, or to be extracted by fair inference, very definite things to do within a discretion of elastic yet reasonable limits.

(1.) The granted lands are to be sold,—not sacrificed at slaughter prices, but marketed at reasonable prices:

a. To actual settlers—*no discretion.*

b. In quantities not over 160 acres—*a wide discretion.*

c. At prices not over $2.50 per acre—*a wide discretion.*

(2.) The proceeds of sales are to be retained by the company and used to build its road.

Now here are all the elements of a trust which we have been discussing: A "settlor" of the trust, a competent corporate trustee, a trust estate or subject-matter, beneficiaries pointed out in general terms and identified by their own acts under impulse of their self-interest, of which beneficiaries the

trustee constitutes one, and duties definite within wide yet proper limits plainly prescribed—all to be found in the language of two acts of the Congress.

Every one of the limitations and the elastic discretion within two of them comport with the whole land policy and the railroad grant policy of the United States. Nay more—they actively promote those policies. In no detail do they compete with them. The limits of buyer, area and price exactly accord with the Government's. The more land sold by the company under the given terms, the better for the railroad, the better for the Government as owner of adjoining lands, the better for the buyers, the better for the sparsely settled West, the better for the whole United States of America. Where can anyone find a single element in this situation which negatives a trust? It is definite within reasonable limits. All trusts are definite—some more, some less. It contains wide discretionary powers. Many trusts do. If honestly administered, it effectuates its object and realizes the general policy of which it is a part. And it is embodied in a form of words which are consonant with the idea of a trust and are capable of being so construed.

Much reliance was placed in argument on the demurrers below upon two cases involving provisos like the one here.

Warrior River Coal & Land Co. vs. Ala. State Land Co., 154 Ala. 135; 45 Sn. 53.
Nichols vs. Southern Oregon Co., 135 Fed. 232.

In the first case, there was a land grant by the Congress to the State of Alabama to aid in the building of railroads; the state (by the terms of a proviso) was to sell under limits like those in this case. The state held *in trust* to aid the railroad companies by paying them the proceeds. In a line of previous cases involving this land grant and proviso it had become settled law that the state had invested Swan & Billups with the legal title of *a large quantity* of lands which it conveyed to them *as trustees* and they sold out to others. These cases are cited in the opinions. This cause was ejectment between a remote grantee of Swan & Billups and one in adverse possession. The validity or effect of the proviso was not involved. The case really turned on two questions: (1) Whether a certain deed by Swan & Billups was their deed *as trustees;* (2) Whether a dismissal of a prior bill to quiet title between the same parties operated as *res adjudicata.* Incidentally the court said: "The legal

title to the granted lands having vested in the state, and the beneficial interest in the railroad company having become individualized as to the land and the companies respectively, the land here in controversy included, by the performance of all conditions precedent erected by the national grant, the limitation quoted from the act was, at most, a condition subsequent, a violation of which rendered the feiture by the appropriate action of the granting government, and by that only. This record, of course, shows no such action on the part of the United States. Certainly, it will not be presumed, however conclusively a breach of the quoted condition was shown. Hence the objection urged as upon a violation of the stated condition subsequent is untenable." 45 Sn. 54.

This is all that was said on that point. It is far from a holding that the proviso was a condition subsequent, and not a trust. As a piece of logic for the Government's case, it begs the question. The only way to adjudicate to that effect would be to hold that one taking under a sale in violation of the proviso had no title.

The second case cited was a bill to compel conveyance by the Southern Oregon Company of a quarter section to one who had selected it out of a land-grant to the state under a similar proviso, and

had tendered the limited price. The learned district judge, on demurer to the bill, simply holds without discussion or citation that the grant was not a law for the sale; the restrictions were mere incidental regulations for the state to observe whenever it chose to sell, enforceable only by the United States and creating no interest in the complainant as a beneficiary. This enunciation is a mere *ipse dixit*, and seems to us valueless except as the individual opinion of the writer. And it is weakened by the fact that the court holds that by sundry mesne transfers the trust, if any, had been openly repudiated for thirty years, the Congress had taken no action, and the complainant was barred by lapse of time and by laches.

These two cases are the only ones that the great diligence of counsel for the Government has discovered as involving the proviso at bar.

Much argument was also expended in the lower court on behalf of the Government in applying the common law doctrines of conditional estates to the proviso, and proving by many authorities that the words "provided," and "on condition that" are appropriate to conditions subsequent, and frequently introduce such. We do not dispute it. They often are so used. But the fallacy is obvious; the conclusion of the syllogism does not necessarily fol-

low. It would follow only if it were shown that the words always are and must be read as a condition subsequent—not otherwise. Without that, it still remains a question of construction not of the bare words, as it were *in vacuo*, but of the words with the surrounding circumstances and in their light. The minute it is admitted that there is not a cast iron rule that a clause beginning "Provided that," or "On condition that" is a condition subsequent, that minute all the mediaeval learning of Littleton and Coke becomes useless lumber as to a case like this.

Now that there is an abundance of cases holding that those words, and like conditional clauses create a trust and not a condition subsequent is indisputable. A few will suffice:

A conveyance "upon the condition that it shall be forever for the use of."

Neely vs. Hoskins, 84 Me. 386; 24 Atl. 882.

"With this express condition and limitation."

Mills vs. Davidson, 54 N. J. Eq. 659; 35 Atl. 1072.

"Upon the express condition that said premises shall be forever held and used," etc.

Ashuelot Nat. Bk. vs. Keene, 74 N. H. 148; 65 Atl. 826.

"On condition that the second party shall always continue to be called," etc.

Mackenzie vs. Trustees, 65 N. J. Eq. 652; 61 Atl. 1027.

"Upon condition that the said strip of land shall be forever kept open," etc.

Greene vs. O'Connor, 18 R. I. 56; 25 Atl. 692.

"Upon this express condition" that a devisee pay certain legacies.

Wright vs. Wilkin, 2 Best. & S. 232.

This case is instructive, because it holds that the devisee instead of forfeiting the estate for a breach, holds it in trust for the legatees whom he is to pay. He is in exactly the position of the railroad company here.

In *Mills vs. Davidson*, 54 N. J. Eq. 659; 35 Atl. 1072, above cited, is found the following pertinent remark:

"Words of express condition are not inapt as introductory to a declaration of trust. Every conveyance for a charitable use is a conveyance to hold upon the trust declared, and the execution of the trust is the condition upon which the estate is taken and held, to be given effect to, *not by the forfeiture of the title, but by those methods by*

means of which a court of equity compels the performance of such trusts."

And the Supreme Court of New Hampshire has well said that words of condition "*will not be held to have that arbitrary and technical effect and meaning, if such effect and meaning shall be found* to a lumber company, would only those lands or the *policy of the law. The form of language will not necessarily control the sense, but will receive such an interpreation as circumstances and equity under those circumstances may require.*"

Hoyt vs. Kimball, 49 N. H. 322, 325.

That sums up our entire line of argument, and amply justifies the construction we put on the proviso. But a few words may be added on the contrary construction.

In testing an assumed construction by the rules of good sense and public policy, we must consider what parties under that construction could have done rather than what they actually did. Now if this proviso is a condition subsequent, of course a breach gave a right of instant forfeiture. Forfeiture of what? Of the whole unsold area? Or of only the parcels involved in the breach? If the breach were by sale of ten thousand acres at $5.00 to a lumber company, would only those lands or the

whole grant revert? And so of a breach by a refusal to sell a quarter section to an "actual settler." In other words, is the grant to be treated as severable or a single unit *quoad hoc?* Now the trust theory involves no such practical difficulties. A court of equity will carry it out, enforce the trust as to each applicant in detail and mould its decrees exactly to the circumstances.

A forfeiture if carried out would doubtless not destroy the vested rights of those who had bought within the limits stated, at least before breach, probably even before forfeiture declared and suit brought. But all tracts conveyed in breach of the proviso would be forfeitable. The rigor of the law would take its course. Yet it would be much more just and equitable to hold the railroad company to account for the land sold in violation of the terms of the proviso, on the ground of a trust and as tortious conversion of trust assets. That could be done only on the trust theory, and the tortious trustee could properly be held for the real value, not merely for the $2.50 per acre, or for the excess of price over that figure. Such a course would not unsettle titles, since the Government could pursue the trustee and not disturb the purchaser.

Far more important, however, would be the practical effect of a forfeiture, if carried out, on the

land policy of the Government. For it would throw a very large part of this grant back into the general domain of the public lands; it would annul the whole scheme of this grant until a new grant were made or other steps taken to parcel out the land to settlers. The grant was made with intent to have the lands disposed of on the terms stated. A court of equity on the trust theory can compel that to be done. It can even remove the trustee, appoint a new one and order him to dispose of the lands as agreed, and to pay the proceeds to the railroad company, less the expenses of executing the trust. No court can enforce a forfeiture and at the same time effectuate the object and serve the policy of the grant. That is the best of all possible reasons for saying that Congress did not intend to make a grant involving a defeasance destructive of its moving cause.

In brief, and in conclusion, we come with confidence to this Court, on the sole ground of *"the rule of reason."*

CHARLES E. SHEPARD,
Solicitor for Frank Terrace et al., Interveners.

April 12, 1915.

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PART IV.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

OREGON AND CALIFORNIA RAILROAD Company, et al., defendants and appellants; John L. Snyder, et al., cross complainants and appellants; William F. Slaughter, et al., interveners and appellants,

v.

THE UNITED STATES.

No. 679.

ON CERTIFICATE FROM AND CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE CASE FOR THE UNITED STATES.

Order.—This statement contains an abstract of *all* the testimony, as well as other things, and is divided into four parts:

1. The pleadings summarized, which embraces not only an outline of the pleadings but also certain orders of court.

2. Undisputed facts, under which is given an abstract of the stipulated and other facts not controverted.

3. Disputed facts, which sets forth in condensed form the testimony relating to the character of the land, and also some testimony of minor value.

4. Abstract of the decree—the appeal.

In the front is a table of contents (ante, pp. I–VII).

FOREWORD.

This is an appeal from a decision of the United States District Court for Oregon rendered in an equity suit brought by the United States under the joint resolution of Congress approved April 30, 1908, to have it judicially determined whether about 2,300,000 acres of granted lands in Oregon had been forfeited by the grantees and their successors through breaches of certain conditions subsequent in the two grants under which they had received the lands from the Government.

The defendant Oregon & California Railroad Company is an Oregon corporation and claims to be the absolute owner of the lands in dispute. The defendant Southern Pacific Company is a Kentucky corporation. It owns all of the stock (except a few qualifying shares for directors), guaranteed a bond issue in the sum of $20,000,000, of which $17,745,000 are outstanding, and leases and operates the railroad and telegraph lines of the Oregon & California Railroad Company. The defendant Stephen T. Gage is a resident and citizen of California, and is the surviving trustee in a deed of trust securing the preferred stock of the Oregon & California Railroad Company. And the defendant Union Trust Company is a New York

corporation, and is the trustee under a mortgage given by the Oregon & California Railroad Company to secure the $20,000,000 of bonds just referred to.

The cross complainants (numbering 65) say that they are actual settlers upon some of the land and have thereby acquired a right to purchase from the railroad company the land settled upon. They deny that the grants are upon conditions subsequent.

The interveners (about 6,000) assert that the railroad company holds the grant lands in trust; that they have offered to purchase certain of them upon the conditions of the trust, and ask the court to enforce the trust in their favor. Like the cross complainants, they deny that the grants embrace conditions subsequent.

It was stipulated that but one cross complainant and one petition in intervention should be printed in the record, and that each should be treated as typical of all others of its class (Stip., Vol. XVI, 8652).

PART I.

THE PLEADINGS SUMMARIZED.

THE BILL OF COMPLAINT.

After stating the names of the defendants, their residence and citizenship, the bill proceeds in substance as follows:

One of the granting acts involved in the suit was passed and approved July 25, 1866 (14 Stat., 239). It reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the "California and Oregon Railroad Company," organized under an act of the State of California, to protect certain parties in and to a railroad survey, "to connect Portland, in Oregon, with Marysville, in California," approved April sixth, eighteen hundred and sixty-three, and such company organized under the laws of Oregon as the legislature of said State shall hereafter designate, be, and they are hereby, authorized and empowered to lay out, locate, construct, finish, and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, in the manner following, to wit: The said California and Oregon Railroad Company to construct that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said

company) on the Central Pacific Railroad in the Sacramento Valley, in the State of California, and running thence northerly, through the Sacramento and Shasta Valleys, to the northern boundary of the State of California; and the said Oregon Company to construct that part of the said railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River Valleys to the southern boundary of Oregon, where the same shall connect with the part aforesaid to be made by the first-named company: *Provided*, That the company completing its respective part of the said railroad and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right, and the said company is hereby authorized, to continue in constructing the same beyond the line aforesaid, with the consent of the State in which the unfinished part may lie, upon the terms mentioned in this act, until the said parts shall meet and connect, and the whole line of said railroad and telegraph shall be completed.

SEC. 2. *And be further enacted*, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every

alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That bona fide and actual settlers under the preemption laws of the United States may, after due proof of settlement, improvement, and occupation, as

now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *And provided, also,* That, settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

SEC. 3. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said companies for the construction of said railroad and telegraph line; and the right, power, and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, sidetracks, turntables, water stations, or any other structures required in the construction and operating of said road.

SEC. 4. *And be it further enacted,* That whenever the said companies, or either of them, shall have twenty or more consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, the President of the United States shall ap-

point three commissioners, whose compensation shall be paid by said company, to examine the same, and if it shall appear that twenty consecutive miles of railroad and telegraph shall have been completed and equipped in all respects as required by this act, the said commissioners shall so report under oath to the President of the United States, and thereupon patents shall issue to said companies, or either of them, as the case may be, for the lands hereinbefore granted, to the extent of and coterminous with the completed section of said railroad and telegraph line as aforesaid; and from time to time, whenever twenty or more consecutive miles of said road and telegraph shall be completed and equipped as aforesaid, patents shall in like manner issue upon the report of the said commissioners, and so on until the entire railroad and telegraph authorized by this act shall have been constructed, and the patents of the lands herein granted shall have been issued.

SEC. 5. *And be it further enacted*, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit dispatches by said telegraph line for the Government of the United States, when required so to do by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties

for the same kind of service. And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States.

SEC. 6. *And be it further enacted*, That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the "Central Pacific Railroad" of California, and be connected therewith.

SEC. 7. *And be it further enacted*, That the said companies named in this act are hereby required to operate and use the portions or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and communication, so far as the Government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and trans-

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portation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any State, of competent jurisdiction.

SEC. 8. *And be it further enacted*, That in case the said companies shall fail to comply with the terms and conditions required, namely by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, the act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

SEC. 9. *And be it further enacted*, That the said "California and Oregon Railroad Company" and the said "Oregon Company" shall be governed by the provisions of the general railroad and telegraph laws of their respective States as to the construction and management of the said railroad and telegraph line hereinbefore

authorized, in all matters not provided for in this act. Wherever the word "company" or "companies" is used in this act it shall be construed to embrace the words "their associates, successors, and assigns," the same as if the words had been inserted, or thereto annexed.

SEC. 10. *And be it further enacted*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, so much of the timber thereon as shall be required to construct said road over such mineral land is hereby granted to said companies: *Provided*, That the term "mineral lands" shall not include lands containing coal and iron.

SEC. 11. *And be it further enacted*, That the said companies named in this act shall obtain the consent of the legislatures of their respective States, and be governed by the statutory regulations thereof in all matters pertaining to the right of way, wherever the said road and telegraph line shall not pass over or through the public lands of the United States.

SEC. 12. *And be it further enacted*, That Congress may at any time, having due regard for the rights of said California and Oregon Railroad Companies, add to, alter, amend, or repeal this act.

On October 6, 1866, the bill says, certain persons organized under the laws of Oregon, a corporation bearing the name "Oregon Central Railroad Company," with its principal place of business at *Portland*, and two days later the Legislature of Oregon

designated it as the corporation entitled to receive the grant, by the passage of the following act:

> Whereas the Congress of the United States, at its late session, passed an act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California to Portland, Oregon, and made it the duty of the Legislative Assembly of the State of Oregon, to designate the company, organized under the laws of Oregon, which shall receive that part of said land grant lying within the State of Oregon; Therefore,
>
> *Be it resolved by the House the Senate concurring,* That the "Oregon Central Railroad Company," a company organized under the general incorporation laws of this State, be and the same is hereby designated as the company which shall be entitled to receive the land granted and all the benefits of an act of Congress, approved July 25, 1866, entitled "An act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California to Portland, Oregon," so far as the said land grant applies to the State of Oregon. (Oregon Session Laws, 1866.)

Soon thereafter, says the bill, this company, for the purpose of availing itself of the grant, projected a line from Portland in a westerly direction to Forest Grove and thence southerly to McMinnville on the westerly side of the Willamette River, from which circumstance it became known as the "West Side Company" and its projected road as the "West

Side Line," and they are so referred to throughout the bill (Stip., R., IV, 1555).

May 25, 1867, it is averred, the company adopted a resolution assenting to the provisions of the act of Congress, and on July 6 of the same year filed the assent, together with a copy of its articles of incorporation and of the resolution of designation by the legislature, in the office of the Secretary of the Interior, and on August 20, 1868, filed in the same office a general map of survey of its proposed line of road.

The West Side Company, it is charged, having failed to finish its first 20 miles within the time provided by the act of 1866, applied to Congress for an extension of time, which was granted by the act approved June 25, 1868 (15 Stat., 80), and which reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section six of an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July twenty-fifth, eighteen hundred and sixty-six, be so amended as to provide that instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph shall be completed within eighteen months from the passage of this act, and at least twenty miles in each two years thereafter, and the whole on or before the first day of July, anno Domini eighteen hundred and eighty.

In April, 1867, it is alleged, certain residents of Oregon, contending that the West Side Company had never been lawfully incorporated, and designing to secure the benefits of the Congressional grant, attempted to organize, under the laws of Oregon, another corporation bearing the name "Oregon Central Railroad Company," with its principal place of business at *Salem*, Oregon. This company projected its line of road on the easterly side of the Willamette River, and became known as the "East Side Company," and its road as the "East Side Road" to distinguish it from the other company of the same name, whose line, as we have just seen, was projected on the west side of the Willamette River.

The bill then says that the East Side Company, in furtherance of its promoters' design, on October 20, 1868, procured the adoption of the following resolution by the Legislature of Oregon:

> Whereas the Congress of the United States, by an act approved July 25, 1866, entitled "'An act granting lands to aid in the construction of a railroad and telegraph from the Central Pacific Railroad to Portland in Oregon,'' did grant certain lands in the State of Oregon, and confer certain benefits and privileges upon such company, organized under the laws of Oregon as the legislature of said State should thereafter designate; and
>
> Whereas, the Legislative Assembly of Oregon, at its fourth regular session, did adopt a joint resolution, known as "House joint

resolution No. 13," designating in terms the Oregon Central Railroad Company as the company entitled to receive the land granted by, and all the benefits and privileges of, the said act of Congress; and

Whereas, at the time of the adoption of the said joint resolution as aforesaid, no such company as the Oregon Central Railroad Company was organized or in existence, and the said joint resolution was adopted under a misapprehension of facts as to the organization and existence of such company; and

Whereas, the designation of the company to receive the lands in the State of Oregon granted, and the benefits and privileges conferred by the said act of Congress, yet remains to be made:

Be it resolved by the Senate, the House concurring, That the Oregon Central Railroad Company, a corporation organized at Salem on the twenty-second (22d) day of April, in the year one thousand eight hundred and sixty-seven (1867), under and pursuant to the laws of the State of Oregon, be and the same is hereby designated as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said act of congress (Oregon Session Laws, 1868).

Thereupon a controversy arose between the two companies as to which was entitled to the grant. The East Side Company, realizing that the year had expired within which assent to the provisions of the act of 1866 had to be filed, applied to Congress for an extension of time and simultaneously laid before

Congress the joint resolution of the legislature of Oregon designating it as the corporation to receive the grant, and averred that if the time for filing the assent was not extended the benefits of the grant would be wholly lost to the State of Oregon.

The West Side Company, it is asserted, opposed the application and contended that the grant had become vested in it. Congress granted the extension requested by passing the amendatory act of April 10, 1869 (16 Stat., 47), which reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section six of an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act: *Provided*, That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle

> more than one company to a grant of land: *And provided further*, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.

The East Side Company, through its directors, on June 8, 1869, adopted a resolution which, after reciting that it had been designated by the Legislature of Oregon to receive the grant, declared that it accepted

> all the provisions, rights, privileges, and franchises of said act of July 25, A. D. 1866, * * * and of *all* acts *amendatory* thereof, and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto.

The company filed a copy of this resolution in the office of the Secretary of the Interior June 30, 1869, and in October of the same year filed in the same office a map of survey and location of 70 miles of its projected line.

It is further averred that the right of the East Side Company to use the name "Oregon Central Railroad Company" having become involved in litigation, the stockholders of that company in March, 1870, organized the defendant Oregon & California Railroad Company, under the laws of Oregon, and in the articles of incorporation stated that the principal object of the corporation was to become the successor of the East Side Company, and to

receive and exercise the grants, franchises, and privileges given by the act of 1866 and the acts *amendatory* thereof. Accordingly on March 29, 1870, the East Side Company executed and delivered to the Oregon & California Railroad Company an instrument, purporting to assign, transfer, and convey to it all the property of the East Side Company, including its right to the grant made by the act of July 25, 1866, and acts amendatory thereof. The bill charges that the purpose and intent of this instrument was not to operate as a sale of the lands granted, but to constitute the Oregon & California Railroad Company the successor of the East Side Company.

In April of the same year the East Side Company was dissolved, and the Oregon & California Railroad Company, through its board of directors

> *Resolved*, That this company do accept the grant conferred by such act of Congress (meaning the act of 1866), and all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified.
>
> And directing the president and secretary to file the assent of this company to such act of Congress and *amendments* thereto, as aforesaid, in the office of the Secretary of the Interior.

The resolution also directed that the same officers should file in the same office a copy of the deed of assignment just mentioned. The assent, resolution, and deed were filed as directed on the 28th day of the same month.

The bill then alleges that the West Side Company failed to complete construction of any part of its line, abandoned all claim to the grant of 1866, acquiesced in the substitution of the East Side Company, and applied to Congress for another grant in lieu of the one abandoned. In response to the application Congress passed the act of May 4, 1870 (16 Stat., 94), granting certain lands to the West Side Company. It reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill River, near McMinville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, sidetracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid preemption or home-

stead right at the time of the passage of this act. And in case the quantity of ten full sections per mile can not be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

SEC. 2. *And be it further enacted*, That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And wherever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: *And provided also*, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

SEC. 3. *And be it further enacted*, That whenever and as often as the said company shall

complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed sections.

SEC. 4. *And be it further enacted*, That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, sidetracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

SEC. 5. *And be it further enacted*, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, sidetracks, and wood yards, not exceeding thirty thousand

dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semiannually in coin not exceeding the rate of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and canceled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the State courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

SEC. 6. *And be it further enacted*, That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date.

The West Side Company filed its assent to this act on July 20, 1870.

In that year the owners of a majority of the stock of the Oregon & California Railroad Company purchased all the stock of the West Side Company, and, thereafter, the two companies were conducted as one until the West Side Company was dissolved in 1880, having first conveyed all its property, including the grant, to the Oregon & California Company, defend-

ant. The latter company is now the owner of both grants.

The bill then recites the progress of the work on each line and the financial difficulties of the companies during the next decade. It is stated in this connection that the Oregon & California Railroad Company, between 1870 and 1873, constructed 197 miles and the West Side Company 47 miles of their respective roads. Work was then suspended, not to be resumed on the East Side line until 1881, and never on the West Side line.

It is then averred that in 1881 all of the former stock of the Oregon & California Railroad Company was canceled, because nothing had ever been paid for it, and new stock was issued in the sum of $19,000,000, $12,000,000 preferred and $7,000,000 common; that this stock is still outstanding; that it was used in part to pay the existing indebtedness of the company; that in June, 1881, the company delivered to certain trustees an instrument in writing purporting to convey to them the lands of both grants as security for payment of the *preferred* stock; that this trust deed purports to authorize the trustees and their successors, in case of default, to sell and convey the lands covered; that this is a violation of the terms of the grant; and that Stephen T. Gage has become the sole trustee under the deed.

The bill further alleges that two issues of bonds were negotiated by the company, one on June 1, 1881, and another on May 26, 1883, known as first mortgage

bonds and second mortgage bonds, respectively; that through these bonds the Oregon & California Company procured funds aggregating $5,000,000, at once resumed construction on the East Side line, and continued it until 1884, when, its funds having again become exhausted, the construction was abandoned and not resumed until 1887.

It is stated that default having occurred in the payment of interest on the aforementioned bonds, suit was brought in the United States court for Oregon and the property of the company placed in the hands of a receiver; that in May, 1887, during the pendency of the receivership, the Southern Pacific Company acquired control of the Oregon & California Railroad Company; and the many transactions through which this was accomplished are set out in detail.

It is charged that in 1887 the Southern Pacific Company leased from the Oregon & California Railroad Company its road and telegraph lines, and other property, for a term of 40 years; that this lease remained in effect until about 1893, when a new one was made for a term of 34 years, which is still in force; and that pursuant to this lease the Southern Pacific Company has operated the railroad and telegraph lines ever since; it is also stated, in this regard, that in 1901 the Southern Pacific Company became the owner of all the capital stock of the Oregon & California Railroad Company and is now, and ever since has been, the owner thereof; that through this ownership it has controlled, and still controls, the management of that company.

The bill further avers that after the Southern Pacific Company secured control of the Oregon & California Railroad Company it, on July 1, 1887, caused the latter company to make and deliver to the Union Trust Company a trust deed covering substantially all its property, including the land grants, to secure bonds in the sum of $20,000,000 to be subsequently issued; that these bonds were issued, were guaranteed by the Southern Pacific Company, and their sale negotiated and consummated by that company; that the proceeds of these bonds came under the control of the Southern Pacific Company and were used by it to purchase securities of the Oregon & California Railroad Company to complete the construction of the latter company's road and, in consequence, the bonds represent an indebtedness of the Southern Pacific Company; that the deed to the Union Trust Company, just mentioned, purports to authorize that company, and its successors, to sell and convey the lands described therein, and is, therefore, in violation of the terms of the grants.

It is then stated that the receivership proceedings, heretofore referred to, were dismissed in June, 1888, and the first and second mortgage bonds, excepting those secured by the trust deed of July 1 to the Union Trust Company, together with all mortgages and trust deeds securing them, were discharged.

The bill also alleges that the Southern Pacific Company, through its land department, in 1888 took

control of the sale of the granted lands; that a large force of timber cruisers and land examiners were sent out to examine and appraise the lands; that the prices, as to at least 80 per cent thereof, were fixed at a sum greatly in excess of $2.50 per acre; and that for the purpose of evading responsibility for the comtemplated violation of the terms of the grant the Southern Pacific Company, Oregon & California Railroad Company, and Union Trust Company adopted a form of quit-claim contract and conveyance instead of the forms embodying warranties which had been used theretofore.

It is alleged that the issuance of patents commenced in 1871 and continued until 1877, during which period 323,148.68 acres were patented; that the issuance of patents was then suspended and not resumed until after the Southern Pacific Company had acquired control. But thereafter patents were rapidly applied for. Between 1893 and 1906, 2,442,448.45 acres were patented, making a total of 2,765,597.13 acres patented under the East Side grant, and that in addition to the patented lands, the Oregon & California Railroad Company claims title to about 293,000 acres unpatented; that under the act of May 4, 1870, no patents were issued until 1895; and that between that year and 1903, 128,-618.13 acres were patented under that grant, making a total of 2,894,215.26 acres patented under both grants; which, with the unpatented lands, aggregate 3,187,215.26 acres.

The bill says that all patents were issued to the Oregon & California Railroad Company *as* the *successor* of the East Side Company *and* the West Side Company, respectively; and that no patents have been issued since 1906 under either grant, for reasons stated therein. It is further averred, in this connection, that all patents were issued by the Department of the Interior upon applications in writing of the Oregon & California Railroad Company, accompanied by affidavits, sworn to by duly authorized agent of that company, to the effect that all lands for which patents were asked were of the character contemplated by the grant under which they were claimed; and that the department officials, relying on these affidavits, issued the patents.

It is then alleged that the Southern Pacific Company, between 1894 and 1903, developed a lively demand among wealthy land speculators and timber men for large quantities of land; that during that period the lands were disposed of without any regard for the terms of the grants; that they were sold in parcels of from 1,000 to 45,000 acres to a single purchaser, and at prices ranging from $5 to $40 per acre; that most of the sales in violation of the terms of the grants were subsequent to 1897; and that the total sales amounted to 820,000 acres, classified thus:

	Sales.	Acres.
Sales in quantities not exceeding one quarter section....	4,930	296,000
Sales in quantities exceeding one quarter section.....	376	524,000

It is charged that sales were suspended and all the land withdrawn from market in 1903; that approximately 640,000 acres have been conveyed, and there are outstanding about 830 executory contracts, covering approximately 174,000 acres. It is then stated, on information and belief, that substantially all of these contracts were made between 1898 and 1903, and that the average price fixed therein is in the neighborhood of $10 per acre. To the bill is attached a schedule marked J, setting forth all the conveyances made and contracts pending.

It is further averred that the Oregon & California Railroad Company has received for lands sold $4,970,273.59, and in addition several hundred thousand dollars from the leasing of lands, sale of timber, and forfeitures of partially performed contracts of sale.

The bill alleges that the mortgage to the Union Trust Company has been treated by the parties thereto as a lien on all the granted lands which remained unsold on May 12, 1887; that the Union Trust Company has joined in all conveyances of land since that time, has received substantially all the purchase money paid thereon, and has applied the same on the $20,000,000 indebtedness, and has thereby reduced it to $17,500,000.

It is then asserted that close to 1,800,000 acres of the unsold lands are situated in the neighborhood of Eugene, Oreg., and constitute nearly one-half, in alternate sections, of all lands within approximately 40 miles of the railroad from Eugene to the southern

boundary line of Oregon; that this territory is wholly dependent for railroad transportation on the lines of the Oregon & California Railroad Company, operated by the Southern Pacific Company; that since 1903 well-nigh 1,000 persons have severally applied to the railroad company to purchase the unsold lands in quantities and at prices within the terms of the grants; that these persons desired to become actual settlers and establish their homes thereon; that, in addition to these, a large number of persons are ready and willing to purchase the lands within the terms prescribed by the grants, but that notwithstanding all this the railroad company withdrew all the lands from sale in January, 1903, and has ever since refused, and still refuses, to sell any thereof to actual settlers, and, besides, has resorted to divers means to discourage and obstruct the actual settlement of the lands within the terms of the grant; that this policy has prevented the development of the territory just described, has thwarted the establishment of competing railroads therein, and has given, in effect, a monopoly of the land and transportation thereof to the Southern Pacific Company.

It is also charged that the present existence of the Oregon & California Railroad Company is a mere pretense, because the Southern Pacific Company, through its stock ownership and otherwise, controls it absolutely, originates its policy, and is in all respects responsible for its conduct; then follows the allegation, that ever since 1903 the Oregon &

California Railroad Company, under the influence of the Southern Pacific Company, has assumed and now asserts an absolute and unconditional estate in all of the unsold lands, in violation of the terms of the grant; that these lands have not been reduced to possession or in any way improved, unless it be by persons claiming to have settled thereon; that the reasonable value thereof exceeds the sum of $40,000,000; that none of the unsold lands are, or ever were, necessary for depots, stations, sidetracks, woodsheds, or any other needful purpose in operating the railroad, nor are they reserved or intended for any such purpose; and that the Oregon & California Railroad Company has repeatedly threatened to do acts impairing the title to the lands, to commit waste upon the lands, and will do so unless restrained.

Then follows the statement that prior to 1894 there was substantially no demand for the lands, except for the purpose of settlement; that during this period the Oregon & California Railroad Company maintained an immigration bureau to induce settlement; that in view of this, the occasional violations of the terms of the grant were generally unknown; that since 1894 nearly all of the sales were by executory contracts and were not placed of record, and did not merge into deeds until many years thereafter; that a considerable number of these contracts are still outstanding, as heretofore stated, and that many of the conveyances were not placed upon record until recently and some are still unrecorded; that when the lands were withdrawn in 1903 the rea-

son for doing so was concealed, and the railroad company, from time to time, falsely represented that they had been withdrawn for temporary purposes only.

It is further averred that the Legislature of the State of Oregon, about February 14, 1907, in response to repeated demands of the people, adopted and communicated to the Government a memorial (Exhibit L), pointing out the violations of the grants, and charging in general terms the true facts in the premises; that thereupon the further issuance of patents was suspended and an investigation of the subject instituted by the Attorney General; that this investigation was concluded in January, 1908, and the result was soon thereafter brought to the attention of Congress, which, on April 30, 1908, (35 stat. 571) adopted the following joint resolution:

> That the Attorney General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following-described acts of Congress, to wit: "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," approved July twenty-fifth, eighteen hundred and sixty-six, as amended by the acts approved June twenty-fifth, eighteen hundred and sixty-eight, and April tenth, eighteen hun-

dred and sixty-nine; * * * Also "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," approved May fourth, eighteen hundred and seventy, including all rights and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said acts; and in and by any and all such suits, actions, or proceedings the Attorney General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions, and proceedings, including the claim on behalf of the United States that the lands granted by each of said acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending to entertain, consider, and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found to enforce the same.

The bill then states that, pursuant to the foregoing resolution, this suit was commenced.

It also avers that by reason of the said breaches all the unsold lands have been forfeited; that neither of the defendants, or any one claiming through or under them, has any right therein, and that by virtue of the aforementioned joint resolution, the complainant asserts title to, and resumes the title of, the forfeited lands.

It then alleges that all the lands sold, in violation of the terms of the grants, were forfeited, but were not included in the suit for certain reasons stated in the bill.

It is charged that the mortgage to the Union Trust Company of July 1, 1887, to secure the payment of the $20,000,000 of bonds ($17,500,000 outstanding) covers enough of property outside of the granted lands to more than satisfy the indebtedness; and it is asserted that the trust company has no interest in the lands, either by reason of the mortgage, or otherwise.

Attached to the bill are certain schedules; the one marked "M" sets forth all maps of surveys and locations filed in the office of the Secretary of the Interior by the grantees, pursuant to the conditions of the grants; the one marked "N" shows the time of the construction of the several sections of the road and telegraph lines, together with the dates in which the sections were examined, approved and accepted by the Government commissioners; and the one marked "O" sets forth the quantity of land patented from time to time, under each grant, compiled by years.

It is said that the cross complainants and interveners claim an interest in the lands as actual settlers; that for the purpose of enforcing their claims some had commenced separate suits in the Circuit Court of the United States for the District of Oregon, and one in the United States Court for the Western District of Washington, before this suit was instituted; that if said suits had been permitted to proceed they would have hindered and substantially prejudiced the rights of the Government in this action, and therefore complainant asks that they be enjoined from further prosecuting the suits, but be permitted, if so advised, to become parties to this suit, and set up therein their respective claims.

The bill prays:

That the patented and unpatented lands, remaining unsold, be declared forfeited; that the title thereto be quieted in the complainant against all defendants, and all persons claiming through or under the defendants; that the defendants, and each of them, be required to surrender to the complainant full possession, if any they have, to the lands in question; that all the defendants be enjoined from in any manner asserting title to the unsold lands; and that the Oregon & California Railroad Company, Southern Pacific ompany, and Union Trust Company be required to account for any moneys received from or on account of the lands, and for general relief.

Or, in case the foregoing relief should be denied,

That a receiver be appointed to sell the lands and account for the proceeds "as the court shall direct."

Or, if both prayers be denied,

That a mandatory injunction directing the Oregon & California Railroad Company to sell the lands in conformity with the terms of the restrictive proviso under such conditions as the court might deem expedient; and that all persons feeling aggrieved by the refusal of the railroad company to sell be given the right to apply to the court at the foot of the judgment for such relief as they might think themselves entitled to (R., 1, 7980).

CROSS COMPLAINTS.

Each of the cross complainants alleges that he had, prior to the institution of the suit, actually settled upon a quarter section of the land described in the grants for the bona fide purpose of making his home thereon and of purchasing the land from the Oregon & California Railroad Company at the price of $2.50 per acre, and that he had made tender to that company of the purchase price.

He then alleges substantially the same facts as those stated in the bill; but denies that the lands sued for by him "are or can be forfeited to the United States"; and asserts that he is ready and willing to pay into court for the Oregon & California Railroad Company the sum of $400, the purchase price of the lands settled upon; prays that it be decreed that the railroad company holds the lands

settled upon by him in trust; and that the company be compelled to accept the money tendered and convey to him the lands.

PETITIONS IN INTERVENTION.

The interveners admit substantially all the allegations of fact contained in the bill, but deny that the lands applied for by them are subject to forfeiture.

It is alleged by each intervener that a long time prior to the commencement of the suit he applied to the Oregon & California Railroad Company to purchase a quarter section of land and offered to pay therefor the sum of $2.50 per acre, and made due tender of the money, but that the same was refused; that at the time he made application it was his intention to make actual settlement upon the land, and so stated to the company. He offers to deposit in court, for the use and benefit of the company, the sum of $400 to pay for a quarter section of land at $2.50 per acre.

It is further alleged by each that Congress intended to create a trust in the granted lands for the use and benefit of such citizens of the United States as should become actual settlers thereon and offer to purchase the same in accordance with the terms and under the restrictions imposed by the grants; that the land is held in trust by the Oregon & California Railroad Company for his benefit and for the benefit of others of his class, and he asks that the company be required to convey to him the land which he has applied for upon the payment of the price thereof.

DEMURRERS.

The defendants, Oregon & California Railroad Company, Southern Pacific Company, and Stephen T. Gage, individually and as trustee, demurred to the bill of complaint, the cross complaints, and the petitions in intervention; and the defendant Union Trust Company separately demurred to the cross complaint.

All of the demurrers were submitted together; the court overruled the demurrer to the bill and sustained the demurrers to the cross complaints and petitions in intervention (R., II, 677–695; 186 Fed., 861).

The cross complainants and interveners filed no further pleading.

The defendants Oregon & California Railroad Company, Southern Pacific Company, and Stephen T. Gage filed a joint and several answer. The Union Trust Company answered separately (R., III, 1165).

ANSWER OF DEFENDANTS OREGON & CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, AND STEPHEN T. GAGE.

The answer of the above-named defendants admits substantially all the allegations of fact in the bill, except as hereinafter stated. No useful purpose would be served by detailing those admissions in this place.

DENIALS.

The answer denies that the East Side Company applied to Congress for an extension of time within which to file its assent to the act of July 25, 1866,

or that it laid before Congress the joint resolution of the Legislature of Oregon and represented that the recitals therein were true; that the Oregon & California Railroad Company was organized by promoters or stockholders of the East Side Company; that the stock of the West Side Company was acquired by the owners of the Oregon & California Railroad Company; that the stock of both companies was at any time held by a single interest, or issued without consideration; that the West Side Company was dissolved in October, 1880; that the Oregon & California Company applied for any of the patents issued to it as the successor of the East Side Company, or that the Southern Pacific Company established a general land office for the disposition of lands of its constituent companies.

It also denies that the applications of persons exceeding 1,000 to purchase tracts of 160 acres were made in good faith, or that each applicant tendered $2.50 for each acre at the time of making such application; that a large number of persons had settled upon the lands and offered to pay $2.50 per acre; that it refused or refuses, to sell any part of the unsold lands to actual settlers; that the lands have been converted to the use of the Southern Pacific Company and that a land monopoly has been maintained for the benefit of that company, or that the industrial development of Oregon has been seriously retarded by reason of the Southern Pacific Company's refusal to sell the lands in question.

It further denies that the bill presents a suit of equitable cognizance.

It also denies that the conveyances made by the West Side Company to the Oregon & California Company on October 6, 1880, was for the purpose of merging the former in the latter company, and denies that the Oregon & California Railroad Company thereby became the successor of the West Side Company.

It further denies that the Pacific Improvement Company was wholly owned or controlled by the owners of a majority of the stock of the Southern Pacific Company; that the latter company was the actual purchaser of the second mortgage bonds, or any part thereof, as alleged by the bill.

It denies that the Southern Pacific Company controlled the election of directors and officers of the Oregon & California Company, or influenced the corporate acts of the latter company; or that any of the proceeds from the issue of the $20,000,000 of bonds, secured by the mortgage to the Union Trust Company, was used by the Southern Pacific Company to purchase securities of the Oregon & California Company.

It also denies that no patent has been issued since 1906 under either of the grants, and says that Exhibit J, attached to the bill, is incorrect, but that Exhibit 4, attached to the answer, sets out correctly the matters referred to in Exhibit J.

ALLEGATIONS.

The answer *alleges* that construction of the East Side Company was commenced in the month of April, 1868, and that all the interests acquired by the East Side Company in the grant were free from the obligations of the amendatory act of 1869.

It avers that the lands not sold are essentially timber lands, and are not susceptible of actual settlement; that only about 300,000 acres of all the lands granted are capable of actual settlement, and that nearly all of these lands have been sold to such settlers, in quantities of 160 acres, or less, and at prices not exceeding $2.50 per acre.

It further alleges that it has paid $1,827,234.10 in taxes, and sets forth what purports to be a statement of receipts and disbursements on account of the lands. It is substantially as follows:

Receipts	$5,506,199.22
Disbursements	3,242,777.00
Profit	2,263,422.22

It asserts that for more than 40 years the Government had actual and constructive knowledge of the sales of land in quantities in excess of 160 acres to one person, other than an actual settler, and at prices in excess of $2.50 per acre; that it had constructive knowledge of substantially all transactions by the defendants charged as unlawful, and acquiesced therein and expressly approved and ratified some of them; that it issued patents for lands under the grants in question after diligent investigation by the proper officers of the Government;

that it accepted and approved said railroads as constructed; that it has accepted free use of the railroads in the transportation of troops and munitions of war, and that the services thus rendered are worth $1,000,000; that the Oregon & California Company, relying upon said approval and acquiescence, paid the taxes on the unsold lands to the amount of $187,234.10, and made other expenditures amounting to the sum of $145,977.26; and that no part of the money thus paid has been tendered back by the complainant. And it also alleges that, relying on said acceptance, approval, and acquiescence, the Southern Pacific Company guaranteed the payment of said $20,000,000 in bonds.

The answer also charges that the complainant prevented the defendants from further compliance with the provisions of the amendatory act of 1869 and of May 4, 1870; by the passage of the act of March 3, 1891 (26 Stat., 1097), and the act of June 4, 1897 (30 Stat., 1136); also by the act of February 10, 1909 (35 Stat., 639), the act of June 17, 1910 (36 Stat., 531), and the act of June 6, 1912 (37 Stat., 123), all amending the homestead act of May 20, 1862 (12 Stat., 392).

It is also alleged that by the passage of the act of August 20, 1912 (37 Stat., 320) and by the passage of the act of January 31, 1885 (23 Stat., 296), and the act of September 29, 1890 (26 Stat., 496) Congress waived the alleged breaches of the act of April 10, 1869, and of the act of May 4, 1870. None of the aforementioned acts is quoted.

It also avers that persons claiming under the defendants have absolute title to certain of the lands in question; that the Oregon & California Railroad Company is the owner of all the lands patented and unpatented, not heretofore sold, and denies that any of said lands is subject to forfeiture.

ANSWER OF THE DEFENDANT UNION TRUST COMPANY.

This answer is substantially the same as the answer of the other defendants, with this addition: It alleges that by the act of June 19, 1878, there was created in the Department of the Interior an auditor of railroad accounts to whom railroad companies west of the Missouri River, that had received land grants from the United States, should report in accordance with a system to be prescribed by him, and that by the act of March 3, 1881, the title of this officer was changed from auditor of railroad accounts to commissioner of railroads.

In harmony with this law, it is alleged, the defendant Oregon & California Railroad Company made reports of its land sales each year, commencing in 1879 and continuing down to and including the year 1903. These reports show, so it is averred, that the company had sold land in quantities of more than 160 acres to one person, and at prices exceeding $2.50 per acre. It is then stated that these reports were brought to the attention of the Secretary of the Interior, who transmitted them to the President, who laid them before Congress, where they were referred to the appropriate committee of

each House and printed as House executive documents.

It is then stated that notwithstanding the knowledge thus imparted to the administrative officers of the Government and to Congress the complainant continued to issue patents to the company for the lands.

It is further averred that no executive officer ever challenged the correctness of the construction placed upon said act of Congress by the Oregon & California Railroad Company, as shown by its said reports, until the bill herein was filed in 1908.

The act of August 20, 1912, (37 Stat., 320) is referred to and the claim is made that by its passage the United States waived all breaches of the terms of the grants.

It is then averred that by reason of the matters set out in the answer, the United States has waived all right to forfeiture of the lands and is estopped from asserting any claim thereto.

REPLICATION.

There is a formal replication to each answer.

OBJECTIONS TO THE TESTIMONY NOT PASSED UPON.

Many objections were made to the testimony as it was offered before the special examiner. The court did not indicate a ruling upon any of them, either before or at the time of entering the decree.

PART II.

UNDISPUTED FACTS.

Nearly all the facts set forth under this caption are stipulated (R. IV, 1552 et seq.), the others are unchallenged.

THE ORIGIN OF THE PROJECT.

In 1863 citizens of California and of Oregon initiated the survey of a line of railroad from Marysville, Cal., to the Columbia River, with a branch to Portland, Oreg. When the surveyors reached Jacksonville, Jackson County, Oreg., they were out of funds. One Gaston took an interest in their enterprise and secured contributions from the citizens of Jackson County to aid them in the further prosecution of their work. The survey was resumed and continued for some months, then plats thereof were made and one of the promoters was sent to Washington to ask Congress to assist in the work of building the road. (Gaston, R., IV, 1738–1742.) On February 2, 1866, Senator Nesmith of Oregon introduced in the Senate of the United States a bill, which subsequently became the act of 1866 (*supra*, p. 4).

ORGANIZATION OF WEST SIDE COMPANY.

For the purpose of organizing a corporation to be designated by the Legislature of Oregon as the beneficiary of so much of the lands granted by the

act as were situate in Oregon, Joseph Gaston presented to the secretary of state of Oregon on October 6, 1866, proposed articles of incorporation of the Oregon Central Railroad Company, with headquarters at *Portland*, and requested him to file them. The secretary received them and wrote on the envelope containing the articles "October 6, 1866" and at the request of Gaston handed them back to him, who took them away. At the time the articles were presented to the secretary they bore the signatures of eight persons, but no certificate of acknowledgment (Stip., R., IV, 1554). A triplicate of the articles was filed in the office of the county clerk of Multnomah County, Oreg., under circumstances similar to those attending the filing with the secretary of state, and a copy thereof was retained by Gaston as custodian for the incorporators (Gaston R. IV, 1836–1837).

DESIGNATION OF WEST SIDE COMPANY BY LEGISLATURE.

The legislature, on October 10, 1866, four days after the proposed articles of incorporation had been presented to the secretary, as above stated, adopted a joint resolution, which recites:

> That the Oregon Central Railroad Company, a company organized under the general incorporation laws of this State, be, and the same is hereby, designated as the company which shall be entitled to receive the land granted and all the benefits of an act of Congress approved July 25, 1866, entitled "An act granting land to aid in the construction

of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, Oregon," so far as the said grant applies to the State of Oregon (*supra*, p. 4).

ARTICLES OF INCORPORATION OF WEST SIDE COMPANY RETURNED TO SECRETARY OF STATE.

On November 21, same year, the articles of incorporation were returned to the office of the secretary of state with 10 additional names and 2 notarial certificates appended thereto. One certificate, dated November 16, same year, was to the effect that on or about September 29 of that year the articles had been acknowledged, signed, and sealed by those whose names were signed thereto at the time when they were first presented to the secretary of state. And the other certificate, dated November 20, same year, stated that the 10 who had subsequently signed, did so at a date after the designation of the corporation by the legislature. Upon the return of the articles to the secretary of state he indorsed thereon: "Filed in the office of the secretary of state this 21st day of November, A. D. 1866, at 10½ o'clock a. m." (Stip., R. 1 V, 1554, 1625).

FURTHER ACTS TO PERFECT ORGANIZATION OF WEST SIDE COMPANY.

The stockholders of the company held their first meeting on May 24, 1867; shortly before this Joseph Gaston, as trustee for the company, subscribed for one-half of the capital stock for the stated purpose of legalizing the corporation. Other parties signed

for a share or two (Gaston, R., IV, 1757–1834). At this meeting officers and directors were elected (Govt. Ex. 100, A. R., IX, 4286).

The next day the company adopted a resolution assenting to the act of Congress of July 25, 1866, and on July 6 following caused a certified copy thereof to be filed in the office of the Secretary of the Interior, together with a certified copy of the articles of incorporation and a certified copy of the joint resolution of the Legislature of Oregon, above referred to. On August 20 following the company filed in the same office a map of survey of its projected line of railroad (Stip., R. 1 V, 1555).

It is said that at the time this company was designated by the legislature it was not legally organized.

LEGISLATURE REVOKES DESIGNATION OF WEST SIDE COMPANY.

Two years afterwards, October 20, 1868, the legislature decided that the company was not validly organized when designated on October 10, 1866, and, hence, was incapable of receiving the grant (*supra*, p. 14), and on October 20, 1868, designated another company.

ORGANIZATION OF EAST SIDE COMPANY.

On April 22, 1867, there were filed in the office of the secretary of state for Oregon, articles of incorporation of another company under the same name as the first company, Oregon Central Railroad Company, with principal place of business at *Salem*, Oregon (Stip., R. 1 V, 1555). The first meeting of

the incorporators of this company was held on the same day. At this meeting George L. Woods was instructed by those present to subscribe for 70,000 of the 72,500 shares authorized, "for the use and disposal of the company" (Govt. Ex. 100, B. R. X., 4895). This company became known as the East Side Company, and its line of railroad as the East Side line, by reason of the location of the line on the easterly side of the Willamette River (Stip., R. IV, 1556).

CONTROVERSY BETWEEN THE TWO COMPANIES.

Immediately after the filing of the articles of incorporation of the East Side Company, a controversy arose between it and the West Side Company over the use of the corporate name (Gaston, R., IV, 1789). During the first part of the year 1868 each company attacked the legality of the other. Pamphlets were issued (Govt. Exs. 103 and 104, R., X, 5153–5158) and public meetings held (Gaston, IV, 1764), at which the East Side Company was represented by John H. Mitchell, afterwards United States Senator from Oregon, and I. R. Moores, and the West Side Company by Joseph Gaston (Gaston, R., IV, 1758). At this time the East Side Company made no claim to the land grant under the act of Congress of July 25, 1866 (Gaston, R., IV, 1770).

The minutes of the company show that on April 16, 1868, President Moore "broke the first ground on the Oregon Central Railroad Company's road

(East Side)" (R., X, 4941). They contain the speeches of a number of gentlemen who participated in the opening ceremonies, but in none of them is there any reference to the land grant (*Id.*).

Authority was given by the directors, according to the minutes, to "receive land at a fair price in payment for stock subscriptions" (R., X, 4997).

In the contract made for the construction of the first 150 miles of the road, the company agreed to give bonds and secure the payment thereof "by a bottom mortgage on said 150 miles thereof and all the rolling stock of the same" (R., X, 4911). The granted lands are not mentioned.

In a pamphlet issued by the company (Govt. Ex. 104, R., X., 5158) about May 1, 1868, a positive disclaimer was made in words as follows:

> The charge has been extensively circulated that we are seeking to defraud the west side of the river of a valuable franchise—of State and Government aid—in answer to which we have only to say that we recognize that the act of Congress granting lands and the act of the last Legislature of Oregon are both inoperative from the fact that the terms and stipulations of those acts have not been, and can not be, complied with. Any aid to be granted railroad enterprises in Oregon must be reenacted by both the State and General Government * * *. (Gov. Ex. 104, R. X., 5172).

The West Side Company began construction work on April 15, 1868 (Gaston, R., IV, 1760), and at the

end of that year the larger bridges were built and the road graded for the first 5 miles out of Portland (Gaston, R., IV, 1762). On June 25, same year, Congress passed an act extending the time for the construction of the road by providing that "the first section of twenty miles of said railroad and telegraph line shall be completed within eighteen months from the passage of this act, and at least twenty miles in each two years thereafter and the whole on or before July first, eighteen hundred and eighty." In a pamphlet issued by Gaston, as president of the company, it is stated that this act was passed at the solicitation of the West Side Company (R., X., 5247).

EFFORTS OF THE EAST SIDE COMPANY TO SECURE THE GRANT.

The East Side Company began work on April 16, 1868 (Gaston, R., IV, 1760), and prior to February, 1869 had expended about $150,000 in grading (Gaston, R., V, 2423) between Portland and Salem (Himes, R., V, 2443). About September 12, same year, the West Side Company discovered that the East Side Company was making an effort to have the Oregon Legislature revoke its designation of the former company and select the latter as the beneficiary of the grant (Gaston, R., IV, 1768–1770). Both companies appeared before the legislature, the East Side Company represented by John H. Mitchell and Ben Holladay (who had a short time before secured control of the East Side Company), and the

West Side Company by James K. Kelly (Gaston, R., IV, 1771). The contest resulted in the passage by the legislature on October 20, 1868, of a joint resolution revoking the designation of the West Side Company and naming the East Side Company as the recipient of the grant. (See resolution, *supra*, p. 14).

After this action, the contest between the companies was carried before Congress. The act of 1868 required, as we have seen, that assent to its provisions be filed by the designated company within one year after its passage. This time had elapsed before the East Side Company secured its designation. Application was, therefore, made to Congress by that company for an extension of time. The West Side Company resisted. John H. Mitchell represented the East Side Company, and Simon G. Reed the West Side Company at Washington (Gaston, R., IV, 1772.) A pamphlet (Govt. Ex. 105, R., X, 5176) was prepared by Mitchell and approved by the East Side Company November 25, 1868 (Govt. Ex. 100B, R., X, 5023), defending the right of that company to the benefits of the act of July 25, 1866. This pamphlet was prepared for circulation in Washington only. A copy of it was found in the files of the Secretary of the Interior (Griffith, R., IV, 1900). In answer to this pamphlet, Reed and President Gaston prepared pamphlets for use before Congress (Govts. Ex. 106, R., X, 5228) setting forth the claims of the West Side Company and opposing an extension of time for filing the assent required by the act of

1866 (Gaston, R., IV, 1792). The minutes of
East Side Company show a payment to John
Mitchell on account of his trip to Washington w
reference to this matter (Govt. Ex. 100B, R., X, 50

On January 19, 1869, Senator Williams, of Oreg
wrote a letter to the Secretary of the Interior w
respect to the controversy, in which he said:

> I have nothing to say as to the rights
> claims of either company, but in view of
> fact that the articles of incorporation of
> West Side Company were not filed in the of
> of the secretary of state until after its de
> nation by the legislature in 1866, and in v
> also of the fact that the East Side Comp
> can not file its assent as required by the si
> section of said act, I am apprehensive that
> benefits of the said act will be wholly lost to
> State unless something is done to prevent

The Secretary replied the next day. He assur
that the statement made by the Senator with resp
to the organization of the West Side Company
correct, then referred to the bill pending bef
Congress for an extension of time within which
file the assent, and said:

> The passing of the bill, as stated, is to
> thorize this company (meaning the East S
> Company) to file its assent without prejudic
> the rights or interests of the other compa
> and you ask for an expression of my views as
> whether there is any necessity for the propo
> legislation. In reply I have the honor to st
> that as the matter now stands that the gra
> so far as the portion in Oregon is concern

has lapsed, while the grant for the portion of the road situated in California is still in force, and some legislation by Congress is necessary to revive the grant for the Oregon portion of the line. The proposed bill, if it becomes a law, will, in my opinion, accomplish that purpose (Govt. Ex. 130, R., IV, 1913).

AMENDATORY ACT OF 1869 PASSED.

The bill referred to was passed April 10, 1869, and reads:

> That section six * * * be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act: *Provided*, That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land: *And provided further, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.*

Upon this last proviso, called the "actual settlers provision," and a similar one in the act of May 4, 1870 (*supra*, p. 19), depends the chief controversy in this case.

ASSENT OF THE EAST SIDE COMPANY.

Two days after the approval of the act John H. Mitchell, as the attorney of the East Side Company, addressed a letter to the Secretary of the Interior reciting the terms of the act of July 25, 1866, and of the foregoing amendatory act, touching the time for filing the assent required by the granting act, and said:

> This assent will be presented for filing as soon as I can return to Oregon and have a resolution for that purpose adopted by the company.

He then requested the Secretary not to recognize the West Side Company, called attention to the above letter of the Secretary, addressed to Senator Williams, and asked that no action be taken until the assent of the East Side Company could be filed (Govt. Ex. 130, R., IV, 1914).

The East Side Company, through its board of directors, on June 8, 1869, adopted a resolution reciting the passage of the act of July 25, 1866, the provisions therein relating to the designation by the Legislature of Oregon of a company to receive the grant made thereby, the requirement that the company designated should file its assent with the Department of the Interior within one year from the date of the passage of the act, that no company so

designated had done so, that the East Side Company had been designated by the Legislature of Oregon, that Congress had passed the act of April 10, 1869, extending the time within which the company designated might file its assent, and then said:

> This company, the Oregon Central Railroad of Salem, Oregon, * * * do hereby accept all the provisions, rights, privileges, and franthises of said act of July 25, 1866, * * * and of *all acts amendatory* thereof, upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto.

After this is a direction to the secretary of the company to file a certified copy of the resolution in the office of the Secretary of the Interior, which was done on June 30, 1869. On October 29, same year, the company filed in the same office a map of survey of location of the first 60 miles of its projected line, and on December 24, following, it completed the first 20 miles within the prescribed time (Stip., R. IV, 1557).

WEST SIDE COMPANY ABANDONS ALL CLAIMS TO THE GRANT UNDER ACT OF 1866, AND SECURES INSTEAD THE GRANT MADE BY THE ACT OF MAY 4, 1870.

The West Side Company failed to complete the first 20 miles of its line within the time required, and after that "it never made any claim to the grant" made by the act of 1866 (Gaston, R., IV, 1775, 1779). Immediately after the failure Gaston initiated efforts to secure a new grant for the West

Side Company, which resulted in the passage of the act of May 4, 1870 (Gaston, R., IV, 1779, et seq.). The following is section 4 thereof:

> That said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, sidetracks, wood yards, standing ground, and other needful uses in operating the road, *shall be sold* by the company *only to actual settlers, in quantities not exceeding one hundred and sixty acres* or a quarter section to any one settler, and *at prices not exceeding two dollars and fifty cents per acre.*

(The entire act appears *supra*, p. 19.)

On July 2, 1870, the company, through its directors, assented to and accepted all the provisions of the grant, and on July 20, following, filed its assent in the office of the Secretary of the Interior, as required by the act (Stip., R. IV, 1559).

LEGALITY OF THE EAST SIDE COMPANY DENIED.

In the year 1869 the East Side Company was involved in litigation, wherein the validity of its incorporation and the right to use its corporate name were questioned (Gaston, R., IV, 1762, et seq.; *Newby* v. *Oregon Central Railroad Company*, Fed. Cas. 10144, 10145). In Holliday *v.* Elliott, 8 Oreg., 85, a suit commenced in 1869 but not decided until 1879, the supreme court of Oregon said:

> That suits had been commenced in the United States Circuit Court and in the circuit court of this State against the O. C. R. R. Co. [East side company] to test the legality

> of its existence as a corporation and they had so far progressed as to foreshadow its overthrow (p. 93).

The court was speaking of a time prior to the organization of the Oregon and Cailfornia Railroad Company, defendant.

ORGANIZATION OF THE DEFENDANT OREGON & CALIFORNIA RAILROAD COMPANY.

On March 17, 1870, articles of incorporation of the Oregon & California Railroad Company (defendant) were filed in the office of the secretary of state for Oregon. Ben Holladay, J. C. Hawthorne, and I. R. Moores were among the signers of the articles. Holladay was at this time in control of the East Side Company through stock ownership. Moores was president and Hawthorne a director of the same company (Govt. Ex. 100B, 5058). The articles recited that the purpose of the corporation was among other things, to acquire—

> particularly and especially all the right, title, interest, franchise, claim, and demand which the said Oregon Central Railroad Company of Salem, Oreg. (East Side Company), * * * now has or is entitled to, and to which it may hereafter be entitled under and by virtue of an act of Congress * * *, approved July 25, 1866, and of all amendments thereto. And to construct and establish the whole thereof (railroad and telegraph line) from Portland in Oregon to the California line, in all respects in accordance with the act of

> Congress hereinbefore referred to and the amendments thereto, and for the purpose of receiving all the benefit of such acts of Congress and amendments thereto, and intended to be conferred thereby on the Oregon Company, and for the purpose of complying with all the provisions of said act (Bill, R., I–89; Stip., R. IV, 1558).

By an instrument, dated March 29, 1870, the East Side Company assigned and conveyed to the new corporation, the Oregon & California Railroad Company, all of its property, including the land grant, with present and future rights, under the act of July 25, 1866, and acts *amendatory* thereof. This instrument recites that the

> Oregon Central Railroad Company * * * did afterwards and in pursuance of the act of Congress aforesaid (act of July 25, 1866), and of the acts amendatory thereof and supplemental thereto, file its assent in writing to said act of Congress, and all the provisions thereof * * * was recognized by the Department of the Interior as the corporation in Oregon entitled to take and manage the congressional grant hereinbefore referred to and receive the benefits thereof * * *

and did

> *afterwards* proceed to locate the line of said railroad, and did locate the same for a long distance and did prepare and file its maps in the office of the Secretary of the Interior in strict accordance with the said act of July 25, 1866, and amendments thereto aforesaid" (Stip., R. IV, 1558).

By action of the stockholders and of the board of directors at meetings held March 28 and 29 following, the East Side Company was dissolved (Govt. Ex. 100B, R., X, 5099, 5117).

ASSENT OF THE OREGON & CALIFORNIA RAILROAD COMPANY.

On April 4, 1870, the Oregon & California Railroad Company, through its board of directors, adopted a resolution reciting that that company had purchased and taken an assignment from the East Side Company of its property, including

> All the right, title, interest and claim, both legal and equitable, absolute and contingent,

of the East Side Company to the lands and all other benefits granted to that company by the act of July 25, 1866, and amendments thereto, and said:

> *Resolved*, That this company do accept the grant conferred by such act of Congress (July 25, 1866) and all the benefits and emoluments thereunder or therby granted, upon the terms and conditions therein specified; and
>
> *Resolved*, That the president and secretary of this company be, and they are hereby, authorized to file the assent of this company to such act of Congress and amendments thereto, as aforesaid, in the office of the Secretary of the Interior. * * * And that a copy of the deed of assignment from the Oregon Central Railroad * * * be also filed in the same office.

This was done on April 28 following. It is stipulated in the record that—

> at all times since the date of said instrument (conveyance of March 29), the defendant Oregon & California Railroad Company has assumed and still assumes itself to be the successors of the East Side Company in and to all the franchises, rights, and property granted, or intended to be granted by the said acts of Congress (Stip., R. IV, 1559).

Under date of May 7, same year, the Secretary of the Interior informed the Commissioner of the General Land Office that evidence had been filed by the secretary of the East Side Company

> that said company has sold and transferred all its rights, interests, etc., to the Oregon & California Railroad Company, of Portland, Oreg.

This notice was acknowledged by the commissioner May 23, 1870, and on the same day he wrote notifying the register and receiver of the United States land office at Oregon City, Oreg., of the information received from the Secretary of the Interior (Defts. Ex. 373, R., XIV, 7371). This matter was again considered in 1871, and an opinion rendered by the Assistant Attorney General for the Interior Department, to the effect that the use of the word "assigns" in the act of Congress of July 25, 1866, authorized the conveyance of the grant by the East Side Company to the Oregon & California Railroad Company. After some correspondence be-

tween the attorney general and Secretary of the Interior, the matter was permitted to stand on the action of the Secretary of the Interior in his notification to the commissioner of the transfer of the grant (Defts. Ex. 376, R., XIV, 7439).

OREGON & CALIFORNIA RAILROAD COMPANY SECURES CONTROL OF WEST SIDE COMPANY.

In the spring of 1870, Holladay, controlling practically all of the stock of the Oregon & California Railroad Company and being its president (Defts. Ex. 341, R., XIV, 7309, Govts. Ex. 129, R., XI, 5765), entered into negotiations with Joseph Gaston to acquire control of the West Side Company, offering, among other inducements, a township of the granted lands in part payment for a majority of the stock of that company. This, Gaston at first refused, upon the ground that Holladay could not dispose of the granted lands that way, but must conform to the provisions of the granting acts and sell to actual settlers (Gaston, R., IV, 1787). Later, however, Gaston, having been offered $50,000 and employment for a term of years, yielded to Holladay's wishes and assigned a majority of the stock of the West Side Company to R. H. Towler, private secretary to Holladay, and immediately thereafter Holladay assumed control of the company (Gaston, R., IV, 1797). This transfer was made on or about August 15, 1870 (Govt. Ex. 100A, R., IX, 4424). Holladay continued in control of the two companies until he surrendered the same to a bondholders' committee

(Gaston, R., IV, 1788, 1798) under an agreement dated February 29, 1876 (Govt. Ex. 126D, R., XI, 5603).

EARLY EFFORTS TO HAVE EXECUTIVE OFFICERS OF THE GOVERNMENT PUT UPON THE GRANTS A CONSTRUCTION SOMEWHAT SIMILAR TO THAT NOW CONTENDED FOR BY DEFENDANTS.

On April 15, 1870, the Oregon & California Railroad Company conveyed the granted lands to trustees to secure a bond issue of $10,950,000. The trustees were given the right to sell or dispose of the lands upon such terms as the president of the Oregon & California Railroad Company might approve, the proceeds of the sales to be applied to the payment of the interest and principal of the bonds secured (Govt. Ex. 126A, R., XI, 5530).

By an instrument dated March 20, 1871, the trustees and the Oregon & California Railroad Company assigned and conveyed the lands to the European & Oregon Land Company (a California corporation organized by Holladay) (Gaston, R., IV, 1840), describing them as lands granted by the act of July, 1866, and "acts amendatory and supplemental thereof." Under the conditions of this instrument the lands were to remain in the possession of the grantor trustees until the grantee had paid the agreed price (Govt. Ex. 126I, R., XI, 5734).

Joseph S. Wilson, as president of the European & Oregon Land Company, under date of January 17, 1872, wrote George H. Williams, then Attorney

General of the United States and former Senator from Oregon, with respect to the land grants. He called attention to the actual settlers provision of the act of April 10, 1869, and said that, in pursuance of a legal opinion, the board of trustees of this company had ordered that persons who had become actual settlers between July 25, 1866, and April 10, 1869, should have the privilege of purchasing not to exceed 160 acres at $2.50 an acre, but as to *all others* the company was *not* legally restricted from selling on liberal terms, for cash or credit, at reasonable rates. He further stated that he had been directed by the company to lay the facts before the Attorney General, to the end that the same might be referred to the Interior Department, with the request that the liberal construction given by the trustees of the company might be approved. (Gov. Ex. 109, R., X, 5339.) With this letter he inclosed a copy of the legal opinion referred to, and also a copy of the minutes of his company, setting forth the above agreement between it, the trustees aforementioned, and the Oregon & California Railroad Company. This letter, with the papers attached thereto, was not sent directly to the Attorney General, but was inclosed with another letter to President Holladay of the Oregon & California Railroad Company. In the latter letter Mr. Wilson requested Mr. Holladay to ask the Attorney General to procure from the Secretary of the Interior a construction of the grants desired (Gov. Ex. 109, R., X, 5341), and

inclosed a draft of the decision sought. We quote therefron:

> The department has considered the papers you referred from the European & Oregon Land Company, in right of the Oregon & California Railroad Company, under the grant in western Oregon, by act of Congress approved 25th July, 1866 (Stat., vol. 14, p. 239), and the amendatory act of 10th April, 1869 (Stat., 1869, p. 47), and is satisfied that the construction given by the said company is just and proper, to the effect that an actual settler on the odd sections from 25th July, 1866, the date of the original grant, and all those who went on the odd sections from that date to the passage of the act of 10th April, 1869, and all those who are found on such odd sections when the line of the railroad is surveyed and established, are protected; and have the right to purchase, each one, not exceeding 160 acres, at $2.50 per acre—*but that in regard to all other persons, the original absolute grant*, by act *of 25th July, 1866, is in full force and effect*, and authorizes the company to sell on such terms as may be reasonable and just to all parties without any restrictions (Gov. Ex. 109R., X, 5346).

Attorney General Williams on April 20, 1872, wrote to the Commissioner of the General Land Office:

> I inclose some papers which have been transmitted to me by the attorney of the Oregon & California Railroad Co. to be filed, I suppose, in your office.

> You will see that they relate to the construction of an amendment to the act granting lands to said company (Gov. Ex. 109, R., X, 5364).

The commissioner on May 20, 1872, laid before the Secretary of the Interior this letter and all accompanying papers, and stated that the purpose of the inclosed correspondence was to obtain a construction of the actual settlers provision of the act of Congress of April 10, 1869. To the commissioner's letter the Secretary replied, under date of June 5, 1872, as follows:

> I have considered the question presented in the papers transmitted with your letter of the 20th ultimo, as to the meaning of the last proviso of the act approved 10th April, 1869, amendatory of the act of 25th July, 1866, "granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon," and am of opinion that the proviso *means just what it says*, "that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding $2.50 per acre." *The legislative intention was plainly to prevent the lands from being held for speculative prices and disposed of in large quantities to other than actual settlers; and to limit the proviso's operation to those on the lands granted at or before the survey of the road, would, in my judgment, utterly defeat such intention.*

> The papers transmitted with your letter are herewith returned (Govt. Ex. 109, R., X, 5343).

The commissioner on June 14, same year, transmitted this opinion to the Attorney General (Govt. Ex. 109B, R., X, 5367).

An entry on the jacket in the files of the General Land Office containing the correspondence on this subject shows that on June 27, 1872, the Attorney General returned certain papers relative to the Oregon & California Railroad Company and asked a recall of the Secretary's opinion (Govt. Ex. 109, R., X, 5322).

Under date of July 16, 1872, the commissioner wrote to the Attorney General a letter from which we quote:

> I have the honor to acknowledge your communication of 27th ult., returning certain papers filed with you, by B. Holladay, Esq., relative to the construction to be placed on the last proviso of the act of 10th of April, 1869, amendatory of the act of 26th of July, 1866, granting lands for the Oregon & California Railroad.
>
> It is stated in your letter that the papers contain no communication to me or to the Secretary of the Interior, asking any action or decision in reference to the subject which they discussed. That they were not filed with the view of eliciting any opinion, and that you did not suppose any would be given until some questions were presented which it would

> be necessary for the department to decide, etc. You, therefore, ask * * * that the opinion which the Secretary has given upon the subject may be *withdrawn* until some question is raised, making it necessary to pass upon the construction of the act mentioned, or *until* the *parties interested desire* an opinion on the subject.

He then analyzed the papers laid before him and concluded thus:

> I certainly had no doubt but that the company did desire, and asked for, the view of the office on the matter.
>
> It was not understood that you desired the opinion but the letter was addressed to you because I viewed you as the medium of communication adopted by the company.
>
> Your request for a recall of the opinion expressed was presented to the Secretary, who desires me to state that while he *must* respectfully *decline* to formally withdraw his opinion, yet, in view of your letter, he will be willing at any time, on application, to *reopen* the case and to have all arguments the company may desire to present upon the matter. [Italics ours.]
>
> The papers have, as you requested, been placed on file (Govt. Ex. 109D, R., X, 5370).

[It was stipulated between the parties in this suit that all the facts and circumstances proven by Govt. Ex. 109 (R., X, 5322) should for all purposes be deemed to have been specifically pleaded in detail in the bill of complaint (Stip., R., IV, 1909).]

The willingness of the Secretary of the Interior to reopen the case was never taken advantage of, and his ruling is to this day unreversed.

Even as late as March 19, 1907, Mr. Ballinger, Commissioner of the General Land Office, in answer to an inquiry with respect to the meaning of the actual settlers provision, said:

> The company is therefore without authority to sell the lands to any person in any other amount or for a greater price than prescribed in the proviso, and any conveyance which the company has attempted to make on a sale in violation of the statute would not be sustained by the courts.

PROGRESS OF CONSTRUCTION ON BOTH LINES, AND FINANCIAL DIFFICULTIES UP TO OCTOBER 6, 1880.

By a trust deed dated July 15, 1871, the West Side Company conveyed to Milton S. Latham and Faxon D. Atherton, trustees, all of its railroad property, and the land grant under the act of May 4, 1870, to secure a bond issue of $4,395,000 (Govt. Ex. 126B, R., XI, 5548).

Through the sale or pledge of mortgage bonds approximately $8,000,000 was procured by the Oregon & California Railroad Company during the year 1870, and nearly $1,000,000 was raised in the same way during 1871 by the West Side Company. With the funds thus secured the work of construction on both railroads was proceeded with, on the West Side line until 1871 and on the East Side line

until 1873. On the dates mentioned the West Side line was completed from Portland to McMinnville, a distance of 47 miles, and on the East Side line to a point near Roseburg, a distance of 197 miles. Work was then suspended for want of funds. It was never resumed on the West Side line, and on the East Side line not until 1881 (Stip., R., IV, 1560).

The European & Oregon Land Company on July 25, 1874, reconveyed to Latham, Atherton, and Norris, as trustees, the lands in question, except about 4,000 acres which the company had sold (Govt. Ex. 126G, R., XI, 5688).

On or about July 24, 1874, control of the financial affairs of both companies was taken over by a bondholders' committee, and in February, 1876, the same committee acquired all the stock of both companies and held the same until 1881 (Govt. Ex. 126D, R., XI, 5603; Stip., R., IV, 1561).

WEST SIDE COMPANY TRANSFERS ALL ITS PROPERTY TO THE OREGON & CALIFORNIA RAILROAD COMPANY AND IS DISSOLVED.

The West Side Company, in October, 1880, assigned and conveyed to the Oregon & California Railroad Company all its property, including its interest in the land grant of May 4, 1870, the stated consideration being the payment of *all* the *debts* of the West Side Company. A copy of this conveyance was filed with the Secretary of the Interior about October 20, 1880. It does not name the East Side grant (Stip., R., IV, 1561).

The stockholders approved the conveyance and at the same time adopted a resolution, which reads, in part, as follows:

> *Resolved*, That this company, the Oregon Central Railroad Company, be, and the same is hereby, dissolved, to take effect on the transfer of the property of this company and the settling of its business (Govt. Ex. 100A, R., IX, 4871).

On May 28, 1883, the board of directors passed a resolution to the effect that at the time of the dissolution of the company, and the disposal of its property, there was some property which was not conveyed, because it was in litigation, and then authorized the transfer of this property to the Oregon & California Railroad Company (Govt. Ex. 100A, R., IX, 4874).

At all times since the date of the aforementioned conveyance the Oregon & California Railroad Company has assumed to be the successor of that company under the grant of May 4, 1870 (Stip., R. IV, 1561).

PROGRESS IN THE CONSTRUCTION OF THE RAILROAD, FINANCIAL TRANSACTIONS OF THE OREGON & CALIFORNIA RAILROAD COMPANY AFTER 1880, AND STEPS BY WHICH THE SOUTHERN PACIFIC COMPANY SECURED CONTROL OF THAT COMPANY AND ESTABLISHED A MONOPOLY OF MORE THAN 19,000,000 ACRES OF LAND.

All of the outstanding capital stock of the Oregon & California Railroad Company was canceled on or about May 7, 1881. The authorized capital

stock was then established at, and still is, $19,000,000, consisting of $12,000,000 preferred and $7,000,000 common. This stock was issued and accepted in part payment of the existing indebtedness; the *balance* was taken care of by a bond issue (*infra*), and *all* mortgages and *other* instruments purporting to secure the indebtedness were satisfied and canceled (Stip., R. IV, 1562).

In pursuance of the adjustment of its financial affairs, the Oregon & California Railroad Company, on June 2, 1881, delivered to Henry Villard, Robert Peebles, and Charles Edward Bretherton, as trustees for the owners and holders of the preferred stock, a trust deed covering all its property.

By subsequent action under the last-mentioned trust deed, Stephen T. Gage (defendant) became, and is now, the only surviving trustee thereunder. The defendant Southern Pacific Company is the present owner of all of the preferred stock (Stip., R., IV, 1563). Gage, as such trustee, and the Southern Pacific Company, as the owner of the stock, assert a lien upon the lands covered by the trust deed.

Through two separate issues of bonds, bearing date June 1, 1881, and May 26, 1883, respectively (known and designated as "first-mortgage bonds" and "second-mortgage bonds"), the Oregon & California Railroad Company procured approximately $5,000,000, some of which was used to pay the remainder of its indebtedness (*supra*) and the balance went to the construction fund. And about June 1, 1881, the work of constructing the East Side

Railroad was resumed and thereafter continued until about January, 1884. During this period the road was extended from Roseburg to Ashland, Oreg., a distance of approximately 145 miles (Stip., R. IV, 1564). In January, 1884, construction was discontinued.

About January 19, 1885, default having been made in the payment of interest, suit was brought in the United States Circuit Court for Oregon, by certain of the first-mortgage bondholders, and the company was placed in the hands of a receiver (Stip., R. IV, 1564).

The Central Pacific Railroad Company, by consolidation, became about this time the owner of the Western Pacific Railroad Company and the *California* & Oregon Railroad Company, the company which built the part of the road lying in California.

In this way it secured all the lands granted to the *California* & Oregon Company by the act of July 25, 1866, in addition to its own lands acquired under the act of July 2, 1864, and continued to be the owner of all these lands until 1899. In February, 1885, it leased its line of railroad from Ogden to San Francisco and the branch thereof from Roseville Junction to Delta, Cal., together with certain other railroads and properties used in connection therewith, to the Southern Pacific Company for a period of 99 years. Under this lease the latter company took possession of the property covered thereby and has ever since held and controlled the same (Stip., R. IV, 1569); Ans., R., II, 957.)

On October 11, 1886, the Central Pacific Company, Pacific Improvement Company (a California corporation), and the Southern Pacific Company, made an agreement whereby the Pacific Improvement Company was to construct a line of road which would connect the Central Pacific lines (leased) with the line of the Oregon & California Company. This agreement further provided that the Pacific Improvement Company would, within a reasonable time, purchase and obtain possession and control of the *Oregon* & California Railroad Company (Stip., R. IV, 1571).

Prior to this time the stockholders of the last-named company had organized under the name of the stockholers committee; certain of the bondholders thereof under the name of Frankfort bondholders' committee, and certain others of the bondholders under the name of the London bondholders' committee. The bondholders' committees represented the owners of substantially all of the first and second mortgage bonds then outstanding (Stip., R. IV, 1572).

In March, 1887, the Pacific Improvement Company became the owner of a controlling interest in the Southern Pacific Company, and continued to hold the same until April, 1901 (Stip., R. IV, 1573). About this time, to wit, March 28, 1887, a contract was entered into between the Pacific Improvement Company, the committees just mentioned, the Southern Pacific Company, and the Union Trust Company

of New York, which resulted in the transfer of all the capital stock and all the second-mortgage bonds of the Oregon & California Railroad Company to the Pacific Improvement Company, and of all the first mortgage bonds of the *Oregon* & California Railroad Company to the Southern Pacific Company (Stip., R. IV, 1572). The stock thus transferred to the Pacific Improvement Company was held by it until 1901, and then delivered to the Southern Pacific Company, which has ever since owned and held the same.

On July 1, 1887, the Oregon & California Railroad Company conveyed to the Union Trust Company of New York, defendant, by trust deed, all its railroad lines constructed or to be constructed and all its other properties, including both land grants, to secure the payment of a $20,000,000 bond issue. The payment of these bonds was and is guaranteed by the Southern Pacific Company. Part of the proceeds of this bond issue was used to pay the first and second mortgage bonds issued June 1, 1881, and May 26, 1883, respectively (Stip., R. IV, 1573–5).

On the same day on which the aforementioned trust deed was executed the Oregon & California Railroad Company leased all its property to the Southern Pacific Company for a period of 40 years. Pursuant to this agreement the lessee took possession of the property. On June 6, same year, a contract was entered into between the *Oregon* & California Railroad Company and the Pacific Improvement Company for the construction by the latter

company of the former company's railroad from a point near Ashland, Oreg., south to the northern boundary line of the State of California, there to connect with the *California* & Oregon Railroad, now owned by the Central Pacific Company but leased by the Southern Pacific Company, and to equip the road with rolling stock and a telegraph line. At the time this contract was made a large part of the work provided for therein had been done by the Pacific Improvement Company (Stip., R. IV, 1576). In December following the railroad was completed and connected with the line of the California & Oregon Railroad Company (Hood, R., IV, 2061).

January 1, 1888, the Central Pacific *Railway* Company leased to the Southern Pacific Company its railroad from Delta to the northern boundary line of the State of California, and thus the Southern Pacific Company secured control of the entire line from Portland to Delta (Stip., R. IV, 1570). On June 6 following the receivership proceedings against the Oregon & California Railroad Company heretofore referred to, were dismissed, the receiver discharged, and all the first and second mortgage bonds issued prior to July 1, 1887, canceled, and the mortgages securing them released (Stip., R. IV, 1576).

On July 29, 1899, the Central Pacific *Railroad* Company conveyed to the Central Pacific *Railway* Company all of the unsold lands of the three land grants owned by it (Stip., R. IV. 1568), and on August 1, 1899, the Southern Pacific Company became, and has since remained, the principal stockholder

of the Central Pacific *Railroad* Company and Central Pacific *Railway* Company (Stip. R. IV, 1571).

On August 1, 1893, the lease of July 1, 1887, between the Oregon & California Railroad Company and the Southern Pacific Railroad Company was abrogated and a new one entered into for a period of 34 years. In this lease the Southern Pacific Company agreed, among other things, to pay all expenses connected with the lands and the land department of the *Oregon* & California Railroad Company, except as the same should be paid from the rentals or proceeds of the lands, and in addition to this it agreed to pay $5,000 per year, which, so far as requisite, was to be applied by the Oregon & California Railroad Company to the "*expense of maintaining and keeping up its corporate organization* under the laws of the State of Oregon." Under this lease the Southern Pacific Company has ever since operated the lines of the Oregon & California Company.

Through the stock manipulations just mentioned, the Southern Pacific Company secured control of the following grants of land:

	Acres.
Central Pacific (acts of July 1, 1862, and July 2, 1864).....	6,500,000.00
Oregon & California (acts of July 25, 1866, and May 4, 1870)..	3,500,000.00
California & Oregon (act of July 25, 1866).....	3,686,400.00
Southern Pacific Railroad Company (act of July 27, 1866)..	5,511,264.26
This gives it control of.....	19,197,664.26

So there may be no misapprehension in this regard, we think it proper to say that only the Oregon and California grants were subject to restrictions on the power of sale, nevertheless the figures show a monopoly of a vast area.

ADMINISTRATION OF THE TWO LAND GRANTS, AND THE CONNECTION OF SOUTHERN PACIFIC COMPANY THEREWITH.

From about 1884 until 1888 George H. Andrews supervised the land department of the Oregon & California Railroad Company, with headquarters at Portland (Loring, R., V, 2187). In the latter year William H. Mills was appointed land agent of the company (Gov. Ex. 129, R., XI, 5765; Minutes, 161). He was at this time also land agent of the Central Pacific Company (Casey, R., IV, 1879), in which position he continued, maintaining offices in San Francisco (Eberlein, R., V, 2230). Andrews remained, however, in active charge of the Portland office, with authority to execute contracts and discharge such other duties in connection with the sale of lands as might be assigned to him by Mills (Gov. Ex. 129, R., XI, 5765; Minutes, 164). Mills kept in touch with the Portland office by visits thereto and examinations made by his representative, Judge Singer (Loring, R., V, 2196).

This method of handling the lands continued until about January 1, 1903. (Loring, R., V, 2187.)

Some time before this a group of financiers headed by E. H. Harriman (Eberlein, R., V, 2307) acquired control of the Union Pacific Railroad Company, Southern Pacific *Railroad* Company, and Southern Pacific Company, including the Oregon & California Railroad Company, and thereby formed what is known as the Harriman system (Eberlein, R., V, 2229, 2298).

About January 1, 1903, Charles W. Eberlein, connected with the land department of the Union Pacific Railroad Company, was given charge, under the supervision of Judge Cornish, vice president of that company, of the land grants of the Oregon & California Railroad Company, Central Pacific Railroad Company, and Southern Pacific Railroad Company (Eberlein, R., V, 2229, 2298). He established headquarters at San Francisco. After looking into the land grants of the Oregon & California Railroad Company, he found that Mills had been keeping one set of records with respect to them in San Francisco and Andrews another set in Portland. This led to a serious confusion of accounts (Eberlein, R., V, 2229) and necessitated a reformation, which was undertaken at once and completed in the fall of 1904. After this all the records were removed from Portland to San Francisco (Eberlein, R., V, 2234), where they remained under Eberlein's general supervision. One set of men kept the books with reference to *all* the land grants which he controlled, but the records of the grants of each railroad were kept separate (Eberlein, R., V, 2231, 2234, 2235).

Mr. Eberlein testified that in 1906 he issued circulars to the effect that he would sell agricultural and grazing lands as soon as applications made could be examined (R., V, 2258), but as to the timber lands the company was not in a position to sell, and that he was authorized by Judge Cornish to sell

only agricultural and grazing lands (R., V, 2331, 2332). However, the only sale made by him from the time he took charge of the land department in 1903 until the time when he severed his connection therewith in 1908, was to the Southern Pacific Company (R., V, 2280).

In September, 1908, B. A. McAllaster succeeded Eberlein as land commissioner of all the grants (McAllaster, R., IV, 1920). His salary was fixed by Judge Cornish, and was apportioned among the several companies served, without reference to the services rendered each (McAllaster, R., IV, 2003). He took instructions from Judge Cornish and discussed with him the policy to be pursued in handling the lands of the Oregon & California Railroad Company (McAllaster, R., IV, 2003, 1977). After the death of Judge Cornish in 1908, McAllaster received his instructions from R. S. Lovett, of the Southern Pacific Company, until 1910; then from Mr. Herrin, general counsel, and to some extent from Mr. Sproule, president of the same company.

From the time of becoming land commissioner McAllaster kept his offices in the Flood Building at San Francisco, where the greater portion of the offices of the Southern Pacific Company were located. On the door leading to his office were printed the words, "Southern Pacific Company—Land Department—B. A. McAllaster, Land Commissioner—F. W. Houtz, Assistant Land Commissioner" (McAllaster, R., IV, 1894, 1895, 1896). (McAllaster says

the words "Southern Pacific Company" had been placed there without his knowledge). On the letterheads used in his office were printed the words, "Southern Pacific Company—Land Department," and beneath them these words, "Southern Pacific Land Co.—Southern Pacific Railroad Co.—Central Pacific Railway Co.—Oregon & California Railroad Co.—Oregon & California Land Co.—B. A. McAllaster, Land Commissioner—F. W. Houtz, Assistand Land Commissioner—Room 801, Flood Building—San Francisco, Cal." (McAllaster, R., IV, 1985; Gov. Ex. 112, R., XI, 5477).

There were used in his office, he said, other letterheads which contained only the words, "Oregon & California Railroad Company."

The annual reports of the Southern Pacific Company contain the name of McAllaster as an officer of that company (McAllaster, R., IV, 2009).

The question as to how much of the expenses of running McAllaster's department should be borne by each of the railroad companies concerned, was determined by the auditor of the Southern Pacific Company (Adams, R., V, 2166, 2167).

The Southern Pacific Company is the operating company of its constituent lines, including the Oregon & California Railroad, and controls substantially all the transportation facilities of Oregon west of the Cascade Mountains, and particularly south of Albany (Eberlein, R., V, 2306).

Construction of the first section of 20 miles of the East Side line was finally approved on January 29, 1870, and the last on November 8, 1889. The first section of 20 miles of the West Side road was accepted and finally approved February 16, 1872, and the last, and only other section, June 23, 1876. (Stip., R. IV, 1558).

Pursuant to the rules and regulations of the Department of the Interior all patents to the granted lands were issued upon applications in writing of the Oregon & California Railroad Company as the "successor and assignee" of the East Side and West Side Companies, respectively. Each application contained a descriptive list of the lands for which patents were desired, and was accompanied by an affidavit, signed and sworn to by the land agent of the defendant Oregon & California Railroad Company, alleging, among other things, that "The said lands are vacant, unappropriated, are not interdicted mineral nor reserved lands, and are of the character contemplated by the granting act," under which patents were applied for (Stip., R. IV, 1586).

On May 9, 1871, the first patent covering lands of the East Side grant was issued, and, with the exception of Supplemental Patent No. 3, hereinafter referred to (*infra*, p. 82), the last patent was issued December 7, 1906. Under date of October 9, 1895, the first patent was issued covering lands of the West Side grant, and the last on March 20, 1903

(Gov. Ex. 110, R., X, 5374; Stip., R., IV, 1577). All of the patents under both the East and West Side grants were issued to the Oregon & California Railroad Company (Gov. Ex. 110, R., X, 5374).

That part of the West Side Railroad extending from Forest Grove to Astoria was never constructed, and for this reason the granted lands of the West Side grant coterminous with such unconstructed railroad were, by act of Congress approved January 31, 1885, declared forfeited to the United States.

The gross amount of land that has inured to the Oregon & California Railroad Company, under both the East and West Side grants, is 3,182,169.57 acres (Eddy, R., V, 2569). Between the years 1871 and 1906 there were patented of the East Side grant 2,745,786.68 acres, and between the years 1895 and 1903 there were patented of the West Side grant 128,618.13 acres (Stip., R. 1564, 1577).

Put in the form of a table, the figures are:

		Acres.
Lands earned under both grants		3,182,169.57
Patented under East Side grant	2,745,786.68	
Patented under West Side grant	128,618.13	
		2,874,404.81
Total not patented		307,764.76

Supplemental Patent No. 3, dated June 21, 1909, was issued upon a letter request of A. A. Hoehling, as attorney for the Oregon & California Railroad Company (Def. Ex. 250—R., XI, 5767), which set forth a discrepancy in the descriptions of lands included in a patent issued May 29, 1872. To correct this description this supplemental patent was issued (Casey, R., IV, 1863). The records of the General

Land Office show that this matter was handled in that office by a clerk named Lord, who died prior to the taking of testimony in this case (Casey, R., IV, 1866).

LANDS REMAINING UNSOLD, AND REVENUE DERIVED FROM BOTH GRANTS.

A correct description of all the unsold patented lands is given in Exhibit K of the bill (R., I, 273, 508) as corrected by Exhibit No. 5 of the answer (R., II, 987, 999; Stip., R. IV, 1580).

		Acres.
Total unsold land		2,360,492.81
Of which there has been patented	2,075,616.45	
Unpatented	284,876.36	
	2,360,492.81	2,360,492.81

The reasonable value of these unsold lands *exceeds* the sum of $30,000,000, and they are all claimed by the Oregon & California Railroad Company under and by virtue of the East and West Side grants (Stip., R. IV, 1580, 1582).

The net amount received by the Oregon & California Railroad Company from the granted lands, as given by the defendants, appears in the following table:

(DEFT. EX. 289, R., XIII, 6836.)

Receipts:	
From sales of lands	$4,338,822.53
From sales of timber on lands	18,850.25
(STIP., R., IV, 1583.)	
From forfeited contracts	88,205.06
From lease of lands	5,532.07
From timber used by railroad company	18,350.25
From timber depredations	10,687.92
(ANS., R., II, 915.)	
From interest on contracts	1,025,922.89
	5,506,870.97

(DEPT. EX. 289, R., XIII, 6836.)

Disbursements:	
To advertising	$34,784.85
To law expenses	218,415.25
To grading lands	142,651.40
To United States surveys	145,977.26
To salaries and office expenses	624,344.19
To stationery and printing	18,369.89
To taxes on lands	1,827,776.94
	3,011,776.94
Total receipts	5,506,870.97
Total disbursements	3,011,776.94
Credit balance	2,495,094.03

(Bill prays for forfeiture of unsold lands only.)

DEMAND FOR THE LANDS.

Until about 1890 or 1891 there was substantially no demand for the granted lands, except for the purpose of settlement by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres and at prices not exceeding $2.50 an acre, and nearly all sales made prior to the year 1894 were of that character (Stip., R., IV, 1584).

In 1888 an increased force of cruisers was employed by the land department of the Oregon & California Railroad Company to examine the lands (Loring. R., V, 2197). Part of the cruisers' duties was to report on bodies of timber that could be operated together (Loring, R., V, 2224). About one-half of the lands had been examined and reported on prior to October 1, 1904 (Loring, R., V, 2199). A rapidly increasing demand for the lands in large quantities and at increased prices commenced about 1889 or 1890 and *has continued ever since* (Stip., R., IV, 1578). Approximately three-

fourths of all sales made since 1887 were made by contracts providing for payments of purchase price in from five to ten annual payments and execution of conveyances upon final payment. Many of these sale contracts were pending on January 1, 1903, pursuant to which conveyances were issued subsequently, and a considerable number of them was still pending when this suit was brought (Stip., R., IV, 1579).

At the time the joint and several answer was filed, 740,002.45 acres had been sold and conveyed, and 81,684.31 acres were under contracts of sale (Stip., R., IV, 1579). About the same time there remained unsold of the granted lands 2,075,616.45 acres, of which, as we have heretofore stated, 2,975-, 616.45 were patented, and 284,876.36 unpatented (Stip., R., IV, 1580).

BREACHES OF THE "ACTUAL SETTLERS PROVISION."

On April 15, 1870, the Oregon & California Railroad Company, as we have heretofore stated, conveyed all its lands in trust to certain trustees to secure a bond issue of $10,950,000 and gave to the trustees the right to sell or dispose of the lands with the consent of the company and apply the proceeds thereof to the payment of the debt (Govt. Ex. 126A, R., XI, 5530). Afterwards the trustees and the railroad company united in a conveyance of the lands to the European & Oregon Land Company to be paid for at the agreed price of $1.25 per acre (Govt. Ex. 126I, R., XI, 5734).

On or about the 2d day of June, 1881, the Oregon & California Railroad Company executed and delivered to Henry Villard, Robert Davie Peebles, and Charles Edward Bretherton, as trustees, an instrument purporting to convey to said trustees all of the lands of both the East and West Side grants, in trust, to secure the payment of a preferential dividend. And it was made the duty of the trustees or their successors upon certain defaults—

> to sell said rolling stock, equipment, and appurtenances to the land and premises comprised herein or then subject to the lien of these presents, in one lot or in more than one lot or parcel, and at one time or different times, and for cash or on reasonable credit, payment therefor being secured on the property sold, and otherwise, upon such terms and in such manner as said trustees may in their discretion think best (Bill, R., I, 152; Stip., R., IV, 1562).

By mortgage deed dated July 1, 1887 (*ante*, p. 74), the Oregon & California Railroad Company conveyed to the Union Trust Company all of its unsold granted land, to secure a bond issue and authorized the trustees in case of default—

> to cause the whole of the said premises, estates, franchises, roads, privileges, and property hereby granted and conveyed * * * to be sold at public auction in the city of New York in the State of New York, or in the city of Portland in the State of Oregon.

Prior to 1894, as we have seen, there was substantially no demand for the lands except for the purpose of settlement, and few sales in excessive quantities were made, but after that there were many such sales (Stip., R., 1V, 1578, 1584).

From 1884 until the lands were withdrawn from sale in 1903, they were sold at the best obtainable price and in quantities as great as the purchaser was willing to buy (Loring, R., V, 2208–2223). The company did not require the applicants to state whether they desired the lands for purposes of actual settlement or not (Loring, R., V, 2206). When the demand by timber buyers arose about 1894, the railroad company encouraged it (Loring, R., V, 2223). The prices were determined at first by Mr. Loring, chief clerk of the land department of the company, and then by Mr. Andrews. But after the appointment of Mr. Mills as land agent in 1888 (*ante*, p. 77) the matter of fixing prices was subject to his supervision. These prices were always the highest obtainable, and had *no reference* to *those fixed in the grant* (Loring, R., V, 2216).

From 1894 to 1903 there were many sales of from 1,000 to 20,000 acres to one purchaser at prices ranging from $5 to $40 per acre, and there was one sale of 45,000 acres at $7 per acre to a single purchaser. Up to 1903 the company had made approximately 5,306 sales; of these sales 376 did and 4,930 did not exceed 160 acres to one purchaser, but the

376 sales covered 524,000 acres, while the 4,930 covered only 296,000 acres (Stip., R., IV, 1578). Substantially all of the 524,000 acres were sold to persons who were not actual settlers, who purchased for purposes other than settlement and at prices in excess of $2.50 per acre. About 478,000 acres of the 524,000 were sold since 1897, and approximately 370,000 of the 524,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each. The following table is correct:

	Acres.	
Total sales		820,000
Sales not exceeding 160 acres to one person	296,000	
Sales exceeding 160 acres to one person and at more than $2.50 per acre	524,000	
Total acres sold		820,000

Exhibit J, attached to the bill, correctly shows all sales made and their character as to quantity and price. Exhibit 4, attached to the answer, purporting to cover the same subject, differs from Exhibit J, but the difference is accounted for by the fact that Exhibit J is based upon executed conveyances while Exhibit 4 is based upon original sales (Bill, R., I, 260; ans., R., II, 971; Stip., R., IV, 1579).

It is conceded by the defendants that in making sales *no attention* was paid to the restrictions of the actual settlers' provision, and that if those restrictions had been called to the attention of the defendant railroad company at the time the sales were made it would have *disregarded them* (Fenton, R., V, 2369).

COMPANY REFUSES TO SELL, AND WITHDRAWS THE LANDS FROM MARKET.

B. A. McAllaster, land commissioner, testified that between September, 1907, and July, 1912, about 10,000 applications to purchase quarter sections of the land at $2.50 per acre were made to the company and refused. (McAllaster, R., IV, 1959.)

It is stipulated that there were 4,000 such applicants between January 1, 1903, and February 14, 1907. In some instances the applicants claimed to be actual settlers upon the lands applied for, and in all other cases that they desired the lands for actual settlement. Each applicant stated at the time he made his application that he was able to pay $2.50 per acre for the lands applied for, and in some instances the tender was actually made.

The refusal of the company to sell was based on the stated claim that the lands were essentially timber lands and unsuitable for any other purpose.

On January 1, 1903, the company *withdrew* from *sale* all the unsold lands (Stip., R., IV, 1581).

Approximately 1,800,000 acres of the unsold lands are situated southerly from Eugene, Oreg., and constitute more than one-third, in alternate sections, of all lands lying within approximately 20 miles on each side of the company's railroad between that point and the southern boundary of the State (Stip., R., IV, 1581).

CHANGE IN FORM OF DEEDS.

Prior to 1892 the Oregon & California Railroad Company used a form of deed containing covenants of warranty (Govt. Ex. 129, R., XI, 5765; Minutes, p. 248; Singer, R., V, 2508). The use of those deeds was discontinued after that time by order of the board of directors and a form adopted which did not contain warranties (Stip., R., IV, 1577).

The new form of deed, one witness said, was adopted for the purpose of standardizing deed forms, and he denied that it was intended to anticipate any contention by the Government in this suit (Singer, R., V, 2509).

The contracts and deeds executed by the defendant Oregon & California Railroad Company prior to (about) the year 1894 contained the following reservation:

> also reserving all claim of the United States to the same as mineral lands. (Stip., R., IV, 1587).

This was stricken from the contracts and deeds executed by the company between (about) 1894 and 1902; and in contracts and deeds executed *after* that the words—

> and also reserving and excepting from said described premises so much thereof as may be mineral lands—

were substituted for it (Stip., R., IV, 1587).

VALUE OF THE PROPERTY COVERED BY UNION TRUST COMPANY MORTGAGE.

The mortgage to the Union Trust Company covers, in addition to the unsold lands, 660 miles of railroad lines and other property of the Oregon & California Railroad Company. This road was worth $50,000 per mile at the time the mortgage was given and is worth more now (Koehler, R., IV, 1903–1904).

On this basis the property covered by the mortgage, outside of the granted lands, is worth $33,000,000. The balance due on the mortgage is $17,745,000 (Stip., R., IV, 1575).

The Southern Pacific Company, guarantor of the mortgage debt, is financially able to pay the debt secured (Koehler, R., IV, 1908).

POSSESSION OF THE LANDS.

The only occupation or possession asserted by the railroad company has been through the cruising and examination of lands, the payment of taxes, contests in land office to defend title, maintenance of fire patrols, the leasing of lands (the highest acreage leased being 24,671.02 acres), (McAllaster, R., IV, 1980, 1984; Eberlein, R., V, 2288), issuance of deeds, inspection of reported trespasses, and protection of the lands from depredation and waste (Loring, R., V, 2203).

REPORTS MADE TO A BUREAU OF THE INTERIOR DEPARTMENT.

The railroad company made reports to a bureau of the Interior Department between 1879 and 1903. These reports show the maximum and average selling price of the lands to be in some instances in excess of $2.50 an acre (Stip., R., IV, 1590, et seq.), but *do not* show they had been sold in tracts of more than 160 acres to one person or to persons who were not actual settlers. The bureau chief transmitted the reports annually to the Secretary of the Interior, who in turn transmitted them to the President, and by him they were laid before Congress, where they were referred to appropriate committees and printed as executive documents (Stip., R., IV, 1612). Beyond this it does not appear that Congress gave them any consideration.

APPROVAL OF TITLE TO BASE LAND.

Certain of the lands sold by the company in violation of the grant as to price and quantity were subsequently deeded by the purchasers to the Government in lieu of other lands received from the Government, in accordance with the provisions of an act approved June 4, 1897. The lands thus deeded are called base lands; those received in their place, lieu lands. Clerks in the Interior Department examined the title to the base lands. At the time of the examinations they had no knowledge of the act of April 10, 1869, or May 4, 1870. The result of their examinations was approved *pro forma*

by the Chief of the Forest Lieu Division, Commissioner of the General Land Office, and Secretary of the Interior (Stip., R., IV, 1885, et seq.).

ACTUAL SETTLER'S PROVISIONS NOT CONSIDERED WHEN PATENTS WERE ISSUED.

The work of determining that the lands for which patents were requested were free from all claims belonged to the Railroad Division of the General Land Office. This division, in recommending the list of selections for patenting, never considered or determined whether any of the conditions subsequent annexed to the grants involved in this suit had been violated (R., IV, 1854, 1856, 1861).

FREE TRANSPORTATION OF PASSENGERS AND FREIGHT FOR THE GOVERNMENT.

Defendants shows, by Exhibit 288, that the railroad company furnished to the Government free transportation for passengers and freight between 1906 and 1910 of the value of $315,828.34. (R., XIII, 6835.) The exhibit also shows the amount supplied each year. The volume of free transportation from 1872 to 1906 was approximately the same by years as shown by the exhibit, except that prior to 1887 there were few shipments (Sherburn, R., V, 2412). The Government paid for all transportation of mails on rates based upon weight (Sherburn, R., V, 2413), and continued to make requests for free transportation up to the date of taking testimony in this case (Sherburne, R., V, 2412).

TAXES PAID.

Defendants showed by Mr. Eddy, tax agent of the Southern Pacific Company and Oregon & California Company, that the total amount of taxes paid on the lands was $2,434,843.33, of which $1,637,601.69 has been paid since 1905 (Eddy, R., V, 2567). From 1874 to 1907 the total amount of taxes paid was $1,208,833.86, or 58 cents per acre on 2,073,415 acres then owned, and from 1908 to 1911 taxes paid were $1,266,009.47, or 57 cents an acre on 2,109,927 acres owned during that period. The average tax paid, based on the total grant of 3,182,169.57 acres, is 76 cents per acre, of which amount 38 cents per acre has been paid since the institution of this suit (Eddy, R., V, 2569).

USES OF CONGRESSIONAL RECORDS.

All committee reports and debates in Congress appearing in the Congressional Globe or Congressional Record, and all other proceedings in Congress published in recognized official reports relating to the enactments of the acts of July 25, 1866; June 25, 1868; April 10, 1869; May 4, 1870; January 31, 1885; and September 29, 1890, are treated as received in evidence subject to the defendants' right to object on the ground of incompetency, irrelevancy, and immateriality, except that the objection of incompetency shall not go to the identification of the documents (Stip., R. IV, 1623).

PART III.

DISPUTED FACTS—THE CHARACTER OF THE LAND.

This is the only serious question about which there is a dispute of fact. The defendants, contending that the actual settlers' provision applies only to cultivable lands, offered about 36 witnesses and many exhibits to sustain their claim. To all this testimony the Government objected on the ground that it was immaterial what the character of the land was—that the actual settlers' provision applied, irrespective of whether the land was tillable or otherwise—and it still urges that objection. (R. IV, p. 1
However, out of caution the Government produced about 70 witnesses and several exhibits in rebuttal.

An abstract of the testimony of all the witnesses, as well as of all the exhibits produced by both sides, follows below.

A number of the witnesses did not describe the land by legal subdivisions, but utilized local landmarks, such as "from east fork of Dead Indian Creek to Little Butte Creek." In all such cases the proper legal subdivisions are substituted for the descriptions given by the witnesses.

Some of the witnesses testified as to more than one county, others as to one county only, and most as to a small part of a county.

Testimony relating to more than one county is given under the head "Generally" and that relating to a county or less appears under the name of the county to which it refers.

DEFENDANTS' TESTIMONY.

GENERALLY.

A. W. Reese: Engaged in the lumber and timber business since 1882, and for the past 10 or 12 years manager of the field work of the Oregon & California Railroad Company. (R., VI, 2800–2810.) Defendants' Exhibit 353 is a tabulated statement of the grant land cruised by him during the last four or five years. It shows the present condition of the land, also a classification of it after being denuded of timber. (R., VI, 2801.) Examined in all 48,258 acres, of which he classified in its *present* condition 36,616 acres as timberland, 8,577 acres as grazing land, and 3,066 acres as agricultural land, and *after* denuding 41,606 acres as grazing land and 6,652 acres as agricultural land. (R., VI, 2802.) Agricultural lands, according to him, were such as had very little timber, could be cultivated and yield a reasonable return on an investment; timberlands were such as were chiefly valuable for merchantable timber; grazing lands, after the timber had been removed, included, he said, all lands that were not agricultural, except a small portion which appeared to be of no value on account of being rocky. (R., VI, 2809.) He estimated that of the entire grant which he had examined, 4 or 5 per cent was suitable

in its present condition for agricultural purposes, about 75 per cent was valuable for timber only, and about 20 per cent for grazing. Of the timberlands there was, he said, a very small per cent which would justify the cost of clearing (R., VI, 2815), which he estimated, from knowledge gained by inquiry, at $100 to $500 an acre for heavily timbered lands (R., VI, 2815).

Witness testified that defendants' Exhibits 355 and 356 were tabulated statements made from the reports of Timber Cruisers F. A. Elliott and S. A. Carmichael, respectively (R., VI, 2804–2805); that defendants' Exhibit 357 was a tabulated statement from cruiser reports of T. J. Cronin, C. A. Cavill, M. F. McCowan, John D. McDonald, Ben Peck, and W. W. Pennoyer, who had been employed as timber cruisers by the railroad company. (R., VI, 2805.) Defendants' Exhibits 354 and 358 were forms used by the company, the former for timber cruisers' reports and the latter for field examinations. (R., VI, 2803–2806.) Defendants' Exhibit 342 was a map showing the location of the various tracts cruised by the company's cruisers (R., VI, 2808), and defendants' Exhibit 362 is a tabulated compilation of defendants' Exhibits Nos. 343, 344, 351, 353, 354, 355, 356, and 357 (R., VI, 2808–2816). The greater portion of the timber cruises mentioned in his testimony were made since 1907, but he had cruisers at work in 1906. (R., VI, 2823.)

Homer D. Angell, an attorney, testified that he had been employed by the Oregon & California Rail-

road Company to make tax investigations and examinations of land, etc. (R., VI, 2765, 2785.) He began to make field examinations as to settlers on the lands in 1907 (R., VI, 2786); had been over some of the lands in Columbia County which were heavily timbered, and valuable for timber only (R., VI, 2772); had been on lands in township 40, 3 west, in Clackamas County; part of these lands contained heavy timber and part had been burned over, but the chief value was for timber. (R., VI, 2771.) He had been over portions of the timbered area of Marion County, and had been *informed* that the unsold lands were mountainous and rocky, and that the lands in this county were chiefly valuable for timber, though there was a considerable area of burned-over land. (R., VI, 2771.) In Polk County some of the grant lands were timbered and some had been burned over, but their chief value was for timber. (R., VI, 2771.) He had also been over *some* of the grant lands in Multnomah County which were mountainous and heavily timbered. (R., VI, 2772.) In Tillamook County the chief value of the grant lands was for the timber. (R., VI, 2772.) He had been over a considerable portion of the lands in eastern Linn County, and their chief value was also for timber, though portions of the lands might be used for agricultural purposes. (R., VI, 2770.) In Lane County he had examined some lands along the McKenzie River which were timbered or had been burned over, and expressed the opinion that their only value was for the timber. (R., VI, 2770.) In

Douglas County he surveyed 30 miles of the Willamette meridian, and also two townships. The lands he surveyed over were mountainous, heavily timbered, or contained an undergrowth, except isolated tracts on the creek bottom, and were chiefly valuable for the timber. (R., VI, 2769, 2781.) He expressed the opinion that, excepting the timberlands in the valleys, the grant lands in Jackson County were of little value, because of rocks and thick brush, with some scattering timber. He did not know whether he was on any of the unsold grant lands in this county.

He also testified that the lands of Josephine County were similar to those of Jackson. The soil on the uplands being of poor quality and not adapted to agriculture, because a great deal of it was decomposed granite. (R., VI, 2769.)

Witness expressed the opinion that there was not a quarter section in the grant a man could make a living on by grazing, because of the high altitude and heavy snow fall in winter (R., VI, 2776), and that all the lands suitable for agricultural or dairying were secured by individuals soon after the grant was acquired (R., VI, 2800). Of the lands he had surveyed since 1892, not one-half dozen quarter sections acquired under the homestead law in the timbered area were occupied by the entrymen after securing title. Such lands had been sold to large timber holders, and the homesteads abandoned. He expressed the opinion that this would be the result if title to the unsold lands passed to so-called settlers

in quantities of 160 acres, at $2.50 an acre. (R., VI, 2770.)

Witness testified that he assisted in taking photographs shown in defendant's Exhibits 267 and 270.

He also said that defendant's Exhibits 345, 346, 347, 348, and 349 were articles and bulletins prepared by officers of the Forestry Service, Department of Agriculture, and Department of Commerce and Labor, relating to the timber industry and the properties of Douglas fir. (R., VI, 2786 et seq.)

Ben Irwin testified that he was employed by the Oregon & California Railroad Company from 1905 to 1910, chiefly in abstracting records and in some cases examining lands (R., VI, 2899); that he had been over the land of the company in Jackson and Josephine Counties to a considerable extent, and practically in all parts of the grant, except in Benton, Washington, Tillamook, and Lincoln Counties. He expressed the opinion that a great majority of the land in the grant was valuable for nothing except the timber growing on it, and that there was a large amount of land in the southern part of the grant which was useless for any other purpose, the soil being rocky, the land mountainous, and requiring irrigation. (R., VI, 2906.) Prior to his employment by the railroad company, he had been a stenographer and clerk in stores. When about twenty years of age, engaged some in farming in the prairie country of Nebraska. (R., VI, 2908.) His only experience in timber work was while in the employ of the rail-

road company, as above stated, from 1907 to 1910. (R., VI, 2909.)

Witness testified that defendants' Exhibits 270 and 313 were photographs of lands within the grant limits. (R., VI, 2900–2907.)

W. J. Lander testified, on direct examination, that he had worked for the Oregon & California Railroad Company, as fire warden, for 15 years, until May, 1912 (R., VI, 2857), and since had been employed under F. A. Elliott (R., VI, 2846). Upon cross-examination, he said that he had worked for the railroad company during the winter of 1912 and 1913, a few months prior to the trial, preparing records to be used in this suit. (R., VI, 2857.) His service as fire warden of the company was confined to Douglas County, but he had also examined lands in all the rest of the counties of the grant, with reference to the character of and improvements upon the lands. (R., VI, 2847.) He had been on portions of the grant lands in Jackson, Josephine, Washington, Polk, Yamhill, Benton, Lane, Clackamas, Linn, Marion, and Columbia Counties. (R., VI, 2849.) Generally the unsold lands in the grant, situated in the southern part of the State, were rough, broken, and rocky, with clay soil that was not very good. (R., VI, 2854.)

He testified that he knew of no railroad lands in Douglas County that could be used for farming purposes in their present condition, and expressed the opinion that probably 3 or 4 per cent could be used

for that purpose when cleared of timber, and some of the lands might be used for grazing purposes. In his opinion, the chief value of the unsold lands in Douglas County was for the timber (R., VI, 2849), and he thought this same condition prevailed as to all of the unsold lands. He thought that settlers could not make a living on 160 acres of the unsold lands in Douglas County, and that if the railroad company had sold the lands to actual settlers at $2.50 an acre, in quantities of 160 acres, the lands would be sold by the purchasers to the timber companies. He did not think that a settler could make a living on 160 acres of the land, after clearing, by grazing stock. (R., VI, 2853.)

Witness estimated the cost of clearing burned-over lands from $50 to $100 an acre. (R., VI, 2849.) He thought that a person could buy lands cleared for less money than it would cost to clear the timbered lands. (R., VI, 2849.) Twenty years ago the grant land in Douglas County was considered worthless because it was timbered. Prior to the time timber came into demand the grant lands were usually bought by people who wanted to clear up a little home. (R., VI, 2848.)

In making an examination for the railroad company, he found that the railroad land that could be used for grazing or agricultural purposes had all been appropriated in some way (R., VI, 2847); the highest price he had known of a quarter section of timber lands in Douglas County or western Oregon selling for was $5,000 (R., VI, 2855).

D. C. McLennan testified that defendant's Exhibit 351 was a tabulation prepared by A. W. Reese from timber cruise reports made by witness while employed by the railroad company, since 1902. (R., VI, 2559.) Witness said that if the grant lands covered with valuable timber were sold to actual settlers at $2.50 an acre, in quantities of 160 acres, the settlers would probably sell the timber, and if the land was fit for agriculture it would be used for agricultural or grazing land (R., VI, 2862–2863); that a settler would have to clear the timber off in order to raise stock, and could not make a living from the land while he was clearing it (R., VI, 2863). He expressed the opinion that it would cost as high as $200 or $300 an acre to clear some of this land for plowing (R., VI, 2867), but he had had no experience in clearing such timberland (R., VI, 2866). He also testified that lands taken under the timber and stone act in the Cascade or Coast Ranges of mountains within the limits of the grant are now owned by timber companies, the homesteaders living on the land only until they got title, and then sold it. (R., VI, 2864.) He did not know whether abandoned improvements he had seen on the even sections within the grant belonged to homesteaders or what their use had been. (R., VI, 2869.)

S. C. Bruce testified that he had been employed by the Oregon & California Railroad Company examining lands and cruising timber since 1907 (R., VI, 2825); he first cruised timber for the company in 1909 (R., VI, 2832). Witness testified that Defend-

ant's Exhibit 343 was a tabulated statement made from his reports while working for the railroad company (R., VI, 2830). In making his classification of lands, after the timber was removed, he used but two classes—grazing and agricultural—with no allowance for worthless land. He classified as timber lands, such lands as carried more than 100,000 feet to 40 acres, and as grazing lands such as had no timber. In his classification of land as grazing, when denuded of timber, he included land that was level enough to be farmed or tilled after the land was cleared (R., VI, 2827), and classified as agricultural, when denuded of timber, that which would be level enough to cultivate. Land that was rocky, or the soil not fit for cultivation, he classified as grazing (R., VI, 2827).

The lands examined by him could be used, he said, for grazing, except such portions in Jackson County as were worthless on account of rocks and chaparral. In order to put the land in condition for grazing, the timber would have to be removed and the ground seeded (R., VI, 2828.) Witness was doubtful as to whether a settler could support himself and family on ground classified by him as grazing in its present condition, or after the timber was removed. He thought a settler could keep eight head of stock on a quarter section of land, and might make a living from this stock if the land was not too steep. (R., VI, 2831.)

L. D. McLeod testified that he had been working as a compass man and land cruiser for the defendant,

Oregon & California Railroad Company, since 1908. (R., VI, 2833.) Defendant's Exhibit 344 is a tabulation of his reports to the railroad company of grant lands examined by him. (R., VI, 2833.) He had made several trips into Clackamas, Tillamook, and Washington Counties, other than his cruise trips, and the lands in these counties were valuable chiefly for timber. (R., VI, 2843.) He had been over the grant quite thoroughly, but was not prepared to say what percentage is chiefly valuable for timber, but that the lands were heavily timbered. He estimated the percentage of agricultural lands in their present condition, in various counties, as follows: Coos, 5 per cent; Douglas, 5 per cent; Lane, 6 or 7 per cent; Marion, 7 per cent; Clackamas, 6.77 per cent; and Perry none. (R., VI, 2841, 2843.) Witness expressed the opinion that a settler could not make a living on 160 acres of the grazing and timber land. (R., VI, 2836.) He *supposed* he had a general knowledge of the cost of clearing timberland, and that it would be from $75 to $500 an acre without removing the stumps. (R., VI, 2835.) He had called upon people in behalf of the company who had settled on the grant land in regard to leasing, it being the policy of the company to have those living on the land lease it. (R., VI, 2844.)

Witness testified that prior to his employment with the railroad company he had been a street car conductor for three years; had very little experience in the timber business before he commenced working for the railroad company. (R., VI, 2841.)

Roy Woods, testified that he was 36 years old, and since he was 21 years had followed the occupation of stationary engineer. He worked at various times, since 1902 for the Oregon & California Railroad Company. His acquaintance with the railroad lands was obtained while in the employ of the company. (R., VI, 2877.) During his employment he made examinations with reference to settlers on the lands in Columbia, Washington, Jackson, and Josephine Counties. (R., VI, 2871.) Had not worked for the railroad company since June, 1912. (R., VI, 2871.) He had been over some of the lands in Columbia, Josephine, Coos, and a little in Douglas County. (R., VI, 2870.) Did not know the stand of timber necessary to render land valuable as timber land, as he was not a timber man. (R., VI, 2872.) Could not express an opinion as to the amount of timber on a 40-acre tract of this land, and had no experience in clearing land. (R., VI, 2872.) He had no knowledge of abandoned homesteads in timber regions (R., VI, 2872), but he had seen a good many homesteads in even sections that apparently had been settled and abandoned, some of the entrymen were living close to these homesteads. (R., VI, 2872.) Practically all homesteads in the part of Columbia County he went over, were abandoned. (R., VI, 2873.)

Witness testified that the unsold lands of the company which he had seen were chiefly valuable for timber. (R., VI, 2872.) Also expressed the opinion that a settler could not make a living on 160 acres of

timber land in this grant, and that if the railroad company had sold the timbered lands to actual settlers they probably would have sold them to some timber corporation. (R., VI, 2875.)

Charles W. Eberlein, who formerly had charge of the land interests of the "Harriman system" on the Pacific coast, did not think that the timbered lands in the grant were available for settlement, because of the cost of clearing them, which he thought would be from $50 to $150 an acre. (R., V, 2273, 2277.)

This witness had practically no *personal* knowledge of the grant. He had been in the grant at only two points, one in Multonomah County in northern Oregon, and one in Klamath County in southern Oregon. (R., V, 2382.)

F. A. Elliott testified that he was employed by the land department of the Oregon & California Railroad Company from April, 1889, until May, 1906, as an assistant land examiner in cruising and classifying lands and as chief land examiner. (R., VI, 2716.) Since April, 1911, he has been State forester of Oregon. (R., VI, 2714.) He had *probably* cruised the lands shown in defendants' Exhibit 355 since 1906. (R., VI, 2728.)

Witness testified that he had cruised a great deal of the unsold lands in all the counties within the limits of the grant except Curry County. In his reports he classified all lands in their present condition as timbered, agricultural, or grazing, and after the removal of the timber as agricultural and grazing, the latter class including lands that were

unfitted for any purpose. (R., VI, 2717.) He estimated that from 5 to 10 per cent of the unsold lands were suitable for purposes of settlement. (R., VI, 2721, 2722.) The chief value of the unsold lands, he said, was in the timber. (R., VI, 2723.) However, the best timber land in the grant had been sold. (R., VI, 2718.) In his opinion 40 per cent of the grant lands in Jackson and Douglas County were worthless, being rocky, covered with brush, and very rough. (R., VI, 2718.) He estimated the average value of the best timbered quarter section of the unsold lands at $3,000, the maximum value at $10,000. (R., VI, 2720.) He knew of none of the vacant unsold lands of the company that would support a family. (R., VI, 2761.) While with the railroad company he never knew of a man purchasing a quarter section of the grant land and actually making a home on the land. It would, in his opinion, be impossible for an actual settler to make a living on one of the best quarter sections of timber lands. (R., VI, 2727.) Very few of the homestead entrymen on the even sections remained on the lands after final proof, and the lands so obtained are now largely owned by timber investors.

Witness expressed the opinion that the land, if sold to actual settlers, at $2.50 an acre, in quantities of 160 acres, would be purchased for the timber that was on it, and would eventually go into large timber holdings, although occasionally a man might take a quarter section for his own use. (R., VI, 2722.)

He was of the opinion that the unsold grant lands should be largely used for forestry purposes, and if this was done, good piling and some saw timber could be produced within a period of 50 to 75 years. (R., VI, 2725, 2761.)

For the purpose of impeaching this witness, complainant introduced in evidence Government Exhibit 122, a typewritten statement which B. D. Townsend, formerly attorney for the complainant in this suit, testified, was a substantial report of statements made to him by Elliott. (Townsend, R., VIII, 4269.) In these statements Elliott stated that 50 per cent of the unsold grant land would be "valuable chiefly for the growing of fruit, vegetables, and other farm products." Elliott denied having made the statement, but admitted the conversation referred to. (Elliott, R., VI, 2729.)

B. A. McAllister, land agent of the Oregon & California, and other Southern Pacific land grant railroads on the Pacific coast (R., IV, 1922, 1925, and 2000), testified that defendant's Exhibits 258, 259, 260, 262, 263, 264, 266, 275, 276, and 297, all relating to the character of the grant land and its availability for settlement, were prepared from records in his office, or from public records, by employees of the railroad company, since the institution of this suit. He admitted that he had never been on any of the lands involved in this suit. (R., IV, 2015.)

H. W. Scott testified that he resided at Forest Grove, and was engaged in the real estate business and

farming. He had cruised timber for the last 20 years. (R., VI, 2972.) Had cruised lands in Washington, Yamhill, Columbia, Clatsop, some in Douglas, and a little in Coos Counties. (R., VI, 2972.) Lived in Washington County 22 years, and Yamhill County 10 years. The unsold grant land in Washington, Yamhill, and Tillamook Counties were in the Coast Range of mountains, except those east of Forest Grove in ranges 1, 2, and 3 west, which would be in the foothills of the Willamette Valley. (R., VI, 2980.) He was acquainted with the unsold lands in township 1 south, ranges 4 and 8 west; townships 2 and 3 south, ranges 5 to 8 west; township 4 south, ranges 5 to 7 west; townships 5, 6, 7 south, ranges 6 and 7 west; townships 8 and 9 south, ranges 6, 7, 8 west. Had also cruised lands in township 3 north, ranges 2 and 3 west; township 1 south, ranges 2, 3, 4, 5, and 6 west; township 3 south, range 1 west; township 2 south, ranges 2 and 3 west. (R., VI, 2973.) Was acquainted with the unsold lands in Tillamook County.

He said the character of the lands in Washington County was generally rough, broken, and heavily timbered; a great deal of the land was rocky and unfit for cultivation; in many cases quite a high altitude, with deep snow in the winter; soil very coarse and unproductive. In his opinion, it would cost $100 to $200 an acre to put the land in cultivation; not over 20% of the lands could be used for agricultural purposes after the timber was removed. (R., VI, 2975.)

The unsold lands in Tillamook County were rough, mountainous, steep, broken and rocky and a great many places heavily timbered; the cost to clear for cultivation would be from $100 to $200 an acre. (R., VI, 2927.)

Witness expressed the opinion that a settler could not make a living on 160 acres of the unsold lands. (R., VI, 2980.) He did not think the price a person would receive for the timber would pay for the cost of clearing the land. Cost of clearing is greater in the mountain country than in the valley. (R., VI, 2984.) He filed and perfected a homestead in the northeast quarter of section 22, township 1 south, range 5 west (R., VI, 2983), and resided on this homestead with his family for seven years, but had to work out to make a living. (R., VI, 2984, 2985.) Practically all the homesteaders in the locality of his homestead, abandoned their homestead filings and purchased land from the Government under the timber and stone act (R., VI, 2986); and nearly all of these lands were afterward purchased by timber companies. He had cleared some heavily timbered lands of his own, and this cost from *$40* to *$80* an acre. He owned 430 acres in township 1 south, ranges 4 and 5 west, on which he had cleared 40 or 50 acres (R., VI, 2978), had lived on this land 25 years; 20 per cent of it was available for settlement in its original state. (R., VI, 2978.) He purchased 300 acres of timberland from the railroad company in 1903. (R., VI, 2986.)

Frederick A. Kribs testified that he was 52 years old; had resided at Portland, Oreg., since February, 1902. (R., VI, 2909.) Has been in the timber business practically all of his life. (R., VI, 2920.) Did some cruising in other places (R. VI, 2920), but comparatively very little during his residence in this State (R., VI, 2921); owns property worth several hundred thousand dollars (R., VI, 2933). He has a substantial interest in about 100,000 acres of timberland in Oregon. In making purchases of lands he looks for their timber value, but in the last few years considers the soil. Logging conditions and the stand of timber would outweigh the soil possibilities in his estimation. (R., VI, 2925.) He is interested in four or five thousand acres of these lands, which he purchased from the railroad company, situated in Coos County, and which are involved in one of the so-called "purchaser suits." (R., VI, 2929.)

He stated that he was familiar with the unsold lands of the railroad company, more particularly in Coos and Douglas Counties, some few lands in Curry County, in a general way in Lane and Linn Counties, and in eastern Multnomah County. (R., VI, 2909.)

He expressed the opinion that if the unsold lands were sold to actual settlers, the settlers would sell the timber to a lumberman or speculator. (R., VI., 2914.) That a settler might make some kind of a living on 160 acres of this land, but it would be a poor living, for he would be confined to a quarter section high up in the mountains, and, in his opinion,

these lands were not fit for settlement. (R., VI, 2914.) The elevation of the Cascade Mountains where the good timber grows is from 1,200 to 2,500 feet. (R., VI, 2913.) Witness testified he rented his lands for grazing purposes at 7½ cents an acre. (R., VI, 2917.) In forming his opinion he depended largely upon the reports of cruisers in his employ. (R., VI, 2921.)

Witness testified that his personal knowledge of the lands within the limits of the grant in the various counties was as follows:

Coos: Had been over townships 26 to 31, inclusive, range 9; township 25, range 10; townships 25 to 32, inclusive, range 11; townships 27 to 32, inclusive, range 12; and in range 13; partly in Coos and partly in Curry County (R., VI, 2924); that the railroad lands in Coos County are particularly heavily timbered and mountainous lands, and their chief value is timber (R., VI, 2985).

Douglas: Had been over township 32, ranges 4, 5, and 6 west; township 27, ranges 7 and 8 west; township 28, ranges 8 and 9 west; townships 24 to 31, inclusive, ranges 9 and 10 west; townships 26 to 31, inclusive, and north part of 32, range 10 west. (R., VI, 2924.)

Linn: Had been in townships 12, 13, and 14 south, ranges 1, 2, 3, 4 east, and township 15 south, ranges 1, 2, 3 east (R., VI, 2922); that as a whole, Linn County was a mountainous timbered country; the lands of the company were chiefly valuable for timber in that county (R., VI, 2912).

Lane: Had made one trip up the Coast Fork of the Willamette River, and on the Mohawk above Wendling, on a railroad (R., VI, 2922). He owns a number of even sections in the company's holdings in Lane County; the company's holdings there are in a mountainous country particularly valuable for its timber. The stand of timber in Lane County was heavy except in the burns.

Multnomah: His knowledge of lands in this county was obtained from driving over the public highways. Had made no extensive personal examination (R., VI, 2921). The lands of the company are valuable for timber (R., VI, 2910).

Marion. No personal knowledge as to lands of Marion County, his opinion as to them being based entirely upon what other men have reported to him (R., VI, 2922), according to those reports the lands are chiefly valuable for their timber. (R., VI, 2911.)

Lincoln. Only knowledge of lands from hearsay. (R., VI, 2924.)

Clackamas. Made one trip in this county some years ago, inspected but a very small portion of the railroad lands, but had men in the mountains. (R., VI, 2922.) The unsold railroad lands in Clackamas County are all timbered. (R., VI, 2911.)

Polk. Near Falls City the lands are mountainous and timbered, in the Abiqua Basin there is heavy timber. (R., VI, 2911.)

Tillamook. No personal knowledge; had men in this county who reported heavy timber. (R., VI, 2918.)

Josephine. Made one trip in this county a number of years ago on some creek, the name of which he had forgotten; could not give the township and range or the general locality. (R., VI, 2923.) Had men in different parts of the county; it is a mountainous country with valuable timber in parts. Some of the soils are fair in the timbered area. (R., VI, 2916.)

Jackson. Had looked at some scattering lands east of Medford. (R., VI, 2923.) Had not personally been in the western part of this county, but the topography of these lands is of high elevation and mountainous. (R., VI, 2916, 2917.)

Curry. Familiar with a few of the unsold lands. (R., VI, 2909.)

Washington. Had men working in certain parts of this county. (R., VI, 2909.)

The highest price for which he knew of a timber claim's selling in western Oregon was $4,000 to $12,000 for 160 acres (R., VI, 2919); they were asking from $2 to $3 a thousand at Timber, Washington County, since the railroad went in there, and at that rate some sections could not be bought for less than $60,000 (R., VI, 2920).

R. A. Booth, of the Booth-Kelly Lumber Company, which had purchased 75,300 acres of the grant lands, and owns in all, 136,000 acres of lands in Linn and Lane Counties (R., V, 2578), testified, that the unsold grant lands in Douglas, Linn, Lane, and Josephine Counties were similar in character to lands held by the Booth-Kelly Lumber Company

(R., V, 2616). In his opinion, in their present condition, these lands are valuable only for the timber that is on them (R., V, 2579), but after it is removed and the lands seeded they will be good for pasture, and a considerable portion of them would be suitable for fruit, gardening, and agriculture (R., V, 2516). He estimated the cost of clearing some of the land for *cultivation* at from $50 to $500 an acre (R., V, 2579), and other at from $20 to $50 an acre (R., V, 2591), and that it would cost from $1.25 to $2.50 an acre to clear the land suitable for *seeding* to grass for pasturing (R., V, 2582). He expressed the opinion that reforestation of logged-off lands was problematical, but their value as pasture had been demonstrated (R., V, 2630).

Witness did not think that a settler could make a living from the timbered land until the timber had been removed (R., V, 2515, 2579, 2583), but that the reasonable value of the timber would go a long ways to pay for clearing the land, and if a settler had the opportunity of disposing of the timber while clearing the land he could establish a home (R., V, 2660).

Witness testified that timber land, as such, first began to have a market value about 1898 (R., V, 2589), and that the *highest* price he had known timber buyers to pay in Lane County was on a basis of $1 a thousand (R., V, 2684).

Witness was of the opinion that the withholding of the grant lands from sale had naturally checked

industry and commercial development in Douglas, Washington, Josephine, and Lane Counties (R., V, 2621), and that the permanent withholding of the unsold lands south of Eugene would retard the growth of that territory and prevent the normal increase in population; also that the failure to sell the odd sections retarded the settlement of the intermingled lands (R., V, 2625).

A. C. Dixon, manager of the Booth-Kelly Company, agreed with R. A. Booth, of the same county, as to the availability of the unsold lands for grazing and other agricultural purposes. (R., VI, 2705.)

Milford Jacobs testified that he was 54 years old; had been a land locator and timber cruiser for 15 years, working principally for the Weyerhauser Timber Company. (R., VI, 3178.)

Has cruised timber in townships 38, 39, and 40 south, range 5 east, and has examined that country as a timber proposition. (R., VI, 3178.) The unsold grant lands of the *railroad company* in that country are not very heavily timbered, the best timber land having been sold. (R., VI, 3181.) In the present condition these unsold lands have no value for agricultural purposes, except grazing. (R., VI, 3182.) He thought it was possible for a settler to pick up a quarter section of land in this area that he could make a living on. There were, he said, two or three families in the area described. He estimated the percentage of agricultural lands, not coming under irrigation, at 2 per cent. (R., VI, 3186.) Witness tes-

tified that the stand of timber depended upon the richness of the soil; that poor soil would not produce good timber (R., VI, 3182); that in the southern part of Jackson County they had to irrigate along creeks, but not along the river bottoms. (R., VI, 3183.) He said that he had cruised lands in Coos County and the western part of Douglas County, in townships 23, 24, and 25 south, range 10 west, townships 21, 22, and 23 south, range 1 west, and townships 22 and 23 south, range 2 west. A very small amount of the unsold railroad lands in their *present* condition will be valuable for agricultural purposes, they are generally timbered. (R., VI, 3187.) About 60 per cent of these lands could be used for orchards and general farming purposes *after* the timber is removed. He estimated that $100 per acre would be cheap for clearing the land. (R., VI, 3188.)

B. A. Gifford testified that the photographs shown in defendant's Exhibits 267, 268, 269, and 270 were taken by him under the instructions of the officers of the Oregon & California Railroad Company. (R., VI, 2953, et esq.)

Fred H. McClure, a photographer, testified that some of the photographs in defendant's Exhibit 270 were taken by him under the direction of the Oregon & California Railroad Company. The position in which his camera was placed in taking the photographs was directed by an employee of the railroad company, who accompanied him when the photographs were taken. (R., VI, 2942, et seq.)

C. W. Kempton, testified that he took the photographs composing defendant's Exhibit 273 while employed by the Oregon & California Railroad Company. (R., VI, 2889, et seq.)

CONCERNING COUNTIES, AND LESS THAN COUNTIES.

LINCOLN COUNTY.

W. A. Ball testified that he was 40 years old and had been county assessor of Lincoln County for the past five years. He had acquired a general knowledge of the unsold lands of the railroad company in Lincoln County by traveling over the trails and roads leading through the county in which the lands were located. (R., VI, 3229.) That about six or seven thousand acres, of the total 15,906 acres of the lands in Lincoln County, were steep and practically worthless, except some small tracks amounting to about 15 per cent which could be used for agricultural purposes. (R., VI, 3230, 3231.) Of the remaining 9,000 acres there were 3,000 of which about 25 to 30 per cent could be utilized for agricultural purposes, fruit, and products of that character, and the remainder of the land was chiefly valuable for timber. Witness testified that in his opinion from 1,500 to 2,000 acres of the total amount of unsold lands in Lincoln County could be rendered suitable for agriculture by clearing (R., VI, 3231, 3232); that there were some 160-acre tracts of the unsold lands in Lincoln County that a settler could make a home on (R., VI, 3233). But eliminating the 1,500 or 2,000

mentioned, he did not think that settlement was practical in 160-acre tracts. (R., VI, 3233.)

Witness testified that these lands in Lincoln County were situated on the western slope of the Coast Range, and that practically all lands on that slope had red soil and grew vegetation profusely (R., VI, 3234); that fruits and berries did well in that country (R., VI, 3235). He expressed the opinion that the raising of sheep, goats, and cattle would be the principal industry of the people in Lincoln County. (R., VI, 3238.)

CLACKAMAS COUNTY.

J. F. Nelson testified that he was 62 years old; resided at Mulino, Clackamas County; by occupation a farmer; deputy assessor for Clackamas County from 1894 to 1902, and county assessor of that county from 1902 to 1909. As deputy assessor he became acquainted with the unsold lands of the Oregon & California Railroad Company in Clackamas County, while passing over and through them *assessing settlers*. (R., VI, 3100, 3105.) That nearly all of these lands were in the Cascade mountain range, and the majority of them timbered or worthless.

The land was principally valuable for the timber. In his opinion not over 4 per cent of the lands would be good for agricultural purposes, and about 20 per cent situated in the foothills of the Cascades, would be good for summer range. A good deal of the land was rocky and cut up with canyons (R., VI, 3104), and the elevation would interfere with the growing

of crops. (R., VI, 3102.) The lands were about 50 miles from Portland, Oreg. (R., VI, 3112.) He never attempted to raise any products in the vicinity of these lands but knew people who had lived on similar lands for from *15 to 25 years*, but were unable to make a living. (R., VI, 3118.) The difficulty in raising grain was on account of the growth of fern. (R., VI, 3119.) Witness expressed the opinion that a settler could not make a living on 160 acres. (R., VI, 3110.) He thought there were settlers scattered through all the townships where the railroad lands were located. (R., VI, 3107, 3108.)

YAMHILL COUNTY.

R. L. Booth testified that he was 68 years old, by occupation a stock raiser and farmer, residing in section 1, township 5 south, range 7 west, Yamhill County, Oreg., where he had lived since 1869 (R., VI, 2969), principally engaged in the stock business (R., VI, 2970). He was acquainted with the lands within 6 miles of his home (township 4 south, ranges 6 and 7 west; township 5 south, ranges 6 and 7 west). (R., VI, 2969.) The railroad land east of where he lived was covered with good saw timber and was chiefly valuable for the timber. The remainder, which was burned over some years ago, was red shot soil. (R., VI, 2969.) Where the hills were not too high, the land would be good for fruit. In his opinion 25 per cent of this land could be cultivated, if cleared, and the remainder used for grazing. (R., VI, 2970.) Witness testified that the red shot soil on the ridges

produced well when cleared; the altitude of the high land was over 700 feet above sea level. (R., VI, 2971.)

George W. Jones, county clerk of Yamhill County, testified that he had resided in Yamhill County 47 years and had operated a sawmill in township 3 south, range 6 west, for 14 years; that he was acquainted with the lands of the railroad company in townships 2 and 3 south, range 6 west (R., VI, 2990); his acquaintance with these lands was as a timberman (R., VI, 2993).

The general character of the unsold lands with which he was acquainted was very poor, cut up into ravines and gulleys, highest elevation 2,000 feet, and valuable only for timber. He did not know of any of the land that could be used for agricultural purposes. The soil is shot soil, with rocks almost to the surface. After the timber was removed the land could be used for stock range during the summer season. (R., VI, 2991.)

There were a few settlers residing on the even sections in the vicinity of this land. (R., VI, 2993.)

He had purchased from the railroad company 600 acres of the grant lands, the first purchase being in 1876, when he bought 400 acres, at $1.25 an acre; the second purchase was at $3 per acre, and the last purchase at $5 for 80 acres. (R., VI, 2994.) He never attempted to clear or raise anything on any of his land. (R., VI, 2994.)

POLK COUNTY.

W. V. Fuller, testified that he was a merchant, residing at Dallas, Oreg., and had lived in Polk County for 11 years; had engaged in the timber business for 8 years, handling and cruising timber. (R., VI, 3127.) Made cruises of the unsold grant lands in Polk County, for assessment purposes, during 1907 and 1908. (R., VI, 3138.) Was familiar with all the unsold lands of the railroad company in Polk County in ranges 6, 7, and 8 west. (R., VI, 3127.)

The unsold grant lands that he was acquainted with lie in the Coast Range of mountains, on both slopes, and were mostly hilly; the elevation of Coast Range in Polk County is from 1,000 to 3,500 feet. (R., VI, 3128.) Nearly all the railroad lands in this county were well timbered with fir, white pine, hemlock, and cedar. There were five or six sections of the land that had practically no timber, but the remainder would run from 40,000 to 75,000 feet per acre. He expressed the opinion that not more than 10 per cent of the land could be used for agricultural or horticultural purposes, because of the elevation. (R., VI, 3128.) It would cost from $75 to $100 an acre to clear the timber land. (R., VI, 3129.)

Witness also testified that he did not think a settler could make a living on 160 acres of this land, devoting his entire time to the cultivation of the land. (R., VI, 3121.) He knew of people who had

tried to make a living on the hills, but had failed. (R., VI, 3129.) The intermingled even sections were principally entered under the timber and stone act, and the lands afterwards sold by the entrymen. (R., VI, 3130.)

Witness admitted having made the statement contained in an affidavit (Government's Exhibit 119), that the railroad lands in townships 7, 8, and 9 south, ranges 6, 7, and 8 west, were, in their present condition, principally valuable for their timber, but much of it would be valuable, if cleared, for general farm purposes, including fruit, dairying, and grazing. (R., VI, 3132.) He further said, that at the time he signed this statement he did not know for what purpose the statement was wanted. (R., VI, 3134.)

BENTON COUNTY.

J. T. Gray testified that he was 45 years old, by occupation a farmer, residing in township 12 south, range 6 west, Benton County, Oreg., where he has lived for 14 years. He had been over about one-half of the unsold lands of the railroad company in Benton County, hunted over them, and for six weeks served as fire patrol in the employ of the railroad company. (R., VI, 3119.) He had been employed by the railroad company within a week or 10 days prior to testifying in this case. (R., VI, 3123.) Witness stated that in his opinion about three-fourths of the land he was acquainted with in Benton County was timbered and the remainder burned over. (R., VI, 3120.) He expressed the opinion that not more than

15 per cent was suitable for agricultural or horticultural purposes. The burned-over lands were covered with fern and salal with a few patches of pea vine. The timber was good. (R., VI, 3121.) He expressed the opinion that a settler could not make a living under present conditions on 160 acres of this land. (R., VI, 3121.)

Willis Vidito testified that he was 68 years old and had resided in township 14 south, range 8 west, for 37 years; had been engaged in farming and was fire warden in Benton County for the Oregon & California Railroad Company for 9 years. He was acquainted with the lands in Benton County and was of the opinion that their chief value was in the timber. (R., VI, 3058, 3060.) There were some burned areas which might be used for grazing if seeded, but he did not think a settler could make a living on 160 acres in this burned area. A small portion of the lands could be used for agricultural purposes, though there were many benches which, if cleared, would raise grass, garden, vegetables, and fruit, but he did not think the value of the land would justify the expense of clearing. He had no knowledge as to the cost of clearing timberland. (R., VI, 3063.) He knew of no 160-acre tract on which a settler could earn a support. (R., VI, 3064.)

LINN COUNTY.

C. H. Stewart testified that he was 60 years of age; manager of the Commercial Club at Albany, Linn County, Oreg. (R., VI, 3008); had lived in Linn

County since 1865; had been county clerk, hardware merchant, county judge, but never had engaged in farming. (R., VI, 3010.) He said he had been through the lands of the railroad company in eastern Linn County, townships 9, 10, 11, 12, and 15 south, ranges 1 and 2 east, hunting and fishing, and had also examined them for purposes of taxation while serving as county judge. (R., VI, 3008.) He estimated that 50 per cent of the unsold lands could be cultivated, if cleared (R., VI, 3008), but did not think that it paid to clear land in order to cultivate it. "Life is too short for that." (R., VI, 3012.) Witness stated that settlers had gone out in the cut-over timberland, cleared it, and made homes there. (R., VI, 3012.) He knew of homestead entrymen in this vicinity who had sold their land to timber companies as soon as they proved up, but also knew of homestead entrymen who had made permanent homes on the lands entered. (R., VI, 3015.) As the lands of the valley settled up, people went up into the hills, but there has been little clearing done. (R., VI, 3015.)

LANE COUNTY.

R. B. Hunt testified that he was 36 years old; resided at Eugene, Oreg.; by profession a civil engineer; had never engaged in farming for a livelihood; never taken a homestead or settled on any lands or attempted to clear them. (R., VI, 3157.) Had been in every township in the county containing railroad lands, and on each section of some of the townships while engaged in examining timber lands for individuals and timber concerns. (R., VI, 3138.) In

making examinations of the timber lands he reported as to whether land was susceptible to agriculture. (R., VI, 3139.)

Witness estimated that from 15 to 20 per cent of the unsold grant lands could be used for agricultural purposes if cleared (R., VI, 3140), at a cost of from $100 to $150 an acre, and that from 60 to 70 per cent could be used for grazing purposes if the lands were logged off, burned over, and seeded, at an expense of about $40 to $50 an acre. (R., VI, 3141.) He expressed the opinion that there were 16 sections of grant land in western Lane County that had been burned over about two years ago, some of which had been heavily timbered, and these sections, situated in the Coast Range, were very productive, and some of this land would produce grain or almost anything in the way of vegetation. (R., VI, 3149.) The east side of the grant in Lane County was from 1,000 to 3,000 feet in altitude. (R., VI, 3150.) Witness expressed the opinion that the value of the lands was in the timber (R., VI, 3143); that the average value of the best quarter section of the unsold grant land in Lane County was about $4,000. (R., VI, 3142.)

Witness was also of the opinion that a settler could not make a living on 160 acres of this land. (R., VI, 3143.) He stated that he had personal knowledge of applications of so-called actual settlers to purchase grant lands at $2.50 an acre, and that these applicants tried to get on quarter sections that had the best timber. (R., VI, 3142.)

Witness further said that in western Lane County most of the settlers within the limits of the grant had sold their land to timber investors who purchased the land for the timber (R., VI, 3160); that there were settlers in all the townships within the grant, with possibly one exception (R., VI, 3155), and most of these settlers were along the streams (R., VI, 3159).

DOUGLAS COUNTY.

Irvine Gardner testified that he was 37 years old; occupation, surveyor and timber estimator; had lived in Douglas County five or six years, engaged during that time in buying and estimating timber. (R., VI, 3025.) In his work of cruising timber he had become acquainted with the unsold grant lands in township 28 south, ranges 3, 4, 5 west; township 29 south, ranges 1 to 9, inclusive, west; township 30 south, ranges 1 to 6, inclusive, west; township 31 south, ranges 1 to 8, inclusive, west; township 32 south, ranges 1, 2, 3, 4 west; township 25 south, ranges 2 west.

The unsold lands with which he was acquainted were practically all mountain lands with elevations running from 500 to 5,000 feet. (R., VI, 3030.) Witness estimated that 95 per cent of these lands were covered with merchantable timber (R., VI, 3032), averaging 35,000 feet to the acre (R., VI, 3028). In his opinion less than 1 per cent of the lands, in their present condition, could be cultivated (R., VI, 3029), and after the timber was removed 25 per cent

to 30 per cent could be farmed (R., VI, 3029). H estimated the cost of clearing the lands at from $75 to $100 an acre. (R., VI, 3029.) Witness expressed the opinion that a settler could make a living on but very little of the railroad lands with which he is acquainted (R., VI, 3031), and the land was chiefly valuable for its timber (R., VI, 3029). He stated that the lands acquired through homestead and timber entries in this timbered area had largely passed into the hands of timber companies (R., VI, 3032), and, in consequence, very few homestead entrymen were living on lands in this area (R., VI, 3033).

Witness admitted the execution of an affidavit (Government Exhibit 117), in which he estimated the land within the limits of the grant, with which he was acquainted, at one-third agricultural and two-thirds grazing, and wherein he stated that this percentage would hold good if the land was divided into 160-acre tracts. (R., VI, 3048, et seq.) In this estimate he included lands that would be agricultural after clearing. (R., VI, 3049.)

Witness said he had a homestead in the timbered area of Douglas County, section 18, township 28 south, range 3 west, 20 to 25 acres, of which he had cleared, at a cost of from $100 to $200 an acre, and that he entered this land for the purpose of making a home on it. (R., VI, 3035, 3029.)

J. D. Zurcher, testified that he had resided in Roseburg, Oreg., during the last five years, being engaged in the abstract business, and buying and selling timberland. (R., VI, 2994.) Was employed in 1905 and

1906 by the Southern Pacific Company, with reference to these unsold lands, investigating the matter of squatters upon the land, and reporting upon the character of the land, his work being all over the State, but principally in Douglas and Jackson Counties. (R., VI, 3001.) He never engaged in farming in a timber country and is acquainted with the possibilities of the soil only by observation. (R., VI, 3002.)

Has traveled practically all over Douglas County. (R., VI, 2996.) About 70 per cent of the unsold lands of the company in that county, carried merchantable timber, and about 30 per cent of the land would be practically worthless, the soil being unfit for cultivation. (R., VI, 2999.) Not more than one-tenth of 1 per cent, or five or six hundred acres, out of the total of 616,843 acres of unsold granted lands in Douglas County, was suited for agriculture in its present condition. (R., VI, 3003.) Witness expressed the opinion that from 15 per cent to 20 per cent of the grant land in Douglas County would be suitable for agriculture, after the removal of the timber, and that it would cost from $100 to $400 an acre to clear it. The best agricultural land, he said, is on the first bench which contained the heaviest growth of timber. (R., VI, 2998.)

In certain parts of the country, as soon as homestead filings were proved up on, the homesteads were abandoned and title passed to timber companies. (R., VI, 3004.) There were not very many settlers residing within the limits of the grant on the even sections at the present time, and what were, were

located along creeks and in clearings. (R., VI, 3004.) He received his first information with reference to these settlements on even-numbered sections, while in the service of the Oregon & California Railroad Company engaged in *ejecting* settlers from grant lands in Douglas County. (R., VI, 3006.)

Identified defendants' Exhibit No. 312, as a map showing ownership of lands in Douglas County, by certain timber companies. (R., VI, 2994.)

COOS COUNTY.

Dennis McCarthy testified that he had cruised 60,000 acres of the unsold grant lands in Coos County, for the purpose of tax assessment, and had been over the townships containing the remainder of the land, sufficiently to acquaint him with their general character. These lands were mostly high and heavily timbered, and nearly all are situated in a generally rough country. In its present state he did not think any of the land would be suitable for agricultural or horticultural purposes, and because of the heavy timber it would not be practical to clear it for cultivation. Practically all the land was nothing but bed rock. It did not, he said, take good soil to raise fine timber, very large trees grew practically on rock. (R., VI, 3083.) The chief value of the lands was in the timber. (R., VI, 3072.) He estimated that about 5 per cent of the lands would be susceptible to cultivation after being cleared, and 50 or 60 per cent could be used for stock ranches. (R., VI, 3073.) He stated that the elevation of these lands was from

1,500 to 3,000 feet. Witness expressed the opinion that a settler could not make a living on 160 acres. (R., VI, 3074.) There were very few settlers on the intervening even sections, most of the land having been entered under the timber and stone act, or by scrip, and after the title had been obtained by the entryman, the land passed into the hands of some large timber holder. (R., VI, 3074.) Witness admitted that there were ranches within the limits of the grant (R., VI, 3088), and that Myrtle Point, an agricultural town, was located on the edge of the grant (R., VI, 3098).

Witness also stated that he had been on some of the railroad land in Curry County, and that it was high, steep, rough, but with fairly good timber. It was chiefly valuable for its timber. (R. VI, 3075.)

Witness mentioned as some of the timber holdings in Coos County: C. A. Smith Timber Company, 70,000 acres; Simpson Lumber Company, 24,000 acres; Menasha Woodenware Company, 20,000 acres; Weyerhauser Lumber Company, 25,000 acres. (R., VI, 3070.)

JOSEPHINE COUNTY.

Elmer S. Shank testified that he was 32 years old; by profession, an attorney, and also a real estate agent, located at Grants Pass, Josephine County, Oreg., where he had resided for five years. In 1908 he made a personal investigation of 120 quarter sections of the grant lands in Josephine County (R., VI, 2964), from township 36 south, range 6 west, to township 40 south, range 2 east (R. VI, 2965). From

this investigation, and the *knowledge of others* at Grants Pass engaged in the timber business, it was his opinion that 11 to 16 per cent of the unsold lands of the railroad company in Josephine County was chiefly, or wholly, valuable for timber, and from 4 to 5 per cent would be agricultural, of which 3 per cent would be heavily timbered. The expense of clearing would be from $40 to $100 per acre. About 20 or 25 per cent of the unsold lands were rocky, but it was impossible for him to say as to whether this land was totally unfit for cultivation. (R., VI, 2961.) These unsold grant lands were largely of granite formation, and of rather high elevation. Witness was of opinion that not over 2½ per cent of the unsold lands in this county would be available at the present time for settlement. (R., V, 2961.)

He testified that the ranches and farms situated in Josephine County were generally irrigated, but there were a few successful homesteads that had no irrigated land. Nearly all land in that county would be benefited by irrigation, and some had to have it, but would not say that a person could not successfully operate a ranch without irrigation. (R., V, 2967.) The railroad company received in its grants but very little lands that were suitable for fruit-raising purposes. (R., VI, 2959.)

W. H. Fallin testified that he was 49 years old; had been county assessor of Josephine County from 1902 to 1908; prior to that time had been deputy sheriff and tax collector for a period of four years, and was at present employed in the assessor's office. (R., VI,

3015, 3021.) Prior to entering upon his official career he was in the mercantile business. (R., VI, 3022.) While county assessor he had the lands of the railroad company cruised for purposes of taxation; he did none of the cruising himself and knew nothing about the business. (R., VI, 3015.) He had been over the lands of the company in Josephine County and had personal knowledge of their character. (R., VI, 3015.) The lands of the company situated in Josephine County were mountainous, part of them timbered and part barren, a considerable portion of these lands being bald hills. (R., VI, 3015.) The barren land was rocky, rough, and of granite formation, with some grass on it. On the highlands there was a red soil that is considered good fruit land and a white soil that was not good for that purpose. (R., VI, 3020.) A large portion of the railroad lands were rolling and might contain considerable soil for fruit raising. (R., VI, 3023.) Witness expressed the opinion that not over 5 per cent of the unsold lands in Josephine County was suitable for agricultural purposes, and not over 5 per cent of the lands that are timbered could be utilized for agricultural purposes after the timber is removed. (R., VI, 3017.) Where there was no heavy timber grass grew during the months of April, May, and June almost everywhere in the open country. (R., VI, 3017.) Witness expressed the opinion that a settler could not make a living on 160 acres of these lands, and that such lands were not settled upon in that country (R., VI, 3018), but a man might make a living on 160 acres of this

land after the timber had been removed (R., VI, 3018). He could not say as to whether a settler could or could not make a living on these lands, because it had not been tried. A settler might make a living or he might not. (R., VI, 3019.) His knowledge of the lands in Josephine County was *gained by going wherever there was a settler.* He had *assessed settlers on these lands* and had looked at the lands while assessing people in their vicinity. He based his opinion as to susceptibility of these lands for settlement largely upon reports of timber cruises made for Josephine County. (R., VI, 3023–3024.)

Witness testified that the assessor's roll of Josephine County showed there were 20,000 acres of land in actual cultivation in that county. (R., VI, 3024.) This includes only lands actually tilled. (Galloway, R., VIII, 4263.) Witness did not think that there would be over 5 per cent of the entire area of Josephine County that would be susceptible to cultivation (R., VI, 3024), but fruit was raised in all parts of the county (R., VI, 3024).

C. M. Stites testified that he was a farmer, and had lived in Oregon since 1882. He was assessor of Josephine County during 1895 and 1896; worked in the sawmill business, first in 1897, in California. (R., VI, 2878.) He examined the unsold lands in Josephine County for the purpose of taxation, and estimated the lands that were suitable for settlement and agricultural purposes at about 2 per cent. The first value of the unsold lands of the company, in that county, was for the timber. The unsold lands were

mountainous and contained very little pasture except in the highest mountains. (R., VI, 2881.) That 50 per cent of the lands around the valley could be used for raising grapes and some of them for raising peaches. (R., VI, 2882.) The suitableness of these lands for the growing of grapes had been demonstrated. (R., VI, 2882.) He estimated the cost of clearing the lands, and putting them to agricultural or horticultural uses, at from $30 to $100 per acre; land that contained saw timber, at from $50 to $200 per acre, and some as high as $300 per acre. The soil of most of the lands was decomposed granite and required irrigation, which was impossible by reason of there being no available water. (R., VI, 2883.) Witness expressed the opinion that none of the unsold lands with which he was acquainted would support a settler on a 160-acre tract. (R., VI, 2883.) A great many of the timber claims that had been taken up under the public-land laws, he said, had been sold, in some instances to mill owners and timber speculators (R., VI, 2886), but he did not know what had become of the lands taken through homestead entry (R., VI, 2885).

W. R. Whipple testified that he was 67 years old; had lived in Josephine County for 14 years; occupation, surveyor and locating timber claims. (R., VI, 2934.) Was employed by the defendant railroad company several years ago in classification of the unsold grant lands. (R., VI, 2939.) He became acquainted with the unsold lands in Josephine County while engaged in surveying. (R., VI, 2934.) Witness stated that

these lands were mostly mountainous and hilly (R., VI, 2934), the soil generally poor, and largely too broken to be cultivated. About 15 per cent was covered with timber of a merchantable character and the remainder burned over. Along the Rogue River the formation was of a decomposed granite, very steep. Neither the burned-over nor decomposed granite lands were suited for cultivation, except some very small tracts; all of the lands that were fit for cultivation had been settled upon years ago. (R., VI, 2936.) Witness expressed the opinion that a settler could not make a comfortable living, with a reasonable amount of work, on 160 acres of any of the railroad lands in Josephine County. (R., VI, 2936.) There were, he said, a good many fine farms in Josephine County, and a great many fruit ranches. The latter he did not consider first class, though he admitted they were selling these fruit lands at high prices, and had been for four or five years. (R., VI, 2940.) Witness stated that none of the fruit lands that he knew of were on railroad lands, but were mainly in the Rogue River Valley on lands obtained from the Government under the donation land law. (R., VI, 2941.)

JACKSON COUNTY.

W. T. Grieve testified that he was 35 years old; had lived in Jackson County since 1889; engaged in farming, running stock, in the timber business, and for 13 and 14 years was deputy assessor, and for the last four years had been assessor of that county.

While running stock and locating timberlands and deputy assessor he had become acquainted with practically all of the unsold railroad lands in Jackson County (R., VI, 3199–3200), and, excepting the mineral value they may have, the 251,000 acres were valuable only for the timber, save some that might be used for grazing. He computed the acreage of the unsold lands in Jackson County that had no value for agricultural purposes at 192,000 acres. Some districts of the county were too steep for farming and very rocky. (R., VI, 3200–3201.)

He estimated the percentage of the unsold lands that could be rendered suitable for agriculture at 12 per cent (R., VI, 3204). In the Jenny Creek, Big Butte, Elk Creek, Evans Creek, Foots Creek districts, and on the headwaters of the Applegate the timber would average 20,000 feet to the acre (R., VI, 3203). It consisted of fir, sugar and yellow pine (R., VI, 3203). An insolated fractional section of land containing 240 acres, mentioned by counsel for defense, witness stated was first-class land, and was then under lease from the railroad company. (R., VI, 3212–3214.) Witness expressed the opinion that a settler could not make a living on 160 acres of the unsold land. (R., VI, 3205.) He testified that some of the foothills which were too steep and rocky to farm were used for orchards (R., VI, 3210). Fruit lands around Medford had been sold for $3,000 an acre.

Witness admitted the execution of an affidavit, Government's Exhibit 120, wherein he stated that

from 15 to 50 per cent of the unsold grant lands in Josephine County were suitable for settlement in 160-acre tracts (R., VI, 3219 et seq.), and that this referred to the land in its present condition (R., VI, 3225). Also that he made this affidavit without knowing for what purpose the information was desired. (R., VI, 3227 et seq.)

KLAMATH COUNTY.

Jackson F. Kimball, testified that he was 39 years old; resided in Klamath County, Oreg.; was by occupation a timber cruiser and local representative of the Weyerhauser Timber Company in southern Oregon and northern California (R., VI, 3164); had no practical experience in farming (R., VI, 3174).

He had a general acquaintance with the lands in townships 38, 39, 40, and 41 south, range 4 east; townships 38, 39, and 40 south, range 5 east; and townships 36, 37, 38, 39, and 40 south, range 6 east. The unsold lands that he was acquainted with are timbered and are chiefly valuable for their timber, but most of the best timber had been sold. The soil on these lands was generally more or less rocky and brushy, and the percentage of agricultural land was very small, comparatively a few acres. There would be little glades on the headwaters of Jenny Creek (within the area mentioned) where a settler might clear a few acres and raise a little garden. (R., VI, 3167.) He did not know of 160-acre tract in that country from which a settler could make a living. (R., VI, 3170–3171.)

No. 259. A map showing the primary limits of the grants; indemnity limits; patented and unpatented lands of both grants; lands covered by outstanding contracts; lands deeded by the companies; lands lost to the grants by adverse entries; lands unavailable for indemnity selections by reason of forest reserves.

No. 260. A map purporting to classify the land in suit, as to being timbered and nontimbered; and also purporting to show the topography of the lands. [Complainant objected to the identification of this map, as it was sought to be introduced in evidence solely upon the testimony of B. A. McAllaster, who admitted that he had never been on the grant land (R., IV, 2015) and that he personally had no knowledge of the conditions purported to be shown by the exhibit (R., IV, 2028, 2017).]

No. 261. Form of reports of field examinations by employees of the railroad company.

No. 262. A statement showing lands examined by employees of the company and classifications made.

No. 263. A map purporting to show lands patented, unpatented, and unsurveyed, and lands taken up under the public land laws.

No. 264. A plat purporting to show disposition of lands entered under the public land laws within the boundaries of the grant.

No. 265. Certified copies of field notes in the General Land Office, covering a part of the grant land.

No. 266. A map purporting to show line of railroad and elevations.

Nos. 268, 269, 270. Photographs of lands within the limits of the grant.

Nos. 273, 274. A photograph of land within limits of the grant.

No. 309. Purported report of Charles W. Eberlein as acting land agent of the Oregon & California Railroad, dated May 1, 1908, pretending to describe the character of the lands involved in this suit. (The introduction of this exhibit was objected to by complainant, as incompetent, irrelevant, immaterial, hearsay, and a self-serving declaration. The report was prepared subsequent to the memorial of the Oregon Legislature, directed to Congress, requesting the institution of this suit, and at the time Eberlein believed the title of the railroad company to these lands would become a matter of litigation; this is shown by correspondence with his superior officer in 1904, which is contained in Government Exhibit 114.)

No. 310. A topographical map of "Riddles quadrangle," in Douglas County.

No. 311. A topographical map of "Grants Pass quadrangle."

No. 312. A map purporting to show the unsold lands of railroad company in Douglas County, and also the lands of certain timber companies.

No. 313. Photographs of lands within the grant in Douglas County.

No. 314. A blue print purporting to show holdings of certain timber companies in southwestern Oregon.

No. 315. A copy of the "American Lumberman" of November 11, 1911, devoted to the C. A. Smith Lumber Company interests in Coos County.

No. 316. A map, in four sheets, purporting to show timber holdings in parts of Klamath and Jackson Counties.

No. 317. A bulletin of the census of 1910, purporting to show the population of Oregon by counties.

No. 322. A statement purporting to show the population in the counties of Oregon, from 1850 to 1900.

No. 323. A statement purporting to show the population in certain counties and towns, for the years 1890, 1900, and 1910.

No. 332. Two maps purporting to show lands of the Booth-Kelly Company and Wentworth Company.

No. 339. A map showing lands in the Roseburg and Portland land districts, included in forest reserve, power site, and other withdrawals.

No. 340. A statement purporting to show the estimated acreage of the public lands in the Portland and Roseburg land districts.

No. 342. A map purporting to show lands cruised by employees of the railroad company.

No. 343. A statement of lands purporting to have been cruised by S. C. Bruce, an employee of the defendant company.

No. 344. A statement of land purporting to have been cruised by L. D. MacLeod, for the defendant railroad company.

No. 345. An article from the Saturday Evening Post.

No. 346. A bulletin issued by the United States Forestry Service on "Properties and uses of Douglas fir."

No. 347. A bulletin issued by the United States Forestry Service entitled "Douglas fir."

No. 348. A bulletin issued by the United States Census Bureau entitled "Forest products."

No. 349. "Silvilical Leaflets," issued by the United States Forestry Service.

No. 350. Four purported reports of land examinations by a timber cruiser of the defendant railroad company.

No. 351. Two purported tabulated statements of land examinations by an employee of the defendant railroad company.

No. 353. Two purported tabulated statements from timber cruisers' reports.

No. 354. Three forms of timber cruiser reports.

No. 355. Purported tabulated statement of cruises made by F. A. Elliott for defendant railroad company.

No. 356. Purported tabulated statements from reports of lands cruised by A. Carmichael for defendant railroad company.

No. 357. Purported tabulated summary of timber cruises made by Cronin, Cavell, McCowan, McDonald, Peck, and Pennoyer, for defendant railroad company.

No. 358. Form of report used in land examinations for the defendant railroad company.

No. 360. Annual report of the State Forester of Oregon, for the year 1911.

No. 361. Bulletin issued by the United States Geological Survey, entitled "The Forests of Oregon."

No. 362. A purported compilation of reports of timber cruises and land examinations of the defendant railroad company.

No. 364. A form of timber cruisers' report.

No. 365. A map showing counties in Oregon and population.

No. 366. A map purporting to show location of timber lands in the public domain.

No. 372. A map showing "Country Club grounds" owned by W. B. Sherman, et al., located near Grants Pass, Oreg.

GOVERNMENT'S TESTIMONY IN REBUTTAL.

GENERALLY.

W. A. Bogard testified that he was born and raised on his father's farm of 50 acres in Douglas County, Oreg. (R., VII, 3660.) That the first settlements in Douglas County were along the rivers or wagon roads, and the later settlers went into the hill lands and cleared farms out of the timber. (R., VII, 3668.) He was a timber cruiser, engaged in the real estate business and well acquainted with farming conditions in Douglas County. (R., VII, 3659.) As a timber cruiser he had been over a great deal of Douglas County and part of Jackson County, and became familiar with the topography of the land and character of the soil and its agricultural possibilities. He

was acquainted with all the lands in township 22 south, ranges 6. 7, 8, and 9 west; township 23 south, ranges 4, 5, 6, 7, 8, and 9 west; township 24 south, ranges 2 to 10 west, inclusive; township 25 south, ranges 2 to 10 west, inclusive; township 26 south, ranges 3 to 11 west, inclusive; township 27 south, ranges 3 to 10, west, inclusive; township 28 south, ranges 4 and 5 west; township 29 south, ranges 4 to 14 west, inclusive; township 30 south, ranges 11, 12, and 13 west; township 31 south, ranges 5 to 13 west, inclusive; township 32 south, ranges 4 to 9 west, inclusive; township 33 south, ranges 4 to 7 west, inclusive; township 34 south, ranges 5, 6, and 7 west; township 35 south, ranges 5, 6, and 7 west. (R., VII, 3663.)

He said that 35 per cent of the lands in these townships could be cultivated, and 60 per cent would be good grazing land; that these percentages would hold good if the lands were subdivided into 160 acre tracts, and each tract would support a settler and his family. (R., VII, 2666.) Similar lands were occupied and cultivated by settlers.

He stated that the failure of the railroad company to sell the land to actual settlers in 160 acre tracts at $2.50 an acre had been detrimental to the development of that country, had interfered materially with the development and building of roads, the upkeep of schools and the settlement of affected area. (R., VII, 3668.)

W. H. Miller testified that he was 41 years old, and was born in Josephine County, Oreg., but now lives

in Jackson County. He had been engaged in farming, mining, and the mercantile business. He had been over and was acquainted with all the grant lands in townships 37, 38, 39, and 40 south, ranges 2, 3, 4, 5, and 6 west, in Jackson and Josephine Counties. Two-thirds of the lands in this area could be used for growing agricultural or horticultural crops in paying quantities, and, if the land was divided into tracts of 160 acres, each tract would support a settler, and his family could obtain support from less than 160 acres. (R., VII, 3428.) In some instances a settler and his family could obtain support from less than 160 acres. (R., VII, 3429.) He based his opinion as to availability of these lands for settlement and growing of crops, upon the use of similar lands. (R., VII, 3433.) In his estimate he includes lands that would have timber growing on them which would have to be removed before the land could be cultivated. (R., VII, 3432.) Lands in the even sections similar to the unsold grant lands were occupied by settlers, who made their living on them. (R., VII, 3442.) There was no very good timber on the railroad lands with which he was acquainted. (R., VII, 3435). He stated that the best fruit land is in the higher altitude (R., VII, 3431), crops being grown in Jackson County at an altitude of 2,200 feet (R., VII, 3435). About two-thirds of the quarter sections of the unsold lands with which he is acquainted contain sufficient fruit land to maintain a settler and family. (R., VII, 3442). Decomposed granite lands in Josephine County were being used

for agricultural or horticultural purposes. (R., VII, 3441.) He attempted to buy some railroad lands some years ago but the company refused to sell. (R., VII, 3439.)

Witness stated that the sale of the grant lands in large tracts and the withdrawal of the land from sale had retarded the settlement of the community. If people could have bought these grant lands, they would have improved them and made homes on them. (R., VII, 3430.)

N. H. Martin testified that he was 47 years old; resided at Cottage Grove, Lane County, Oreg., but had lived on a farm in Lane County until 30 years old and was familiar with the farming conditions of Lane County and other parts of Oregon on the western slope of the Cascade Mountains. Had been engaged in the business of estimating timber for several years. (R., VII, 3300.) He had been over and was acquainted with township 19 south, ranges 1 to 4 west, inclusive; township 21 to 25 south, ranges 1 to 6 west, inclusive; township 26 south, ranges 2 and 3 west; township 20 south, ranges 1 to 5 west, 7 and 8 west, and 9 and 10 west; township 31 south, range 8 west; these lands being situated in the southern part of Lane County and northern part of Douglas County. Witness stated that the lands he was acquainted with in Lane and Douglas Counties were all of the same general character, and if divided into 160-acre tracts there would be more than 25 per cent of agricultural land on each tract and there would be but very few

of the 160-acre tracts that would not support a settler and his family. (R., VII, 3304, 3305.)

He had examined lands in and was acquainted with township 8 south, range 1 west, in Marion County, and in his opinion from 30 to 40 per cent of the land in this township was agricultural and there was a sufficient amount of tillable land on each 160-acre tract to support a settler and his family. (R., VII, 3302–3303.)

He had been over two townships in Josephine County, township 31 south, ranges 7 and 8 west, and was of the opinion that from 15 to 25 per cent of the quarter sections of these townships contained sufficient agricultural land to support a settler and his family. (R., VII, 3309.)

There was timber on a large portion of the unsold railroad land with which he was acquainted (R., VII, 3311), and in estimating his percentage of agricultural land he included lands that are timbered, but would be susceptible to cultivation after being cleared (R., VII, 3319). He stated that the lands which could not be cultivated could be used for grazing purposes. (R., VII, 3319.)

In his opinion there had been no changes in the susceptibility of the granted land to settlement since the grant was made; that it would take about 200 years to reforest this land after the timber is cut off, and that the agricultural products from these lands after the removal of the timber would be of much greater value to coming generations than reforestation of the lands. (R., VII, 3329.) Witness was of the opinion that the sale of the granted lands to

large timber companies and the withholding of the granted lands from the market had retarded the settlement of the country. (R., VII, 3330.)

M. F. McCown it was stipulated would, if called, testify that he had resided in Jackson County, Oreg., since 1900 and had been engaged in cruising timber and surveying since 1891, principally in Jackson and Josephine Counties. Between 1906 and 1908 he spent a year cruising the grant lands for the Southern Pacific Company, and while so engaged made note of the timber, agricultural, and grazing land. Had crossed over a great deal of the unsold grant lands in Jackson and Josephine Counties and was very familiar with them. He had two years' experience in farming, and had lived in agricultural communities all his life. He estimated the grant land suitable for settlement purposes in Jackson and Josephine Counties at 75 per cent, and that each quarter section would average from 25 to 30 acres of plow land, and the remainder would be grazing land, and that a large portion of the land could be utilized to raise fruit. (R., VIII, 4259.)

Charles M. Collier, it was stipulated, would testify, if called, that he was 54 years old, and had been county surveyor of Lane County since 1886. He was familiar with and had surveyed practically all of Lane County and the northern part of Douglas County, and had surveyed more or less in Benton County. That of the lands in Lane County and in Douglas County down to and including township 20 south, 75 per cent were suitable for settlement, 50

per cent of the area being agricultural and 50 per cent grazing. A considerable portion of the area was timber and brush land, which would have to be cleared before the land could be used. (R., VIII, 4261.)

O. M. Carlson testified that he was 35 years old, and resided on his homestead in township 15 south, range 3 east.

He had been over, and was acquainted with, the lands in townships 15 and 17 south, range 1 west, township 16 south, ranges 1 and 2 east, Lane County, Oreg.; also township 15 south, range 3 east, Linn County. That 80 per cent of these lands could be rendered suitable for cultivation. (R., VII, 3758.) Similar lands were occupied by settlers engaged in farming. (R., VII, 3760.) He stated that the railroad company's failure to sell the grant lands to actual settlers had retarded the development and settlement of the community. (R., VII, 3764.)

CONCERNING COUNTIES, AND LESS THAN COUNTIES.

COLUMBIA COUNTY.

E. E. Quick testified that he was 59 years old and had resided in Columbia County since 1880; during this time he had been county school superintendent, county clerk, and county treasurer, and at the time of testifying was engaged in the abstract business. In 1884 he entered a homestead, upon which he, with his family, resided until 1888, when he was elected county clerk. While residing on the homestead he earned his living from that land; all

of this homestead was timber land when he entered it. (R., VII, 3477.) In 1888 he had 60 acres cleared and 60 acres slashed. (R., VII, 3492.) A portion of the timber was burned over and a portion was sold. (R., VII, 3479.) There are now two families residing upon and making a living from his old homestead of 160 acres. (R., VII, 3492.) Logged off and timber lands are occupied and cultivated in Columbia County. (R., VII, 3479.) He mentioned one instance of logged-off land selling at from $60 to $70 an acre. (R., VII, 3482.)

Witness stated that he was acquainted with all of the railroad lands in Columbia County, also the intervening even sections (R., VII, 3479), and expressed the opinion that from 70 per cent to 80 per cent of the grant lands could be cultivated when the timber was removed, and believed that it would be a good investment for a farmer to pay for the removal of the timber on the grant lands and use the land for agricultural and horticultural purposes. He did not think there was any doubt of the ability of a settler to clear the grant lands and make a home if he had the benefit of the timber. (R., VII, 3487.) If a person had a few acres cleared he would have no trouble in earning support for himself and family from 160 acres of the grant lands. (R., VII, 3480.) Similar lands are occupied as homes in Columbia County. (R., VII, 3484.)

Witness estimated that an average quarter section of timberland in Columbia County carried about 3,000,000 feet of timber, and stated that *if* the timber

was convenient to logging roads it could be sold for $2 a thousand feet (R., VII, 3489); that some of the grant lands of Columbia County had been burned over, and that on even sections in the burned area homestead settlers had settled. (R., VII, 3492.) He knew of homesteads and preemptions that had been sold to timber men, in nearly all instances the company paying for the land as well as the timber, but in some cases the land was reserved. (R., VII, 3491.)

He expressed the opinion that the manner in which the railroad company had sold the lands and withheld them from sale had substantially retarded the development and settlement of the community where the lands are situated. (R., VII, 3483.)

T. W. Grant testified that he was 57 years old, and had resided in Columbia County 37 years. He was originally a laborer, but now, with his wife and four children resides on a farm of 80 acres, which he operates principally as a dairy. This land he occupies, originally timbered, was a part of the grant, and was purchased from the Railroad Company in 1880, at $2.50 an acre. (R., VIII, 3869.) Was acquainted with the grant lands in township 3 north, range 2 west, and part of township 3 north, range 3 west, and expressed the opinion that 50 per cent of the grant in this area, when cleared, would be susceptible of cultivation, 45 per cent of the remainder would make good pasture, and the remaining 5 per cent was worthless. (R., VIII, 3869.)

Andrew Anderson testified that he was 61 years old. He had resided on a homestead of 160 acres near Scappoose, Oreg., in township 3 north of range 2 west, originally timber land, since 1885. He had cleared part of this land, having 10 acres under plow and 40 or 50 acres seeded to hay for pasture, which were used in dairying and general farming. (R., VIII, 3860.) He earned a living from his homestead. (R., VIII, 3863.) He was acquainted with the railroad lands in township 3 north of range 2 west and part of the lands in township 3 north of range 2 west. (R., VIII, 3862.) After the timber is removed 50 per cent of these lands could be cultivated. Very little of the land is rough or rocky. (R., VIII, 3865.) Sold fir and cedar timber off his homestead in 1905, receiving 50 cents for the fir and 75 cents a thousand for the cedar. (R., VIII, 3863.) Estimated the timbered area in this community as averaging about 4,000,000 feet to the quarter section. (R., VIII, 3864.) Applied to purchase 160 acres of the grant land from the railroad company at $2.50 an acre. The company replied the land was not for sale. (R., VIII, 3862.)

D. MacLafferty, cross-complainant, testified, that he settled on a quarter section of the grant land in Columbia County, in April, 1908, prior to the institution of this suit, and soon after applied to the railroad company to purchase this land for $2.50 an acre. His application was rejected. (R., VIII, 3872–2880.) He had resided continuously on the land since first set-

tling upon it. He had been over, and was acquainted with all of the lands in township 4 north, range 3 west (R., VIII, 3872), and the soil in this township is very productive, and the even sections were occupied by settlers. The land he occupies contains timber and is good agricultural land, as he had demonstrated during his residence on it. (R., VIII, 3879–3883.) Timber companies in this community after logging off their lands were selling them for from $20 to $60 an acre. (R., VIII, 3876.)

Photographs of his improvements on the land that he applied to purchase, contained in defendant's Exhibit 270, were taken soon after he settled upon the land in 1908. The photographer refused to permit either himself or family to be in the picture, stating that this was the instructions of the railroad company. These photographs were so taken as to depreciate the appearance of the improvements made by witness. (R., VIII, 3883, 3902, et seq.)

CLACKAMAS COUNTY.

U. S. Dix testified that he was 44 years old, had been a farmer all of his life and resided on his farm in section 34, township 4 south of range 3 east, Clackamas County, Oreg., 25 acres of which is cultivated. His father had earned a living for himself and family of seven children on 160 acres of land in this community. (R., VII, 3510.)

He had been over and was acquainted with the character of the lands in townships 4 and 5 south, range 3 east, and was of the opinion that two-thirds

of the railroad lands in these townships were susceptible to cultivation when cleared (R., VII, 3515), and that the grant lands were suitable for settlement in 160-acre tracts, and would furnish a support for a settler and family. (R., VII, 3511.) A portion of this area had been burned over. (R., VII, 3509.) About 60 families had settled on lands in this community within the past four years, and are clearing them and engaged in farming land similar in character to the grant lands. (R., VII, 3517.)

C. L. Standinger testified that he owned and was engaged in farming 108 acres of land in section 6, township 5 south of range 3 east, which was logged off in 1907, and for which he paid $6 an acre. He had 10 acres under cultivation and 60 acres slashed and seeded. Raised 35 bushels of wheat to the acre on the 10 acres under cultivation, and had raised 25 tons of hay in the same area. (R., VII, 3467–3468.) Has earned a living for himself and family from this land since he moved on to it in February, 1909. (R., VII, 3475.)

He had been over and was acquainted with all the lands in townships 4 and 5 south, ranges 2 and 3 east, and did not think a person could find 160 acres that would not support a family. (R., VII, 3468.) A settler could get at least 25 per cent of tillable land from 160 acres. Similar lands were occupied by settlers in this vicinity. (R., VII, 3469.) Part of the granted lands could be cultivated in their natural state. About 50 per cent of them is burned. This could be easily cleared. (R., VII, 3476.) There

were numerous settlers located in this burned area. (R., VII, 3471.) The railroad company's refusal to comply with the terms of the grant and sell to actual settlers in 160-acre tracts at $2.50 an acre, has retarded settlement and development of the community where he resides. (R., VII, 3469.) Twenty yearsago the timber land of the grant was worth from $2.50 to $5 an acre for agricultural purposes.

J. H. Turner testified that he was 48 years old, and had resided in Oregon since 1887. He stated that he was acquainted with all of the lands in township 4 south, range 4 east, having formerly owned land in this locality. (R., VII, 3534.) After the land in this township is cleared it would make good farming land. (R., VII, 3536.)

John Zeek testified that he was a farmer, and had lived in Clackamas County 25 years. He said that he had been over and was acquainted with all of the grant lands in township 5 south, range 2 east, and that all of these lands were susceptible of cultivation. (R., VII, 3539.) Similar lands were occupied and farmed. (R., VII, 3541.)

He was of the opinion that the railroad company's failure to sell lands to actual settlers at $2.50 an acre had retarded the settlement and development of the land in that community. (R., VII, 3540.)

A. W. Riggs testified that he was a farmer, residing in township 7 south of range 2 east. He said he had been over all of the land in township 7 south, range 2 east (R., VII, 3560), and that 75 per cent of it could be tilled after it had been cleared (R., VII,

3562). He applied to purchase 40 acres of railroad land, but his application was refused, the company replying that the land was off the market. (R., VII, 3564.)

W. H. Kandle testified he was a farmer, 53 years old, and resided in township 4 south of range 4 east, Clackamas County, Oreg. (R., VII, 3551.) He had been over and was acquainted with all of the lands in townships 4 and 5 south of range 4 east. (R., VII, 3554.)

Witness expressed the opinion that 50 per cent of these lands could be tilled and the remainder utilized for pasture. (R., VII, 3558.) A portion of the lands are what are termed burned-over lands, there being no timber of value upon them. (R., VII, 3554.) That the settled community where he lives was formerly a timbered country, but had been burned over. The average value of unimproved land in his community is from $15 to $35 an acre. (R., VII, 3560.) He purchased 29 acres of the grant lands from the railroad company for which he paid $7 an acre. (R., VII, 3558.)

He was of the opinion that the refusal of the railroad company to sell to actual settlers at $2.50 an acre retarded the settlement of the community. (R., VII, 3554.)

BENTON COUNTY.

F. M. Wilkes testified that he was raised on a farm in Washington County, Oreg., and had been county engineer of Benton County, Oreg., since 1908. (R., VII, 3824.)

He had been over, and was acquainted with, the isolated tracts of railroad lands in townships 10 and 14 south, range 5 west, and all of these tracts were desirable farm lands with typical river bottom soil. He was also acquainted with the grant lands in townships 10 to 14 south, range 6 west. From 50 to 60 per cent of these lands could be cultivated. He was also acquainted with the lands in townships 10 to 14 south, range 7 west, which were mostly timbered, but about one-third could be cultivated. He stated that if divided into 160-acre tracts these averages would prevail except in a few isolated spots. (R., VII, 3527.) Similar lands were successfully farmed in that locality and burned-over timberlands in the vicinity were being settled upon and farmed extensively. (R., VII, 3828.) Stumpage value in Benton County is about $1 a thousand. (R., VII, 3831.)

S. N. Warfield testified that he was 43 years old, resided at Corvallis, Benton County, Oreg.; present occupation, county recorder. When six years old his father took a homestead in section 7, township 14 south, range 7 west, and upon this homestead and adjoining land witness had lived until elected county recorder. At the time of taking up the homestead his father placed his improvements on railroad land instead of the intended Government land, and subsequently purchased 69 acres, upon which his improvements were located, from the railroad company for $1.25 an acre. (R., VIII, 4152.) His father's homestead was principally bench land with about 6 acres of bottom land, and from this land he made a living

for himself and family of nine children. The soil of the bench land was the richest soil they had in that community, and in its natural state was covered with a large fern growth. On his father's homestead they farmed 20 acres of hill land that was so steep they could not cut it with a binder and had to cradle it. The so-called mountains in this country were really hills or bench land. Had been engaged in farming in this locality all his life. (R., VIII, 4155.)

He was acquainted with all the lands in township 14 south, range 8 west, townships 13 and 14 south, range 7 west. (R., VIII, 4155.) There was some good timber in township 14 south, range 7 west, but a great deal of the land had no timber on it; very few sections were well timbered in this township. A large quantity of this township was open bench land (R., VIII, 4157), and nearly every even section was occupied by homesteaders who had made their final proof. The railroad lands were equally as good as those occupied by the settlers. (R., VIII, 4157.) In township 14 south, range 8 west, there was very little timber. Nearly all of the even sections were occupied by homestead settlers and the odd sections of the grant are of the same general character. Township 13 south, range 8 west, was rough, and a great many, but not all, of the even sections were occupied by settlers. The growth on these lands was principally underbrush. The odd sections were of the same general character as the even sections. The lands in this township that were not susceptible to cultivation would make good pasture. (R., VIII, 4159.)

The lands in township 14 south, range 6 west, were about the same as the lands in township 14 south, range 7 west. (R., VIII, 4160.) There was very little open land in township 13 south, range 7 west, the northeast portion of the township being more adapted to grazing than tillage, but there were settlers in this portion of the township. (R., VIII, 4165.) In all these townships witness mentioned specific sections and described their characteristics. (R., VIII, 4161.)

He stated that the hill land in this community was better adapted to fruit than the lower land. Specific lands were mentioned so steep that the hay had to be cradled upon which settlers were residing and making a living from the raising of hay, grain and fruit, and other agricultural and horticultural crops. (R., VIII, 4165.) None of the land was too high for dairying purposes, except in two sections, and that could be utilized for this purpose during the summer months. If a person had hay it could be used the year round. The homestead settlers on the even sections were making a living from their lands which are intermingled throughout the granted lands. (R., VIII, 4166.) Yaquina wagon road grant runs into this territory, and the lands of this grant had been sold and are occupied by settlers who engaged in raising grain and stock, and dairying. These lands are similar to the grant lands. (R., VIII, 4160.)

His brother applied to purchase 40 acres of grant lands about 1904, which he desired to occupy and cultivate, but the company replied, the land was off

the market. Witness mentioned other cases where settlers had put improvements on railroad lands and attempted to buy but were refused (R., VIII, 4163), and then ejected from their homes (R., VIII, 4169). He mentioned a case, in 1898, where a settler had gone upon land and made improvements prior to survey. Afterwards the lands inured to the grant, and upon application the company asked the occupant $7.50 an acre for the land he occupied. (R., VIII, 4174.)

The failure of the railroad company to fulfill the conditions of the grant and sell the land to actual settlers in tracts of 160 acres had retarded the development of the community very much, as the land would have been occupied by settlers had the company been willing to sell. (R., VIII, 4167.)

POLK COUNTY.

Thomas Benton Masters testified that he was 51 years old. He had resided 8 years in central part of Polk County (R., VIII, 4002), and while engaged in the timber business in Polk County became acquainted with all of the lands in township 7 south, ranges 6, 7, and 8 west; township 8 south, ranges 6 and 7 west; and the north part of township 9 south, ranges 6 and 7 west. In his opinion 75 per cent of these lands could be cultivated after the timber is removed (R., VIII, 4002–4003), and this percentage would hold good if the land was divided into 160-acre tracts (R., VIII, 4004). The railroad lands would not average more than 1,000,000 feet of timber to

the quarter section in this area (R., VIII, 4008), the best timberlands in the grant in Polk County having been sold by the railroad company (R., VIII, 4011). He considered the land in this area better land than in the valley, and the reason the valley lands were settled first was because no remunerative disposition could be made of the timber. (R., VIII, 4008.)

YAMHILL COUNTY.

J. M. Switzer testified that he was 47 years old, had lived in Yamhill County, Oreg., 46 years and had been a farmer nearly all his life. His father had a homestead of 160 acres, originally timbered land, but which had been burned over; he had 18 acres under cultivation, and from this homestead earned support for his family of seven children. (R., VIII, 4012.) He had been over and was acquainted with the lands in townships 4 and 5 south, ranges 6 and 7 west (R., VIII, 4013), and in these townships from 40 to 50 per cent of the land could be cultivated after the timber is removed. Lands similar in character to the grant land were occupied by settlers and farmed. (R., VIII, 4014.)

The first settlers in this community went on the lowlands, the valleys, and open places along the streams, while the more recent settlers have gone onto the mountain land. (R., VIII, 4015.) During the last two years about 40 families have located in townships 4 and 5 south, range 7 west, on Government land (R., VIII, 4015), and settled in the old burns (R., VIII, 4107) and other even sections. Logged-off lands had been taken as homesteads. (R., VIII,

4018.) The people who settled on the timbered land sold the timber to logging companies and retained the land. Mentioned the case of one man who settled in the burned area, cleared his land little by little, and had been offered $100 an acre for one 40-acre tract. Dairying had recently been started on quite an extensive scale in this community, market being obtained for the product in Portland. (R., VIII, 4026.)

A settler could make a living for himself and family on 160 acres of the grant land in this area (R., VIII, 4027), and if the railroad company would sell according to the terms of the grant, the land would be occupied by actual settlers. (R., VIII, 4015.)

F. J. Stewart testified that he was a farmer and had lived in Yamhill County since 1852. He has been over, and was acquainted with, the lands in townships 3 and 4 south, range 7 west, a portion of which were burned over years ago, but had formerly been heavily timbered. He also had been over, and was acquainted with, townships 4 and 5 south, range 7 west, and stated that this land was in a big burn 40 miles wide, extending through the Coast Range of mountains to the Pacific Ocean. Most of the area was brush land, not heavily timbered. Settlers successfully farm the even sections in this area, and maintain comfortable homes. (R., VIII, 4029). He stated that 35 to 40 per cent of this land could be tilled, basing his opinion upon the lands that have been settled upon, and this percentage would hold good if the lands were divided into tracts of 160 acres. (R., VIII, 4029.)

If the railroad company would sell the grant land to actual settlers in tracts of 160 acres, all the land would be purchased by people who would make actual settlement. (R., VIII, 4031.)

H. S. Maloney testified he was 63 years old, had resided in Yamhill County since 1877, and had been a surveyor. (R., VIII, 4037.) The lower elevations in township 3 south, range 6 west, would be adaptable to fruit raising. Land in this vicinity of an elevation of 2,000 feet would produce grain and other crops. Part of this township he thought was too high in altitude for profitable agriculture, and would be principally valuable for stock raising. There were some settlers in this township. He had not been in the township for 8 or 10 years. In township 4 south of range 6 west 40 to 50 per cent of the land could be tilled when cleared.

Township 4 south, range 7 west, with the exception of the south part, on account of its mountainous condition, would be principally valuable for grazing. He had located settlers in this township 25 years ago. Part of this township was in a burn, and he had been informed that during the last year or two every even section in that township had been occupied by settlers. At the present time this township contained no merchantable timber. He had not been in this township for 15 years. There were very few of the quarter sections in township 4 south, ranges 6 and 7 west, but what would contain from 5 to 25 per cent of tillable land. In his opinion a man could not make

a living on the higher sections of the land in these townships unless he had stock to utilize the grazing. (R., VIII, 4038 et seq.)

LINN COUNTY.

C. E. Clark testified that he was 49 years old; resided in Linn County, Oreg., since 1872; and was engaged in farming and the sawmill business in townships 11 and 12 south, ranges 1 and 2 east. He had been over and was acquainted with all the lands in townships 11 and 12 south, ranges 1 and 2 east. Witness stated that from 40 to 60 per cent of the land in this area could be cultivated when cleared. The soil was of good quality and the land better than in the valley (referring to the Willamette Valley). (R., VIII, 4084.) The unsold railroad lands would be susceptible to settlement in tracts of 160 acres (R., VIII, 4080), and could have been sold to settlers years ago if it had not been taken off the market. In forming his opinion as to the suitableness of the unsold lands for settlement, witness had considered all of the elements, such as clearing the land, climatic conditions, etc. (R., VIII, 4099.) He stated that similar lands were occupied by farmers. Some of the timberlands in this area had been logged off and are now fruit ranches. (R., VIII, 4093.)

From $50 to $100 an acre would be a fair price for clearing heavily timbered land. Burning out the stumps by the char pitting method was generally used by settlers and required little expenditure of labor or money. (R., VIII, 4995.)

Witness stated that the refusal of the railroad company to sell these lands has prevented settlement of the community and has greatly interfered with the maintenance of good schools and roads. (R., VIII, 4081.)

Haman Shelton testified that he was 69 years old, and had resided in township 10 south, range 1 east, Linn County, Oreg., practically all of his life. He was acquainted with the unsold land in township 10 south, ranges 1, 2, and 3 east, and 75 per cent of them would, in his opinion, be suitable for cultivation when cleared. (R., VIII, 4055.) Generally this percentage would hold good if the land was divided into 160-acre tracts. These lands were generally timbered, but there were open glades where there was no timber and other places where the timber was light. (R., VIII, 4055.) Stock could run in this locality all the year. (R., VIII, 4055.)

William Brenner testified that he was 43 years old, by occupation a farmer, and had resided in Linn County, Oreg., all of his life. He was acquainted with the unsold grant lands in township 10 south, ranges 1 and 2 east; township 11 south, ranges 2 and 3 east. He said 90 per cent of the lands in these townships could be rendered suitable for cultivation after the removal of any timber growing on them. (R., VIII, 3636.) That there was some good timber on this land. (R., VIII, 3638.)

William Cochran testified that he was 61 years old and resided on what was formerly his father's donation claim in township 13 south, ranges 2 and 3

west. The railroad company owns some lands adjoining his farm, four-fifths of which could be cultivated. (VIII, 3941.)

He was acquainted with all the lands in townships 13 and 14 south, ranges 1 and 2 east; and townships 14 and 15 south, ranges 1 and 2 west, and 80 per cent of these lands could be rendered suitable for cultivation, and the balance would be good for stock purposes. This average would hold good if the land were divided into 160-acre tracts. (R., VIII, 3943.)

In his opinion the railroad company's refusal to comply with the conditions of the grant and sell to actual settlers at $2.50 an acre had retarded settlement and development of the country. (R., VIII, 3943.)

James F. Wilson testified that he is 57 years old, and had lived in Linn County since 1881, principally engaged in logging, but is now farming. Had 107 acres of land in section 20, township 14 south, range 1 west, which he purchased a number of years ago, 60 acres of which he had under cultivation, raising all kinds of agricultural and horticultural crops that are raised in this community, fruits, vegetables, grains, hays, etc. (R., VIII, 3934.)

He was acquainted with all the lands in township 15 south, range 1 west, and 16 south, ranges 1 and 2 west, and, eliminating two or three sections, half of this land would be susceptible of cultivation after being cleared of timber. (R., VIII, 3937.) That if divided into 160-acre tracts the same average of tillable land would prevail. (R., VIII, 3937.) This

is generally a timber country, the largest trees being second growth and part of the trees being what is termed pole timber. (R., VIII, 3938.) The early settlers cut the timber and burned the logs. (R., VIII, 3939.)

He purchased 80 acres of good farm land from the Oregon & California Railroad Company in 1885 or 1886 for $3.50 an acre. (R., VIII, 3935.)

N. I. Morrison testified that he was 50 years old and had resided in Linn County, Oreg., for 20 years; had been engaged in farming on his homestead in section 24, township 10 south, range 1 east, until four years ago, having about 15 acres under cultivation. The railroad company owned lands in the vicinity of his homestead which were better for agricultural purposes than his homestead. Had been over and is acquainted with all the lands in townships 10 and 11 south, ranges 1, 2, and 3 east. (R., VIII, 4068.)

He was of the opinion that from 70 to 75 per cent of the railroad land in this area could be rendered suitable for cultivation after the land was cleared of any timber or brush that might be upon it. (R., VIII, 4069.) That this percentage would hold good if the grant land was divided into tracts of 160 acres.

The failure of the railroad company to sell the lands to actual settlers in quantities of 160 acres at $2.50 per acre had retarded the settlement of the country. Witness had known men who desired to get some of this land for the purpose of establishing a home and engaging in agriculture. (R., VIII, 4070.) Im-

proved farming land in this vicinity sells for $100 an acre. (R., VIII, 4075.)

W. H. Young testified that he was 47 years old; resided on his farm in section 18, township 10 south, range 1 west; also owned a farm in township 10 south, range 2 west. Part of this land had been logged off, cleared and was under cultivation. He had been over, and was acquainted with, the railroad lands in the south half of township 10 south, ranges 1 and 2 east, and the north part of township 11, south, ranges 1 and 2 east. In his opinion from 65 per cent to 75 per cent of the land in this area could be rendered suitable for cultivation after clearing. (R., VIII, 4061.) Some of this land was covered with heavy timber, some with dead timber and some of the land was vine maple flats with practically no timber. (R., VIII, 4062.)

The first settlers in this country settled on the river bottoms. The later settlers have gone back into the mountains, and there is a constantly growing demand for such lands for settlement purposes. Open lands were available for homestead entries until a comparatively few years ago and for that reason timber lands were not settled upon. (R., VIII, 4067.)

C. W. Mariels testified that he was 41 years old and had lived in Linn County since 1885. Was raised on his father's homestead in that county, section 26, township 9 south, range 2 east, which was originally heavily timbered, but had been logged off

and the title to the land retained. (R., VIII, 3836, 3839.) In the vicinity of his father's homestead lands were cleared by killing the saw timber. (R., VIII, 3832.)

He has been over and was acquainted with all the lands in township 8 south, range 2 east; township 9 south, ranges 1, 2, and 3 east; township 10 south, ranges 1, 2, and 3 east. He became acquainted with these lands by hunting and cruising, locating, and acting as guide. (R., VIII, 3838.) In his opinion 25 per cent of the lands in township 8 could be cultivated; 25 per cent in township 9 south, ranges 1 and 2 east; from 40 per cent to 60 per cent in township 9 south, range 3 east; 50 per cent in township 10 south, ranges 1 and 2 east (R., VIII, 3838); and from 40 to 50 per cent in township 10 south, range 3 east (R., VIII, 3838). And if the lands in this area were divided into 160-acre tracts, these percentages would hold good as to each tract. He knew of but one or two 160-acre tracts that a family could not make a living on. (R., VIII, 3838.) Lands that could not be cultivated would be good for pasture. Similar lands were settled upon and farmed. These settlers raised wheat, oats, vegetables, and fruits of all kinds, and stock. (R., VIII, 3839.)

He and his three brothers applied to purchase 480 acres of the unsold grant land in section 35, township 9 south, range 2 east, for the purpose of establishing their homes on the lands. All of this land could have been rendered suitable for cultivation. He first applied to purchase in 1896. The company asked $15

an acre. He applied a second time in 1908, and the company replied the lands were not on the market. (R., VIII, 3840.) Some of the homesteaders sold their lands to lumber companies after they proved up (R., VIII, 3850), because the railroad company owning the odd-numbered sections refused to sell, and it was impossible to develop the country and get schools (R., VIII, 3856). Other settlers remained on their lands and are still there. (R., VIII, 3857.)

Witness stated that the failure of the railroad company to comply with the conditions of the grant and sell the granted lands to actual settlers at $2.50 an acre in quantities of 160 acres has retarded the settlement of the country.

LANE COUNTY.

Michael Kebelbeck testified that he was 54 years old; born in Bavaria, Germany, where he worked on a farm until 24 years old, when he came to the United States; lived in Lane County, Oreg., 24 years; had experience in farming on 80 acres in township 20 south, range 4 west (R., VII, 3246), and at the time of testifying, and for several years prior thereto, had owned 180 acres of land, 45 acres of which were under cultivation. He had worked for the Booth-Kelly Company for 14 or 15 years in township 20 south, range 3 west, 15 south, range 1 west; 18 south, range 1 west, and 17 south, range 1 east, and had been over the lands of the Booth-Kelly Company and other lands in their vicinity during his residence in Lane

County. (R., VII, 3246, 3249.) Of the lands he had been over, excepting pinnacles of mountains, he had not seen any section that would not support four families. (R., VII, 3257.) After the timber is removed these lands would make good plow land. R., VII, 3255.)

Witness estimated the costs of removing stumps and clearing timbered land for cultivation at from $50 to $75 an acre, and in the heaviest timber at $100 an acre. (R., VII, 3253.) He stated that the ordinary settler did not hire people to take out stumps, but cleared a little each year; that it was pretty hard to get a start, but "a man could go out and make a living, and by and by a nice living." (R., VII, 3255.) Witness stated that the land had to be grubbed only 10 inches below the surface to be farmed. (R., VII, 3256.)

He also testified that he applied to purchase 40 acres of the grant lands, adjoining the 80 acres that he originally owned in Lane County, about 14 years ago, but that the company replied it was not for sale. He desired this tract for agricultural purposes. (R., VII, 3250.)

W. J. Pengra testified he was 55 years old, had lived nearly all his life in Lane County, Oreg., and was engaged in the stock and general farming business. He had been over, and was acquainted with, the lands in township 15 south, range 1 and 2 east, and township 16 south, ranges 1 east and 1 west. (R., VII, 3444.) He said that 50 per cent of these lands would be susceptible to cultivation after the timber

and brush were removed (R., VII, 3445), and the balance would be suitable for grazing. A settler could maintain himself and family on 160 acres of this land, if he was industrious. (R., VII, 3445.) A good deal of this territory is covered with timber, and as a general rule land covered with timber is suitable for cultivation after the timber is removed. (R., VII, 3446.) Usually the best timber grows on the best soil. (R., VII, 3445.) Some of the lands that are farmed in this area were formerly covered with heavy timber. (R., VII, 3445.)

James Whitford testified that he was 83 years old; had lived in Oregon 10 years and was employed by Star Lumber Company; had lived in farming communities and was acquainted with the character of the soil used for agricultural purposes in Lane County. (R., VII, 3294.)

He had a general knowledge of the railroad lands of both the western and eastern part of Lane County, but more especially of the lands in township 20 south, ranges 1 and 2 west; township 22 south, range 3 west; township 23 south, ranges 2 and 3 west. The lands in these townships would average 50 per cent farming land after they had been cleared, and the remainder would be good for grazing purposes. (R., VII, 3295.)

A good many of the settlements on the even sections of the timbered area were made years ago, and most of the settlers were living on these sections at the present time. (R., VII, 3298.)

W. A. Renne, testified that he was by occupation a farmer; was 40 years old, and had resided in Lane County since 1887. He earned support for himself and family on 120 acres of land, only 7 acres of which were under cultivation. (R., VII, 3449.) Forty acres of the 120 acres that he farms was granted land which he purchased from the railroad company in 1901, paying $4.00 an acre for it. (R., VII, 3453.) On his farm he raises 3 or 4 tons of hay a year, keeps 2 cows, and has 71 goats. (R., VII, 3453.) The goats are useful in clearing up the land, killing young trees and shrubbery. (R., VII, 3458.) His father raised his family, consisting of a wife and six children, on a homestead which was originally timbered, and had to be cleared before the land could be cultivated. (R., VII, 3462.)

He had been over, and was acquainted with, the lands in townships 19, 20, and 21 south, ranges 3 and 4 west, and townships 21 and 22 south, ranges 1 and 2 west, and township 23 south, range 3 west, and 75 per cent of this area would be suitable for settlement in tracts of 160 acres; that is, a man could earn support for himself and family by farming 160 acres. (R., VII, 3450.) Of these 160-acre tracts, about 35 or 40 per cent of the land could be tilled after it is cleared.

The failure of the railroad company to sell the lands to actual settlers at $2.50 an acre has retarded the development and settlement of this area and had interfered with the maintenance of schools, churches, etc. (R., VII, 3451.)

James W. Kinman testified that he was by occupation a farmer and had resided in Lane County, Oreg., for 10 years on a farm of 80 acres in section 28, township 15 south, range 1 west, which had been logged off, the timber being sold to a lumber company. (R., VII, 3815.) He purchased his farm for $900, and it is now worth $3,500. (R., VII, 3820.) He had been over and was acquainted with the lands in townships 14 and 15 south, range 1 west, and township 16 south, range 1 east (R., VII, 3816); that 50 per cent of this land could be tilled, and this average would hold good if the land was subdivided into 160-acre tracts. Settlers resided on similar lands and earned support therefrom, there being six families on the same section that he resided on. (R., VII, 3817.)

Part of the railroad land in this area was heavily timbered and part of it was open. The land would be worth more with the timber off than with it on. (R., VII, 3820.)

The failure of the railroad company to comply with the conditions of the grant and sell the lands in quantities of 160 acres to actual settlers at $2.50 an acre had prevented settlement and development of the country in his community. (R., VII, 3817.)

He applied to the railroad company in 1905 to purchase 160 acres of granted land in section 21, township 15 south, range 1 west, which adjoined the land that he was then farming. He addressed the communication to the land office at San Francisco, but re-

ceived no reply. He did not mention any price when he applied. (R., VII, 3822.) This land contained timber worth about $40 or $50 an acre, but the land with the timber removed was worth more than the land with the timber on it. (R., VII, 3823.)

Cal Hileman testified that he was 36 years old, and had resided in Oregon 22 years; raised on a farm and followed that occupation until he was 23 years old, and was acquainted with farming and farming conditions in Lane County, Oreg. (R., VII, 3367.)

He became acquainted with township 16 south, ranges 1 and 2 west, and township 15 south, range 1 west, by running stock over this area. From 50 to 60 per cent of the land within this area could be cultivated and the balance of the land would be useful for grazing. (R., VII, 3370.) Similar lands were cultivated. (R., VII, 3371.) And there were settlers on the timber lands in this community. (R., VII, 3376.) A settler could earn support for himself and family on 160 acres of the granted lands with which he is acquainted. (R., VII, 3380.)

He applied to purchase 80 acres of the granted land in section 33, township 15 south, range 1 east, but the railroad company refused to sell him less than 320 acres at $10 an acre, and gave him no price on the 80-acre tract. (R., VII, 3370.)

J. P. Currin testified he was 67 years old, had resided at Cottage Grove, Lane County, Oreg., for 45 years. He had surveyed for the Oregon & California

Railroad Company and for the Government. (R., VII, 3389.)

He was acquainted with all of the lands in Lane County, south of township 19 south, which includes township 19 south, ranges 1, 2, 3, 4, 5, 6, and 7 west, and 1 and 2 east; township 20 south, ranges 1, 2, 3, 4 west, and 1 and 2 east; township 21 south, ranges 1, 2, and 3 west, and 1 and 2 east; township 22 south, ranges 1, 2, and 3 west, and 1 and 2 east; township 23 south, ranges 1, 2, and 3 west, and 1 east, and other lands that are unsurveyed. He had been over these lands sufficiently to acquaint him with the general topography and character of the soil. From 30 to 40 per cent of this land was agricultural and the remainder could be used for grazing or orchard. (R., VII, 3390.) He included in his estimate land that could be cultivated after clearing. (R., VII, 3390.)

In the western part of Lane County the percentage of agricultural land would be higher.

A large majority of the quarter sections of the area with which he is acquainted would be suitable for settlement. (R., VII, 3390.) The mountain or rolling land was the best fruit land. (R., VII, 3393.) A great many people settled in the timbered area prior to the time timber became valuable, clearing the land by burning what would now be merchantable timber, and this land is now occupied by homes. (R., VII, 3406.) He mentioned a thousand acres of logged off land that was recently purchased at $5 an

acre for agricultural purposes. (R., VII, 3402.) In the area with which he is acquainted most of the grant lands that were timbered have been sold. (R., VII, 3404.)

The sale of the grant land by the railroad company to large timber holders and the withdrawal of the lands from market had retarded the settlement of the community. (R., VII, 3392.)

D. P. Caldwell testified that he was 51 years old; had been engaged in farming in Lane County, Oreg., since 1890, had also been engaged in farming prior to this time. (R., VII, 3501.) He had been over, and was acquainted with, the lands in township 19 south, ranges 2 and 3 west, and township 20 south, ranges 2, 3, and 4 west. (R., VII, 3501.) About 80 per cent of these lands could be rendered suitable to cultivation. (R., VII, 3504.) If divided into 160-acre tracts each tract would support a settler and his family. (R., VII, 3503.)

John Deadmond testified that he was born in Lane County, Oreg., in 1854, on a farm, and has been engaged in the farming business at various times. (R., VII, 3768.) He purchased 70 acres of the grant lands in 1882, paying $3.50 an acre therefor, which he cleared and farmed. (R., VII, 3769.) He had been over, and was acquainted with, the lands in townships 16, 17, and 18 south, range 1 east; township 16 south, ranges 2 and 3 east, and township 17 south, range 1 west, and 50 per cent of this land could be rendered suitable to cultivation. (R., VII, 3773.) A part of this area was burned over land and part of

it timbered. (R., VII, 3773.) If the lands in this area were divided into quarter sections, about 40 per cent of each quarter section could be cultivated. (R., VII., 3781.) Settlers earn support for themselves and families with 20 to 25 acres of farming land. Similar lands were occupied by settlers. (R., VII, 3774.)

J. E. Kennerly, testified that he was 59 years old, and had lived in Lane County, Oreg., since 1876, engaged in farming, stock raising, and had also logged some. His farm was in section 10, township 17 south, range 1 east, and in its natural state was heavily timbered. (R., VIII, 3789.) He had been over, and was acquainted with, the lands in township 17 south, ranges 1, 2, and 3 west; township 16 south, range 2 east, and township 17 south, range 3 east. That about one-third of the railroad lands in these townships was good tillable farming land, and that average would hold good if the land was divided into 160-acre tracts. About one-third of it was too steep to plow, but would be good pasture land; and another one-third would be practically of no value by reason of being on high peaks and rocky. The best timber land in the grant in this locality has been sold by the railroad company. (R., VIII, 3790.) The remaining timber land would average about 3,000,000 feet to the quarter section. (R., VIII, 3790.)

He expressed the opinion that the railroad company's refusal to comply with the conditions of the grant and sell the lands to actual settlers at $2.50 an

acre in tracts of 160 acres, and in selling land in large tracts and withdrawing other lands from sale, had prevented settlement in that section of the country. (R., VIII, 3791.)

In 1905 and 1906 he applied to the railroad company to purchase a quarter section of the grant lands for farming and stock raising. This land contained very little timber. The railroad company refused to sell, telling him the land was taken off the market. At the time he applied to purchase this tract it was worth about $7 or $8 an acre. (R., VIII, 3798.)

J. M. Withrow testified that he was 60 years of age; had lived in Lane County for 21 years, engaged in farming and logging. Part of the lands that he assisted in logging off was subsequently put under cultivation. (R., VIII, 3800.)

He was fire warden in and had been over the lands in townships 17, 18, and 19 south, range 1 west, township 16 south, range 2 west and ranges 2, 3, and 4 east, and township 17 south, ranges 2, 3, and 4 east. (R., VIII, 3801.) The land in this area would average about 50 acres of tillable land to the quarter section, except one township which would average about 40 acres when cleared. (R., VIII, 3802.) Settlers occupy similar lands in the even sections. (R., VIII, 3805.)

O. J. Lawrence testified he was raised on a farm; had lived in Lane County for six years and prior to that time for a period of 15 years was in the mercantile business at Aberdeen, Wash. (R., VII, 3257.) He is one of the cross-complainants in this suit.

(R., VII, 3261.) He had been engaged in farming for the last six years in section 4, township 20 south, range 1 west. (R., VII, 3289.)

He applied to the railroad company to purchase the northeast quarter of section 17, township 20 south, range 1 west (R., VII, 3260), grant land, tendering $400 therefor (R., VII, 3264). He placed his cabin on the land applied for about six weeks before filing suit against the railroad company. (R., VII, 3285.) While living on the land his family was there occasionally. (R. VII, 3264.) He selected the quarter section he applied to purchase because it contained good farming land, and also considered the value of the timber, which he estimated at about forty or fifty thousand feet to the acre, with a value of about $3,000. (R. VII, 3266.)

He said that 40 acres of this land would make a fine place after the timber was removed, and would grow splendid grains, berries, and fruits. (R. VII, 3260.) He would never have applied to purchase the land had it not been valuable for farming purposes (R., VII, 3268), and he expected to have the land cleared (R., VII, 3267). He had not lived on the lands steadily for the last two years, but had kept his cabin furnished and had gone out there for short periods of time, but did not take his wife with him. He had very little clearing on this land; had planted some radishes and onions and some fruit trees, but the trees did not do very well because they did not have enough sunshine. (R., VII, 3271.)

The soil would obtain sunshine by the removal of the standing timber. (R., VII, 3272.) He could make a living on this 160 acres of land. That from 20 to 30 head of cattle could be kept on the land very nicely without removing the timber (R., VII, 3275), and there were little places a person could raise all the hay necessary for a milch cow. His cattle ran on the 160 acres he applied to purchase. The land contains good wild stock food. (R., VII, 3267.)

He received no notice from the railroad company after making application to purchase, and the reason he had not made more improvements was that he had understood he was not allowed to cut very much of the timber. One of the settlers had been ordered off the land by the railroad company's attorney, and the company had sent a man up to see how much of the timber had been cut off the place he had settled upon. The settlers were afraid to go too far. (R., VII, 3280.)

Witness recognized two photographs in defendant's Exhibit 270, purporting to show his cabin on the land he had applied to purchase, and said that there were five or six acres around the cabin that could be easily cleared. (R., VII, 3281.) Witness expressed the opinion that the land he applied to purchase would be worth five times as much when the timber was removed as it was with the timber standing. (R., VII, 3291.)

He also testified that he had been deputy assessor of Lane County during the last year and in the discharge of his duties became familiar with the character of the lands in townships 19 and 20 south, range 1 west,

and township 18 south, range 1 east and 1 west. (R., VII, 3268.) After the removal of the timber these lands could be used for agricultural and horticultural purposes. He knew of but one quarter section in this general territory that would not support a settler. (R., VII, 3259.)

There were other parties who had applied to purchase railroad lands in this township who are represented in this suit by Mr. Lafferty. He knew that some of these parties lived continuously on the land for a long time, but had to leave that they might school their children. (R., VII, 3274.)

He had given a great deal of study to the future timberlands, and believed that they would be much more valuable for agricultural purposes than for timber. The removal of the trees was nesessary to a successful growth of agricultural crops in this vicinity. (R., VII, 3263.) He is hiring lands carrying 50,000 feet of timber an acre to be cleared ready for the plow for $40 an acre, and he did not think the witness R. A. Booth was well informed as to clearing land when he estimated the cost at from $50 to $500 an acre. (R., VII, 3273.)

The even-numbered sections of this township were settled and had been for 20 or 30 years, people living on them with their families raising hay, stock, fruit, and making a very comfortable living. The lands of the odd sections were of the same character as those settled. (R., VII, 3273.) If permitted, in his opinion, these unsold lands would be taken up in a day by settlers for the purpose of making homes.

(R., VII, 3281.) The best way to develop that country was to permit the people to have this land to make homes upon it. (R., VII, 3279.)

R. G. Balderee, it was stipulated, would, if called, testify that he had resided in Oregon over 30 years, most of the time in Lane County, and was engaged in cruising timber. He had been over, and was acquainted with, the lands in township 16 south, ranges 1 and 2 west; township 17 south, ranges 1 east and 1 west; township 20 south, range 1 west; township 21 south, range 1 west, in Lane County, and township 14 south, range 7 west, in Benton County, and township 8 south, range 7 west, in Polk County. After being cleared 50 per cent of the lands in township 8 south, range 7 west, 65 per cent in township 14 south, range 7 west; 80 per cent in township 16 south, ranges 1 and 2 west; 50 per cent in township 17 south, ranges 1 west and 1 east; 70 per cent in township 20 south, range 1 west, and 50 per cent in township 21 south, range 1 west, could be cultivated.

It was stipulated that the testimony of this witness as to the character of the lands and other matters relating to the subject would be the same as that of O. J. Lawrence. He is one of the cross-complainants in this suit, having applied to purchase a quarter section of the grant land in township 20 south, range 1 west. The circumstances of the filing of his application was the same as that of O. J. Lawrence. (R., VIII, 3833.)

E. C. Lake, it was stipulated, would, if called, testify that he made application to purchase a quarter sec-

tion of the grant land in township 20 south, range 1 west, under the same circumstances as O. J. Lawrence, and it was stipulated that he would testify the same as Lawrence as to the lands in that township. (R., VIII, 3835.)

DOUGLAS COUNTY.

A. Creason testified he was 56 years old, and had resided in Douglas County for about 33 years; was engaged principally in the stock business. Owned a stock ranch of 1,071 acres near Roseburg, another of 665 acres, another of 361 acres, and another of 628 acres, all in Douglas County.

He was acquainted with the lands in Douglas County for a distance of 40 miles south and 20 or 25 miles north of Roseburg, across the State to the coast, having been frequently over them. (R., VII, 3338.) He was also acquainted with the soil conditions and topography of the land in the area mentioned, and estimated that from 75 to 80 per cent of it was agricultural land and suitable for settlement. (R., VII, 3341.) Some of the land was open, and other parts would require clearing before it could be cultivated, but every quarter section in this area would be suitable for settlement. (R., VII, 3342.)

The grant lands within the limits of Douglas County could be sold to settlers if they were permitted to purchase them. (R., VII, 3348.) Starting in with a garden and a few goats, and gradually clearing the land, a settler could make a living on any quarter section within the railroad grant. (R., VII, 3349.)

He and about 100 other people made application to purchase unsold grant lands in Douglas County at $2.50 an acre, but their applications were refused by the railroad company. (R., VII, 3349.) The tender of $2.50 an acre was made to Eberlein. (R., VII, 3354.) The quarter section he applied to purchase was worth five or six thousand dollars. (R., VII, 3356.) Prior to this time, in 1905, he applied to purchase 80 acres of the grant land which contained no valuable timber and could be cultivated, but the railroad company refused to sell, stating the land was off the market. (R., VII, 3359.)

The general method pursued by the railroad company with reference to the disposition of this land in the area with which he is acquainted had prevented settlement of the country, hence, the establishment and maintenance of schools, roads, and other advantages necessary to the development of a new country. (R., VII, 3339.) The selling of the grant lands in large quantities to timber buyers had also retarded the development of the area, as these people hold the land for speculative purposes and refuse to sell to settlers. (R., VII, 3344.) The large timber holdings of C. A. Smith and other timber companies would be agricultural land when cleared. (R., VII, 3364.) He had purchased a commuted homestead 5 miles west of the indemnity limits of this grant as an investment. This homestead contained about 3,000,000 feet of timber and was remote from railroad transportation, school facilities, and wagon roads. In its present condition, witness esti-

mated its value at about $2,000, but if cleared, at $8,000 to $10,000. (R., VII, 3356.)

The provision of the act of April 10, 1869, restricting the sale of the grant land was generally known in Oregon for a great many years. (R., VII, 3354.)

John Neuner testified that he was 31 years old, and had resided in Douglas County for 18 years, engaged in farming for 14 years in township 30 south, range 4 west, and had also been engaged in the timber business. The lands in the vicinity where he lives in Douglas County had been timbered lands, but were cleared for farming purposes. (R., VII, 3731.)

He had been over, and was acquainted with, the lands in townships 29 to 32 south, ranges 3 to 7 west, Douglas County, and from 30 to 40 per cent of this land could be rendered suitable to cultivation. (R., VII, 3732.) The percentages of these lands that were suitable for settlement in tracts of 160 acres, were as follows: Township 30 south, ranges 3 to 7 west, 75 per cent; township 31 south, ranges 3 to 7 west, 70 per cent; and township 32 south, ranges 3 to 7 west, 80 per cent. (R., VII, 3732.)

Settlers reside on and cultivate lands contigous to unsold grant lands. (R., VII, 3732.) This is generally a timber area, and the country had been developed by settlers clearing the timbered lands and putting them in cultivation. (R., VII, 3734.) He knew of two men who lived on and were farming railroad lands, and attempted to buy them of the railroad company, but the company refused to sell.

(R., VII, 3739.) One of these settlers was occupying 40 acres and the other 80 acres. (R., VII, 3736.) A great deal of the land in this vicinity is held by timber speculators. What is classed as a good timbered quarter section in that community would have not less than 3,000,000 feet on a section, and the highest would run to 6,000,000 feet. Stumpage sold at about 50 cents a thousand. (R., VII, 3736.)

The railroad company's failure to sell the lands to actual settlers in tracts of 160 acres has greatly retarded the settlement of this community, and has prevented the establishment and maintenance of schools and roads. (R., VII, 3734.)

B. F. Shields testified that he was 46 years old, and had been raised on his father's farm of 80 acres in Douglas County. His father raised a family of 9 children on this farm, about 30 or 35 acres of which was cultivated. Witness resided on a homestead which he subsequently sold, and it is now occupied by a farmer who is cultivating the soil. (R., VII, 3682.) He had lived in Douglas County for 38 years, and for the last 10 years has been a timber cruiser. He has been over, and was acquainted with, the unsold grant lands in the following-described townships in Douglas County, and the percentages of same that in his judgment could be cultivated are as follows:

Township 21 south, ranges 7 and 8 west, 35 to 45 per cent; township 22 south, ranges 7 and 8 west, 30 to 35 per cent; township 23 south, ranges 2, 3, 4 west, 25 per cent; township 24 south, ranges 2 and 3 west, 25 per cent; township 25 south, ranges 1, 2, 3 west,

35 per cent; township 26 south, ranges 1, 2, 3 west, 25 to 30 per cent; township 27 south, ranges 2 and 3 west, 25 to 35 per cent; township 28 south, ranges 2, 3, 5, 6 west, 35 per cent; township 29 south, ranges 1, 2, 3, 4 west, 35 per cent; township 30 south, ranges 1, 2, 3 west, 35 per cent; township 31 south, ranges 1, 2, 3 west, 35 per cent; township 32 south, ranges 1 and 2 west, 35 per cent; township 25 south, ranges 8 and 9 west, 30 to 40 per cent. (R., VII, 3682 et seq.)

If the lands were divided into 160-acre tracts the amount of tillable land on each tract would average the percentages stated. (R., VII, 3682.) These lands required clearing before the land could be tilled, but are suitable for settlement purposes. (R., VII, 3684.) Similar lands are being farmed by settlers who make their living from them. (R., VII, 3685.)

The failure of the railroad company to sell the grant lands to actual settlers in quantities of 160 acres at $2.50 an acre has materially retarded the development and settlement of the country. (R., VII, 3685.)

G. E. Keller, testified that he was a farmer 38 years old, and had lived in Douglas County since 1885. (R., VII, 3722.) Resided on and made a living for himself and family from 40 acres of land in township 29 south, range 6 west. (R., VII, 3724.) He was acquainted with the lands in townships 29 and 30 south, ranges 6 and 7 west, Douglas County.

Two-thirds of the railroad land in these townships could be rendered suitable for cultivation. Similar lands were occupied by settlers. Seventy-five per cent of the quarter sections would be suitable for

settlement and would furnish support for a settler and family. These lands produce grains, vegetables, fruits, and all kinds of farm products. (R., VII, 3723.)

The railroad company's failure to sell lands to actual settlers at $2.50 an acre in quantities of 160 acres has retarded the settlement of the community. (R., VII, 3724.)

J. L. Boyle, testified that he was 52 years old, and was born and raised in township 30 south, range 4 west, and now resides in township 30 south, range 5 west, Douglas County, Oreg. Had been engaged in farming all of his life. (R., VII, 3519.) He was deputy assessor of Douglas County from 1898 to 1901 and examined and assessed all the lands in township 30 south, ranges 1, 2, 3, 4, and 5 west, township 31 south, ranges 3 and 4 west. He had also been over, and was acquainted with, the lands in township 29 south, ranges 3 and 4 west. (R., VII, 3534.) He believed 50 per cent of the railroad lands in these townships could be tilled, and all of it would make good pasture. There was a great deal of good timber on the land which would have to be removed before it could be cultivated. (R., VII, 3522.) The intervening even sections in this area were settled. (R., VII, 3521.) Lands of the same general character were being cultivated and occupied as homes by farmers, in this area. (R., VII, 3523.) The soil is fertile and grows wheat, oats, grain, barley, prunes, apples, and all kinds of vegetables and fruit, and was also suitable for stock raising.

The greater portion of the settlers in this community had gone into the timber and cleared their land. (R., VII, 3522.) The first settlers went upon the bottom lands, and as years passed settlers entered and occupied higher and higher lands. (R., VII, 3523.) The land in this area is more valuable for agricultural purposes than for timber. (R., VII, 3528.) The market price of standing timber was from 65 cents to $1 a thousand. The reason there was no great demand for timber land in the early days was due to the fact that there was so much open land in Oregon. (R., VII, 3528.) Lands not in a high state of cultivation sold for from $50 to $75 an acre in this community. He mentioned 160 acres of land in this community, of which 40 acres could be used only for grazing purposes, that was sold for $16,000. This land contained a prune orchard. (R., VII, 3533.) Quarter sections of land containing timber, when sold merely for the timber, range from $800 to $1,000 a quarter section. (R., VII, 3531.) The majority of people who bought public lands under the timber and stone act were residents of cities and towns. He knew of no homestead settlers who entered the land merely for the purpose of getting the timber. (R., VII, 3532.)

His father applied to purchase 160 acres from the railroad company in the seventies and was informed that he would be required to pay $2.50 an acre for 40 acres of it and $5 an acre for the remainder. (R., VII, 3520.) Mentioned a settler who had had to pay $3.50 an acre, and another who paid $5 an acre,

for grant land. (R., VII, 3521.) The failure of the railroad company to sell the grant land to actual settlers at $2.50 an acre, and in selling them in large quantities, had retarded the development of the country by keeping settlers out. (R., VII, 3523.)

W. C. Tipton testified he was 60 years old, had resided in Douglas County since 1855, and was engaged in the stock business. (R., VII, 3409.) He had been over, and was acquainted with, lands in townships 25, 26, 27, and 28 south, ranges 1, 2, 3, 4, and 5 west. He became acquainted with these lands while riding over them in the stock business. (R., VII, 3410.)

If the lands were divided into 160-acre tracts, from 65 to 75 per cent of the quarter sections would be suitable for settlement and farming. (R., VII, 3410.) Similar lands were settled upon, and have been for a long time. Lands that are not susceptible to tillage could be used for grazing. Most of the unsold lands are quite well timbered (R., VII, 3416) and would have to be cleared in order to be cultivated. After clearing, 75 per cent of the land could be tilled. (R., VII, 3417.) It would cost about $40 an acre to clear the timber off the land if the labor were hired. (R., VII, 3422.) The earlier settlers in Douglas County had to clear the lands before cultivation. (R., VII, 3426.)

The sale of grant lands in large quantities to others than actual settlers had retarded the settlement and development of the community where the lands are situated. (R., VII, 3412.)

His father purchased a section of railroad grant lands for $1 an acre and other grant lands at from $3 to $3.50 an acre. (R., VII, 3411.) The railroad lands were unfenced and used as an open range by stockmen. (R., VII, 3415.)

I. B. Spiker testified he was 28 years old, and had resided in Douglas County 10 years, living on his father's ranch most of the time. This was a mountain ranch, 75 acres of which was under cultivation, and was situated in township 24 south, range 5 west. Unsold grant lands lie adjacent to it and are of the same general character. (R., VIII, 4176–4178.) He had been over, and was acquainted with, the lands in township 24 south, range 6 west, part of township 24 south, range 7 west, and from 50 to 75 per cent of this area could be rendered suitable for cultivation after clearing. (R., VIII, 4175.) Nearly all of the even sections in this area were occupied by settlers, but there are some lands which have been taken under the timber and stone act that are not occupied. Residents in this area raise all kinds of grain, fruit, and vegetables. (R., VIII, 4180.)

He had also been over and was acquainted with the lands in township 32 south, range 7 west, and township 33 south, range 6 west, and 50 per cent of this land would be suitable for cultivation when cleared.

If the railroad company had sold the grant lands in this area to actual settlers at $2.50 an acre, in quantities of 160 acres, all of the lands would have been occupied by settlers. At the present time it

was nearly impossible to obtain land at a moderate price. (R., VIII, 4183.)

In 1907 he made application to purchase some of the grant land, 100 acres of which could be farmed after it had been cleared, but his application was refused. (R., VIII, 4184.)

Grant Taylor testified that he was a timber cruiser and was acquainted with the lands in townships 22, 23, 24, 25, and 26 south, ranges 1 to 5 west, inclusive, Douglas County, and that 50 per cent of this land could be rendered suitable for cultivation. (R., VII, 3719.)

C. S. Jackson testified that he was a practicing attorney at Roseburg, Douglas County, Oreg., and was 45 years old. He was born and raised on his father's farm in township 30 south, range 5 west, Douglas County, this farm being what was commonly called timberland, but it had been cleared by his father. (R., VIII, 4100.) In Douglas County there are two characters of soil, river-bottom soil and upland soil. The upland soil would produce the very finest of fruits. (R., VIII, 4101.) He has been all over Douglas County, made numerous trips in all parts of the country from the Cascade Mountains to the Pacific coast, and knew in a general way where the grant lands were located. The intervening even sections were practically all settled, and would average more than one settler to every section, though some of the lands were held in large blocks by timber companies. Some of the unsold railroad lands are occupied by settlers who have been upon them for

years. Other settlers have been ousted from the unsold lands by the railroad company, and then forced to lease the land. (R., VIII, 4104.)

In his opinion from 75 to 80 per cent of the unsold grant land in Douglas County could be cultivated successfully, and would be in the future. He knew of several people making a good living on land with only a few acres under cultivation, having other pasture lands on which to raise stock. (R., VIII, 4104.) There was hardly a quarter section of land in the grant that did not contain sufficient cultivable land from which a settler could earn support for himself and family. (R., VIII, 4105.) There were some lands, however, that would be suitable only for grazing. (R., VIII, 4105.) In many cases settlers were residing on land adjoining grant lands and of the same general character.

A number of men who desired to settle on these lands had consulted him as an attorney with reference to compelling the railroad company to sell them. (R., VIII, 4109.)

If this land would be offered for sale to actual settlers, in tracts of 160 acres, every quarter section would be taken within a few years, developed, and made a home for a family. Increase in population had caused settlers to take less desirable tracts of land; the first settlers took the best. A settler would not have to remove all the timber from 160 acres of land in order to make a living from it. (R., VIII, 4108.)

He was familiar with the administration of the land grant in Douglas County by the railroad company, with reference to the matter of the sale and withdrawal of the lands from sale, and stated that the administration had been such as to greatly handicap the development of southern Oregon. (R., VIII, 4106.) The checkerboard holdings of the railroad company isolated the settlers on even sections, and deprived them of the benefits of society, including schools, churches, etc. (R., VIII, 4107.)

Applications to purchase unsold grant lands that had come within his knowledge since 1903, had been replied to by the company with statement that the lands had been withdrawn from sale. In these instances the price offered by the people who desired to buy was not limited to $2.50 an acre. The general discussion of the sale of grant lands at $2.50 an acre first arose after the lands were withdrawn from market in 1903. (R., VIII, 4119.)

The best timber in Douglas County was near the Coos County line. Occasionally as much as 20,000,000 feet could be cut from a quarter section in this territory. (R., VIII, 4122.) The timber was selling in that locality at from 25 to 50 cents a thousand feet. No timber selling as high as $1 a thousand in this country. The land is worth more than the timber. (R., VIII, 4127.)

H. J. Miller, testified he resided at Oakland, Douglas County, Oreg. He had worked in the woods as compass man and timber cruiser; also located some people on timber claims; these people

were generally from the city and in good financial circumstances; also located people on homesteads who were generally of the poor class, men looking for homes and desiring to engage in farming. (R., VII, 3747.) Had been over the lands in township 23 south, ranges 2 to 5 west, inclusive; township 24 south, ranges 3 to 5 west, inclusive; township 25 south, ranges 3 to 5 west, inclusive, Douglas County, and was acquainted with the formations, growths and character of the soil in this area. (R., VII, 3748.) From 30 to 35 per cent of the land could be tilled, and this percentage would hold good if the lands were divided into 160-acre tracts.

There were settlers within the area of the unsold grant lands, engaged in earning a living from farming on 10 to 50 acres. These farms were generally timbered in their natural state, and had to be cleared. (R., VII, 3748.) There were also homestead settlers throughout this area. (R., VII, 3755.)

The railroad company's failure to sell the grant lands to actual settlers, in quantities of 160 acres, had retarded the settlement and development of the country. There were many demands for lands in that community for agricultural purposes.

The Government land was all taken. (R., VII, 3749.) The average stand on a quarter section of timber land in Douglas County, would be from two and one-half to three million feet. The timber demand became active in this locality about 1900 and was highest in 1906. (R., VII, 3753.)

JOSEPHINE COUNTY.

W. B. Sherman testified that he was 48 years old, had resided in Josephine County for 10 years, and was engaged in the land business and fruit raising. He himself in the development of this country, promoted the fruit and poultry business, and more especially the grape and orchard culture. (R., VIII, 4199.) He had been in every township in Josephine County except within the forest reserve. (R., VIII, 4200.) Was especially well acquainted with township 33 south, ranges 2, 3, and 4 west, and township 34 south, ranges 3 and 4 west. He had not only been over the public highways and trails but over the lands, off the roads. (R., VIII, 4200.)

He was familiar with the character of the soils, climatic conditions, and topography of the lands in Josephine County, and the development of the resources of the county and the manner in which the railroad company had disposed of its grant lands. (R., VIII, 4201.) The lands outside the forest reserve in Josephine and Jackson Counties were generally rolling, with a good deal of level land. (R., VIII, 4201.) The altitude in Josephine County varied from 1,000 to 2,500 feet above sea level, and a few points are as high as 4,000. (R., VIII, 4204.)

There were three different soils in Josephine County, alluvial soil, red soil, and brown soil, the last being more commonly known as granite soil, the proportion being about one-third each. The alluvial soil was generally a river-bottom soil, the red soil was on the

first bench, and the granite soil also on the first bench and the hill lands, but in places these soils were intermingled. (R., VIII, 4201.) The alluvial soil could be used for all kinds of fruits, vegetables, hays, grasses, and general farming purposes. The red soil on the benches and rolling land was more valuable for fruit and vegetables. The granite soil could be used for fruit, vegetables, grass, alfalfa, and kale without irrigation. (R., VIII, 4204.) The granite lands produced two crops of strawberries of the best quality annually, and also very fine loganberries. An acre of this land will earn from $300 to $700 annually. With the dry farming process the granite was the best soil in the district, even better than the river valley lands. (R., VIII, 4217.) The trees growing on the granite soil were of a much better fiber than on the river-bottom land and carry fruit with less danger of breaking. (R., VIII, 4219.)

The people in this county were developing hill lands in preference to the bottom lands at the present time for fruit raising. (R., VIII, 4258.) Grapes, fruits and vegetables grown on the hill sides were of a better quality than similar products grown in the lower altitude. Atmospheric conditions in the hill lands and higher altitudes preclude certain blights that were found in the lower altitudes, and the higher lands obtain more natural moisture. (R., VIII, 4206.) The hill lands were especially adapted to poultry raising by reason of the fact that kale and alfalfa can be raised on these lands without irrigation. Kale produces from 20 to 40 tons an-

nually and remains fresh throughout the year. (R., VIII, 4201.)

One of the elements that made the hill lands more suitable for raising fruit was the fact that the bottom lands were more subject to frost than the hill lands. (R., VIII, 4253.) Frost was like boiling water—as long as one keeps it stirring and moving it does not settle, but as soon as it stops on the flat land, in a pocket, it settles and destroys the fruit. (R., VIII, 4252.)

By observation of a 40-acre vineyard in Josephine County he discovered that the grape business was profitable in this locality, and by experiments had demonstrated that Josephine County was a far superior country, especially as to the cultivation of the tokay grape, than the California grape country. (R., VIII, 4204.) The Josephine County grapes commanded a higher price in the markets than did the product of California. He distributed, in demonstrating and growing the Tokay grapes in this community, over 7,000 grapevines. (R., VIII, 4207.) The success of the industry resulted in an annual festival given at Grants Pass, termed the "Tokay grape festival." (R., VIII, 4209.) A person could make more money in ten years off of 10 acres of grapes on a south slope in Josephine County than he could from a thousand acres of timber. (R., VIII, 4233.) He estimated the shipments of Tokay grapes for the succeeding year at from 100 to 125 carloads. (R., VIII, 4209.) Tokay grapes yielded a profit of about $500 an acre. (R., VIII, 4219.)

Without doubt 50 per cent of the lands with which he was acquainted in Jackson and Josephine Counties could be subjected to cultivation, the tillable and nontillable lands being intermingled. (R., VIII, 4202.) Seventy-five per cent of the quarter sections of the unsold grant lands would be suitable for settlement. (R., VIII, 4211.) The quarter sections that were suitable for settlement would produce not merely a bare existence but a good support for a settler and his family. (R., VIII, 4212.)

Some of the railroad lands were worth from $100 to $300 an acre solely for horticultural and agricultural uses. (R., VIII, 4255.) These lands adjoin the city limits of Grants Pass, but there were other lands worth from $40 to $100 an acre a few miles away from the railroad. A great many tracts of this unsold grant land were worth from $25 to $50 an acre solely for agricultural and horticultural uses. (R., VIII, 4255.) Thirty-five per cent of the lands that were not suitable to settlement, would be useful for grazing purposes. (R., VIII, 4255.) They are scattered on points and tops of ridges along the high land. (R., VIII, 4255.)

Witness stated that the general policy of the railroad company with respect to the disposition of the lands prior to 1903, and its refusal to sell since that time, has retarded the development of the community to a great extent. This had been demonstrated by the large numbers of people who had come into the district and were unable to obtain lands. (R., VIII,

4212.) A prospective settler, upon being shown lands controlled by witness, say 10 miles from the railroad, would make inquiry as to why there was so much uncultivated brush land, and when informed that it belonged to the railroad company, that it was not on the market, and that no assurance could be given that it would be sold or occupied in the near future, would refuse to buy. He knew that if he purchased there would be no one to help build churches, schools, and better roads, and he would be without neighbors. This condition made it very hard to sell other lands to persons who desired them for settlement. (R., VIII, 4213.) If these grant lands were on the market at a reasonable price hundreds of people would buy and develop the lands. (R., VIII, 4215.)

The disastrous effect of the company's refusal to sell was so serious that about 1906 he had the matter investigated to see if there was some way by which the company could be compelled to dispose of the land. At the Oregon State fair in 1906 he delivered an address calling attention to the conditions of the grant requiring the sale of the land and described the ill effects produced by the railroad company's refusal to comply with these conditions. The newspapers of Oregon took this matter up and the speech was circulated throughout the State. (R., VIII, 4224.) This was the beginning of the agitation which led to the adoption of the memorial of the Oregon Legislature. And this agitation did not originate with, nor was it fostered by, the timber owners or timber companies. (R., VIII, 4225, 4226.)

The people of Josephine County desired the railroad lands placed on the market because it would not only mean settlement of the railroad lands, but settlement of the other lands, and an increase in value of the latter. (R., VIII, 4229.) The agitation relating to the sale of the grant land was not restricted to the mining and timber interest, or horticultural and agricultural interest, but resulted from the fact that the whole country was being held back. (R., VIII, 4330.)

He was interested in a tract of 3,040 acres of orchard land in Josephine County, 800 acres of which had been planted in trees, and another 800 acres was being prepared for planting. He desired to clear a 5,000-acre tract, but was unable to purchase the intermingled granted railroad lands. The intermingled railroad lands were of the same character as his orchard lands, which are selling for from $200 to $500 an acre. (R., VIII, 4218.)

Attempt had been made to procure railroad transportation to compete with the Southern Pacific, but by reason of its ownership of virtually one-half of the land in this county the Southern Pacific, through its subsidiary, the Oregon & California Railroad Company, had prevented the construction of competing lines. (R., VIII, 4220.)

Government's Exhibit 125 is a pamphlet gotten out by the Grants Pass Commercial Club and the Southern Pacific Company jointly. The emblem on this exhibit sets forth that it was issued under the cooperative plan of the Southern Pacific lines in Oregon and was on all pamphlets so issued. (R.,

VIII, 4223.) The lands described in this pamphlet were of the same general character as the unsold grant lands. (R., VIII, 4223.)

The testimony of Elmer Shank and W. R. Whipple, called by the defendants, to the effect that 85 per cent of the railroad lands in Josephine County would be unfit for any agricultural or horticultural use, was not correct, as was being demonstrated every day by the use that was made of similar lands in that county. (R., VIII, 4223.)

George W. Kearns testified as to Josephine County. He was 55 years old, and had resided in Oregon all of his life. For the last 10 years his home was at Grants Pass, Josephine County, and prior to that in township 33 south, range 6 west. He was foreman on construction of the Oregon & California Railroad Company from Roseburg south to old Fort Lane from 1881 to 1883. (R., VIII, 3980, 3989.) For the past 10 years had been engaged in handling timberlands and homesteads. Also understood the business of timber cruising. (R., VIII, 3980.) He became acquainted with the grant lands in Josephine County by locating and examining lands in various portions of the county. Had been in most of the townships in the eastern part of the county where the railroad lands involved in this suit are located. (R., VIII, 3981.) The soils in Josephine County are granite, red shot, and black river alluvial, about one-third of each. All of these soils are productive, though it was not until recently that the productiveness of the

granite soil was demonstrated. (R., VIII, 3981.) They would produce sufficient agricultural or horticultural crops to maintain a settler and his family on 160 acres. (R., VIII, 3983.)

There was little milling or logging operations in Josephine County (R., VIII, 3987), albeit there was good merchantable saw timber on the grant, in township 35 south, ranges 4 and 5 west, and also in township 34 south, range 5 west.

The remainder of the county had some timber, but very little, and nearly all of it was within the forest reserve.

Most of the grant lands would require clearing before they could be cultivated, but there were a number of tracts that would require very little clearing, if any, to render them suitable for cultivation. Timber grew on granite soils. (R., VIII, 3987.) A fair marketable timber claim in Josephine County would contain about 2,000,000 feet (R., VIII, 3990), and the best timber land would be worth five or six thousand dollars a quarter section (R., VIII, 3994). In 1881 when he was working on the construction of the Oregon & California Railroad Company, the valley lands south of Roseburg, which were generally taken up under the donation law prior to withdrawal of the grant lands, could be purchased for from $15 to $20 an acre. (R., VIII, 3996.) The present value of the lands is about $10 an acre. (R., VIII, 3994.)

The altitude at Grants Pass, in this county, is 960 feet. There were some points in the county as high

as 3,000. The hills and mountains are all gradual slopes. All the hillsides were being used for agricultural and horticultural purposes. (R., VIII, 3987.) Some of the lands in the even sections adjoining the railroad land are used for horticultural and agricultural purposes, and are of the same general character as the railroad land, and the latter could be put to the same general use. (R., VIII, 3986.) About 25 per cent of the unsold grant lands are rough, and about one-fourth could be cultivated. Fifty per cent of the quarter sections of the lands are suitable for settlement and would support a settler and his family. This has been demonstrated by the use made of other similar lands. (R., VIII, 3983.)

If the unsold lands were open to sale in 160-acre tracts, people would purchase them, and the lands would be occupied and put under cultivation. (R., VIII, 3984, 3996.) Settlers would go on them as did the early settlers in Oregon, and have no greater obstacles to overcome than they did. (R., VIII, 4000.)

Witness personally knew of homestead settlers who had gone on lands practically without money, made a living, and increased the value of the lands by clearing and improving them. (R., VIII, 4001.) Very few homesteads had been abandoned in Josephine County. (R., VIII, 3992.)

Witness stated that the policy of the railroad company with reference to the disposition of the grant lands has retarded the settlement and development of the county, both as to the even sections and the grant land. (R., VIII, 3984.)

JACKSON COUNTY.

James S. Bailey testified he was born and raised on a farm in Jackson County, Oreg., and had owned and operated ranches of his own in townships 39 and 40, range 4 east. He had been over and was acquainted with the character of the lands and their farming possibilities in townships 38, 39, 40, and 41 south, ranges 1 to 8 east. (R., VIII, 3693.) Eighty per cent of the quarter sections of the grant lands would be suitable for settlement; that is, would furnish a support for a settler and his family. (R., VIII, 3695.) Similar lands were occupied as homes by farmers. (R., VIII, 3693.) Settlers were making a living on 40 acres of land of the same general character. (R., VIII, 3705.) The railroad lands in this area are unfenced (R., VIII, 3700) and would average over a million feet of timber to the quarter section. The best timber has been purchased.

The manner in which the railroad company had disposed of the grant land had retarded settlement in this area. (R., VIII, 3696.) If settlers could have acquired title to the lands, they would have been occupied by bona fide settlers. (R., VIII, 3711.)

His father in 1888 made application to purchase 80 acres of grant railroad land which he was farming, and the company placed the price at $7.50 an acre. Later on his father offered the railroad company this price, but the company replied the land was not on the market. (R., VIII, 3689.)

J. W. Kelso testified he was 28 years old, and was engaged in farm and stock raising on his homestead in township 34 south, range 1 east. He had lived in Jackson County all of his life, and was acquainted with the soil and climatic conditions in that county. (R., VII, 3649.) He had a herd of goats, which were of great assistance in clearing his land of brush and shrubs. (R., VII, 3658.)

He said he was acquainted with lands in townships 34 and 35 south, range 1 east, and township 34 south, range 2 east, in Jackson County. In this locality hay, grain, fruit, and vegetables were raised by the farmers. Nearly all of the even sections in the area were occupied by settlers. The unsold grant lands were similar in character to the settled lands. Fifty per cent of 160 acres would be sufficient to support a settler and family. (R., VII, 3650.) Before the land could be cultivated the brush would have to be removed. (R., VII, 3656.)

The failure of the railroad company to sell the grant lands to actual settlers in tracts of 160 acres at $2.50 an acre had retarded settlement, and had been detrimental to the establishment and maintenance of roads and schools in his community. (R., VII, 3650.)

Charles Randles testified he was 45 years old, had resided in Jackson County, Oreg., since 1881, and was engaged in farming and stock raising. He had resided on the homestead of his father in Jackson County for a number of years. (R., VII, 3591.) His father's family consisted of his wife and 10 children, all of whom were supported from the home-

stead (R., VII, 3591–3593), which, in its natural state, was covered with timber (R., VII, 3595). All the lands in that vicinity required clearing before they could be cultivated. (R., VII, 3595.) The early settlers located generally along the creeks and rivers in Jackson County, largely because of the availability of water. (R., VII, 3600.)

He had been over, and was acquainted with, the lands in township 35 south, ranges 1 and 2 east; township 36 south, ranges 1, 2, and 3 east; township 37 south, ranges 1, 2, and 3 east; township 38 south, ranges 1 and 2 east. He had engaged in farming in this neighborhood and had run stock over these lands for 20 years. (R., VII, 3591–3592.) They raised grain, hay, wheat, oats, and other farm products. (R., VII, 3592.) About 80 per cent of the quarter sections with which he was acquainted were suitable for settlement; that is, a settler could support a family from the products of the land. Forty per cent of the land could be cultivated. (R., VII, 3594.) Similar lands had been settled upon and were occupied as homes. (R., VII, 3596.)

The timber in this area is scattering. (R., VII, 3605.) He estimated the value of railroad lands in these townships at $30 an acre. A quarter section of land with 25 acres under cultivation would support 50 head of cattle. (R., VII, 3611.)

Witness stated that the railroad company's administration of the land grant had retarded the settlement and development of the area mentioned. (R., VII, 3599.)

Charles A. Edmundson testified that he was 45 years old and resided on his homestead of 160 acres in section 32, township 35 south, range 3 east, from which he earns support for himself and family. (R., VII, 3614.) He had lived in Jackson County for 27 years and been engaged in farming all of his life. (R., VII, 3611.)

He said he had been over and was acquainted with the lands in townships 33, 34, and 35 south, ranges 2 and 3 east, Jackson County. That 50 per cent of them could be rendered suitable for cultivation; 75 per cent of the quarter sections were suitable for settlement; and similar lands were being cultivated. Some of the unsold lands in this area were open tracts with no timber. Part of the land was sparsely timbered. (R., VII, 3622, 3623.) He estimated the timbered land would average about 3,000,000 feet a quarter section. (R., VII, 3622.) There was an increasing demand for lands for settlement in this place. (R., VII, 3620.)

He made an application in 1907 to purchase 40 acres of the unsold grant land, but the railroad company replied that the land was off the market. This land was all agricultural and contained no timber. (R., VII, 3621.)

He stated that the railroad company's failure to sell the land to actual settler (at $2.50 an acre, in tracts of 160 acres, has prevented settlement in this locality. (R., VII, 3615.)

E. J. Grover. It was stipulated that if called he would testify the same as Charles A. Edmundson

concerning substantially the same area of land. He had resided in the vicinity of the lands from 1902 to 1911. (R., VIII, 4258.)

W. T. Houston testified he was 47 years old and had been engaged in farming all of his life. He had resided, with his family, consisting of a wife and eight children, on his homestead in township 34 south, range 1 west, Jackson County, for 18 years, and earned support for himself and family from the land, only 15 acres of which was under cultivation. (R., VII, 3623.) His father raised a family on a homestead in Jackson County. (R., VII, 3624.) In the vicinity of his place all kinds of vegetables, small grain, and fruits were raised. (R., VII, 3624.) At the time he went on his homestead there was only one-half acre of open ground. (R., VII, 3628.)

He had been over, and was acquainted with, the lands in townships 32, 33, 34, and 35 south, ranges 1 and 2 west, in Jackson County, and knows that 50 per cent of the land could be rendered suitable for tillage, and that 75 per cent of the quarter sections in this area were suitable for homestead settlement. (R., VII, 3626.) Part of this land is timbered. (R., VII, 3627.)

Witness stated that the failure of the railroad company to sell the grant land to actual settlers at $2.50 an acre has greatly hindered development of the community.

F. G. McWilliams testified he was 59 years old, and had resided at Ashland, Jackson County, Oreg., for 15 years. He was raised on a farm, but at the

time he testified was engaged in the real-estate business. He was acquainted with the soil and farming conditions in Josephine and Jackson Counties; owned 80 acres of land in township 38 south, range 3 east, and was also interested in other lands in this township.

He was acquainted with the lands in townships 38 and 39 south, ranges 2 and 3 east. The land in township 38 south, range 3 east, was generally level, 50 or 60 per cent of the land could be rendered suitable for cultivation, and the same percentage in township 38 south, range 2 east, could be utilized. The land is generally open with little good timber. (R., VIII, 3911.)

He was also well acquainted with the lands in township 39 south, range 1 west, and 25 per cent of that land was cultivable. This township is not timbered, except a few scattering large trees. (R., VIII, 3912.) He was acquainted with the lands in township 37 south, range 3 west. These lands were in a mining country, somewhat rolling, and contained no good timber. One-third of this township could be rendered suitable for cultivation. In these townships the lands produce fruits, grains, hays, and were settled throughout. Three-fourths of the quarter sections were suitable for settlement. (R., VIII, 3914.)

Witness stated that he could sell every acre of the unsold grant lands in Jackson County for $2.50 an acre; all of them, with which he is familiar, were worth more than this amount. (R., VIII, 3919.)

The failure of the railroad company to comply with the conditions of the grant and sell to actual settlers in tracts of 160 acres had been very detrimental to the growth of the country, especially with reference to settlement. (R., VIII, 3914.)

He purchased 40 acres of the grant lands, at $2.50 an acre, 14 years ago. He bought this under an arrangement that was then in force by which the company sold any land that was considered mineral at a flat rate of $2.50 an acre, giving a quitclaim deed. (R., VIII, 3920.)

W. R. Lamb testified he was 47 years old, by occupation farmer, and resided in Jackson County. For four years lived, with his family on his homestead in section 26, township 34 south, range 3 east; Jackson County, and while there earned support from the homestead.

For a period leased a tract of 20 acres that had been cleared out of the timber. He sold the homestead to a timber company because he could not get proper school facilities for his children in that locality. The railroad company owned the odd sections in the vicinity. (R., VIII, 3568.)

He had been over and was acquainted with the lands in township 24 south, range 3 east; township 36 south, ranges 2 and 3 east; township 37 south, range 2 west; township 39 south, range 1 east; and township 35 south, range 2 east, Jackson County. (R., VIII, 3572.) About half of this area is grant land, and in his opinion 75 per cent of the quarter sections would be suitable for settlement and about

60 per cent could be cultivated. Similar lands were being farmed. (R., VIII, 3573.) There is scattering timber on some of them. (R., VIII, 3574.) Part of the railroad lands in these townships could be farmed without clearing and part would have to be cleared. (R., VIII, 3680.)

That the failure of the railroad company to sell the grant land, in tracts of 160 acres, at $2.50 an acre, had kept settlers out of the community where such land was situated, and prevented the establishment and maintenance of schools. (R., VIII, 3574.)

He applied, about five years ago, to purchase 160 acres of grant land that contained some timber, but was good for agricultural purposes, and adjoined land that he owned. His application was rejected. (R., VIII, 3875.)

C. F. Carter testified he was 44 years old and resided at Gold Hill, Jackson County, Oreg. He had lived in Jackson County 32 years. Formerly he lived on 80 acres of the grant land in section 21, township 34 south, range 2 west, which his father had settled upon and put under cultivation, but was unable to purchase the land from the railroad company. His father remained on this 80-acre tract until he died. (R., VIII, 3500.) Most of it was good farming land; 60 acres could be plowed. (R., VIII, 3490.)

J. W. Hayes testified he was a retired farmer, residing in township 36 south, range 3 west, Jackson County. On his farm he raised all kinds of grain, fruit, vegetables, and also stock. (R., VIII, 3639.)

He was well acquainted with the character of the lands in townships 35, 36, 37, and 38 south, ranges 3 and 4 west, and township 34 south, ranges 2 and 3 west (R., VIII, 3640), and from 35 to 40 per cent of the land in this area was suitable for cultivation and would grow most agricultural or horticultural crops indigenous to that section of the country (R., VIII, 3644). The lands in this area would be suitable for settlement in tracts of quarter sections, and would furnish support for a settler and his family. (R., VIII, 3643). The early settlers acquired the open land on the river bottoms, and the later settlers have gone into the timber and cleared land for cultivation. (R., VIII, 3649.)

He stated that the failure of the railroad company to sell the grant land to actual settlers in quantities of 160 acres, and the withdrawal of the lands from sale, has retarded the settlement and development of the area with which he is acquainted and has prevented the establishment and maintenance of schools. (R., VIII, 3643, 3648.)

He applied to purchase a fractional tract of land owned by the railroad company, containing about seven acres adjoining his farm, but the railroad company refused to sell. (R., VIII, 3646.) His business partner applied to purchase 120 acres of grant land for orchard purposes about 10 years ago, which application the railroad company refused to entertain. (R., VIII, 3646.)

E. J. Mahan testified he was 33 years old and had lived in Jackson County, Oreg., 23 years. His father,

in 1887, settled on section 17, township 39 south, range 1 east, which was then unsurveyed land and not surveyed until 1905, and remained on this land until his death, in the fall of 1889. While living, his father built two houses on this place, one of which was burned, and also made other improvements. (R., VIII, 4152.) His father claimed 160 acres, and when it was surveyed the railroad company asserted the land was a part of this grant. A contest was initiated by his father against the company, and the General Land Office gave his father 40 acres of the land and the railroad company the remainder. The land patented to the railroad company is involved in the present suit. It had good soil, and almost all of it was suitable for cultivation. His father cleared 20 acres of the 40-acre tract, part of the clearing being on the land the railroad company got patent for. (R., VIII., 4135.) The house on this place is shown in Government's Exhibit 124. (R., VIII., 4134.)

The land claimed by his father was granite soil, formed from decayed vegetation and a granite formation. (R., VIII, 4157.) On this place they raised three crops of alfalfa a year and the finest of apples and strawberries without irrigation. During the last season he sold 400 crates of strawberries, at $1.50 a crate. (R., VIII, 4150.) Witness, his wife, and baby now live on this land. (R., VIII, 4135.)

He was familiar with the grant lands in township 39 south, range 1 east, township 38 south, ranges 1 and 2 west; and township 38 south, ranges 1, 2, and 3 west. In his opinion all of the quarter sections in

this area would support a settler and his family. (R., VIII, 4136–4137.) Some of the land of the railroad company was even better than that of his father's. If these lands were thrown open to settlement, in his opinion they would be settled as fast as offered. (R., VIII, 4133.) Withholding the lands from sale has retarded the settlement of even sections, and the failure to sell to actual settlers had caused the settlers in even sections to sell their lands. (R., VIII, 4138–4139.)

H. S. Palmerlee testified he was 36 years old, and resided on his homestead in township 38 south, range 5 east, where he lived for seven years. His homestead was situated at an elevation of 5,300 feet. He raised vegetables and grain. (R., VIII, 3927.) Eighty per cent of the land could be cultivated when cleared. (R., VIII, 3927.) Railroad lands adjoin his homestead.

He was raised on a farm and was engaged in farming prior to locating on his homestead. Nearly all of the homestead settlers in his vicinity ran stock in the forest reserve, stock raising being the chief industry of that community. (R., VIII, 3931.) He understood the Forest Service had made adverse report as to his own and other homesteads in the forest reserves, contending that the lands were chiefly valuable for timber. There was a great deal of land in the forest reserve devoid of timber, and it was the policy of the Forest Service to retain all lands within the limits of the reserve, even though no timber was

growing on them. (R., VIII, 3931.) Witness mentioned a number of settlers in this community who were living on homesteads making a living from their lands. (R., VIII, 3953.)

He was acquainted with all the unsold railroad lands in township 38 south, range 5 east, two-thirds of township 38 south, range 6 east, and all of township 38 south, range 4 east. These lands were very level, and 80 per cent could be cultivated after being cleared. He had also been through townships 40 and 41 south, ranges 2, 3, 4, and 5 east, and was acquainted with the general character of these townships. Twenty-five per cent of township 40 south, ranges 2 and 3 east, could be rendered suitable for cultivation, and 40 per cent of the lands in township 40 south, ranges 4 and 5 east, could be cultivated.

A good deal of township 41 south was in the Siskiyou Mountains, some of it quite hilly and rocky. (R., VIII, 3928.)

Settlers were living on lands similar to the unsold grant lands, having, as a rule, from 10 to 15 acres under cultivation and using the balance of their lands for grazing purposes. (R., VIII, 3929.)

Josiah H. Beeman, testified that he had lived at Gold Hill, Jackson County, Oreg., for 20 years, engaged principally in the quartz mining business. He was raised on a farm, farmed in a small way in Jackson County, and was familiar with the character of the soil, topography of the country, and the farming industry, etc., in this county. He had made a study

of the soils and their adaptability for agricultural and horticultural crops. (R., VIII, 3947.) He had traveled all over Jackson County, and to some extent in Josephine County, in hunting and on prospecting trips (R., VIII, 3946), and was generally acquainted with the railroad lands in Jackson County. In a good many localities some lands adjacent to the railroad lands were being successfully cultivated. Homesteads had been taken up in even sections while the adjoining grant lands in the odd sections were lying idle. (R., VIII, 3942.)

The higher lands in recent years had been found to be better adapted to fruit raising than the lower lands, as had been demonstrated by actual tests. (R., VIII, 3948.) He had seen soil subirrigated in this country at an altitude of 3,300 feet. (R., VIII, 3965.) Large orchards were located on the highlands in Jackson County, the land being of the same character as that of the unsold grant lands. (R., VIII, 3970.) The soil in Josephine County was generally what is termed a granite soil, which at one time was considered of little value, but has been demonstrated to be very productive. (R., VIII, 3949.) These statements referred to the nontimbered land in the grant.

He was also acquainted with the grant lands that are timbered in Jackson County. In his opinion these lands to a large extent when cleared would make very fine agricultural land. (R., VIII, 3952.) It is his judgment that 50 per cent of the grant lands with which he was acquainted could be cultivated, and

75 per cent of the quarter sections would be suitable for settlement. (R., VIII, 3976.) He knew of railroad lands that had a market value of $400 an acre for agricultural and horticultural purposes only, basing his judgment upon the price paid for adjoining lands of the same character (R., VIII, 3977), and there were other tracts of unsold land of equal value (R., VIII, 3979).

The policy of the railroad company in handling the grant lands had decidedly retarded the commercial development of Jackson County. (R., VIII, 3950.) In his opinion, if these lands had been offered to settlers, they would have been taken. (R., VIII, 3956.)

He contested the issuance of patents to the railroad company for a number of tracts of grant land, contending that they were mineral, and at the hearing the railroad company produced witnesses who testified that the lands were chiefly valuable for agricultural purposes. These were all mountain lands. (R., VIII, 3952.) He knew the railroad company had made propositions to mineral protestants, whereby the protests should be withdrawn and patents issued, and subsequently the railroad company would sell the land to the protestant after he had obtained patent. (R., VIII, 3954.) (The grant excepts mineral land.)

COMPLAINANT'S EXHIBITS.

No. 118. Copy of the Coos Bay Times (Coos County), showing pictures of county farms.

No. 121. Pamphlet setting forth the agricultural and other resources of Lincoln County, Oreg., issued

by the Southern Pacific Company, cooperating with commercial organizations.

No. 124. A photograph of occupied grant land in Jackson County.

No. 125. A pamphlet setting forth and boosting the agricultural and other resources of Josephine County, issued under a cooperative plan by commercial clubs in Josephine County and Southern Pacific Company.

A reduced summary of the foregoing testimony is given in tables A and B. (*Infra.*)

THE ALLEGED INFLUENCE WHICH BROUGHT ABOUT THE PASSAGE OF THE MEMORIAL OF FEBRUARY 14, 1907, BY THE LEGISLATURE OF OREGON.

Messrs. Eberlein and Booth testified upon this point. Mr. Eberlein said that, in his opinion, the memorial was instigated by influential politicians for personal interests, but admitted that he had no personal knowledge on the subject. (Eberlein, R., V, 2378.) He attributed the origin of the memorial largely to the Booth-Kelly Lumber Company and Booth. Booth denied this responsibility. (Booth, R., V, 2612.) In addition Mr. Dixon said that he appeared before the Public Lands Committee of the House of Representatives, and insisted that an amendment be made to the Congressional joint resolution, authorizing the bringing of this suit, to the effect that the titles of all purchasers from the railroad company be confirmed, or else that the resolution should be defeated. (Dixon, R., VI, 2703.)

PART IV.

THE DECREE.

The case was submitted upon the pleadings and the evidence. The court dismissed the cross complaints and petitions in intervention for want of equity, decreed the unsold lands forfeited, quieted the title thereto in the Government, gave other relief and enjoined the defendants from doing certain acts. (R., III, 1296.)

OPINION OF THE TRIAL COURT.

Judge Wolverton, who tried the case, delivered an exhaustive written opinion, which appears in 186 Fed., 861. (R., II, 727.)

THE APPEAL.

The defendants, cross complainants, and interveners appealed to the circuit court for the ninth circuit.

That court, after hearing arguments, certified certain questions to this court under section 239 of the Judicial Code, and later, this court, on motion of the Government, concurred in by all parties, ordered up the entire record.

JOHN W. DAVIS,
Solicitor General.
ERNEST KNAEBEL,
Assistant Attorney General.
CONSTANTINE J. SMYTH,
Special Assistant to the Attorney General.

April, 1915.

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OUTLINE OF BRIEF.

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5 Stat. 245, June 18, 1838.
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13 Stat. 519, March 3, 1865.
14 Stat. 30, April 10, 1866.
14 Stat. 80, July 3, 1866.

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4 Stat. 290, May 23, 1828.
9 Stat. 83, August 8, 1846.
9 Stat. 77, August 8, 1846.

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3 Stat. 727, February 28, 1823.
4 Stat. 234, March 2, 1827.
4 Stat. 242, March 3, 1827.
12 Stat. 797, March 3, 1863.
13 Stat. 140, June 20, 1864.
13 Stat. 183, June 25, 1864.
13 Stat. 355, July 2, 1864.
14 Stat. 86, July 4, 1866.
14 Stat. 89, July 5, 1866.
14 Stat. 409, February 25, 1867.
15 Stat. 340, March 3, 1869.

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9 Stat. 466, September 20, 1850.
10 Stat. 8, June 10, 1852.
10 Stat. 155, February 9, 1853.
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11 Stat. 9, May 15, 1856.
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16 Stat. 277, July 14, 1870.
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18 Stat. 72, June 15, 1874.

19 Stat. 101, July 24, 1876.
19 Stat. 404, March 3, 1877.
23 Stat. 61, June 28, 1884.
23 Stat. 296, January 31, 1885.
23 Stat. 337, February 28, 1885.
24 Stat. 123, July 6, 1886.
24 Stat. 140, July 10, 1886.

Acts providing for sale of lands at public auction and the dates thereof:

1 Stat. 464, May 18, 1796.
2 Stat. 229, March 3, 1803.
2 Stat. 277, March 26, 1804.
2 Stat. 448, March 3, 1807.

Acts providing for the protection of actual settlers and the dates thereof:

1 Stat. 257, April 21, 1792.
1 Stat. 442, March 3, 1795.
2 Stat. 229, March 3, 1803.
2 Stat. 455, January 19, 1808.
4 Stat. 420, May 29, 1830.
4 Stat. 603, July 14, 1832.
4 Stat. 663, March 2, 1833.
4 Stat. 678, June 19, 1834.
4 Stat. 743, June 30, 1834.
5 Stat. 251, June 22, 1838.
5 Stat. 382, June 1, 1840.

Other acts for the benefits of settlers and the dates thereof:

5 Stat. 453, September 4, 1841.
10 Stat. 574, August 4, 1854.
12 Stat. 392, May 20, 1862.

ADDITIONAL AUTHORITIES.

As to words necessary to constitute a condition subsequent without words of reentry or forfeiture: *Marston* v. *Marston*, 47 Me. 495; *Chapman* v. *Pingree*, 67 Me. 198; *Rawson* v. *Uxbridge*, 7 Allen, 125; *Gray* v. *Blanchard*, 8 Pick. 284, 287; *Hayden* v. *Stoughton*, 5 Pick. 528; *Tilden* v. *Tilden*, 13 Gray, 103; *Langley* v. *Chapin*, 134 Mass. 82; *Howe* v. *Lowell*, 171 Mass. 575; *Clapp* v. *Wilder*, 176 Mass. 332, 335; *Brown* v. *Caldwell*, 23 W. Va., 187, 190; *Countryman* v. *Deck*, 13 *Abbott's New Cases*, N. Y., 110; *Trustees of Union College* v. *New York*, 173 N. Y. 38; *Hammond* v. *R. R. Co.*, 15 S. C. 10, 32; *Woodruff* v. *Trenton Water Power Co.*, 10 N. J. Eq. 489; *Downer* v. *Downer*, 9 Watts, 60; *Hoyt* v. *Ketcham*, 54 Conn. 60; *Pierce* v. *Brown University*, 21 R. I. 392; *Blanchard* v. *Detroit, etc., R. Co.*, 31 Mich. 43, 50; *Warvelle on Vendors*, 2 ed., vol. 1, sec. 445; *Brewster on Conveyances*, sec. 177.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 679.

OREGON AND CALIFORNIA RAILROAD COMPANY et al., defendants and appellants,

JOHN L. SNYDER ET AL., CROSS-COMPLAINANTS and appellants,

WILLIAM F. SLAUGHTER ET AL., INTERVENERS and appellants,

v.

THE UNITED STATES, APPELLEE.

BRIEF ON BEHALF OF THE UNITED STATES.

PREFATORY NOTE.

A statement of the case, embracing a summarization of the pleadings, orders of court, all the testimony, and the decree, is printed under a separate cover and referred to herein as "statement" in parenthesis.

On the preceding pages will be found the following: A table of the cases cited in the body of the brief

(p. vi); a list of certain statutes bearing on the disposition of the public lands (pp. xi, xiv); and references to a number of additional authorities dealing with conditions subsequent (p. xiv).

We invite the court's attention to the able and exhaustive opinion of the trial judge (186 Fed. 861, R. II, 696 et seq.).

POINTS DISCUSSED.

First. Pertinent rules of construction.

Second. Vesting of the Grant of July 25, 1866.

Under which will be discussed the question whether the grant under the act of July 25, 1866, is subject to the provision of the act of April 10, 1869, restricting the manner in which the granted lands might be sold.

Third. Construction of actual settlers provisions.

Under which will be discussed (a) the general policy of Congress with respect to the disposition of the public domain, and (b) the meaning and legal effect of the provisions of the act of April 10, 1869, and of the act of May 4, 1870, restricting the manner in which the granted lands might be sold; the Government contending that it is a condition subsequent, the defendants contending that it is an "unenforcible, directive, regulative covenant," and the cross-complainants and interveners contending that it establishes a method by which individual citizens may acquire an enforcible right to purchase the lands.

Fourth. Breaches of Conditions Restricting Sale of Granted Lands.

Under which will be discussed the character and extent of the transactions charged to be in violation and breach of the conditions restricting the manner of selling the granted lands, and certain excuses of the defendants.

Fifth. Remedies—Jurisdiction.

Under which will be discussed the remedies available to the Government and the question of jurisdiction raised by the defendants.

Sixth. Waiver—Effect of Patents—Statute of Limitations—Laches.

Under which will be discussed the arguments advanced by the defendants in support of the following propositions: (1) That all rights under the provisions restricting the manner of selling the granted lands have been waived by the United States by acquiescence in violations thereof, by certain congressional enactments, etc.; (2) that the binding force of these provisions was terminated by the issuance of patents; (3) that this suit is barred by the act of March 2, 1896, limiting the time within which suits may be instituted to cancel patents erroneously issued; (4) that this suit is barred by *laches* on the part of the United States.

Seventh. Rights of the Union Trust Company and Stephen T. Gage.

Eighth. Alleged equities of defendants.

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ARGUMENT.

I.

RULES OF CONSTRUCTION.

(1) An act of Congress making a grant is more than a mere conveyance. It is a law as well. In *Missouri, etc., R. Co.* v. *Kansas Pacific* (97 U. S. 491, 497), it is said:

> It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress.

(See also *Schulenberg* v. *Harriman*, 21 Wall. 44; *Hall* v. *Russell*, 101 U. S. 503; *Winona* v. *Barney*, 113 U. S. 618; *Kansas, etc.*, v. *Dunmeyer*, 113 U. S. 629; *United States* v. *Southern Pacific*, 146 U. S. 570; *St. Paul, etc.*, v. *Greenalgh*, 26 Fed. 563.)

The act in question being a law must be enforced as written, if possible. It should not be impaired or minimized in any wise by construction. All parts should be given effect, unless they be in irreconcilable conflict.

(2) In construing public grants, such as the one under consideration, all doubts must be resolved in favor of the grantor.

In *Coosaw Mining Co.* v. *South Carolina* (144 U. S. 550, 562), it is said:

> The rule of construction applicable to the granting act is the familiar rule that all grants of this description must be construed favor-

> ably to the Government, and that nothing passes but what is conveyed in clear and unmistakable language.

(See also *U. S.* v. *Oregon, etc., R. R. Co.*, 164 U. S. 526, 539; *M. K. & T. Ry.* v. *United States*, 235 U. S. 37.)

The law favors that construction which will give effect to every part. In *Bird* v. *United States* (187 U. S. 118, 124) it is said:

> There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience.

The rule for which we contend is reasonable. When the good of the public comes into conflict with the good of the individual the latter must yield. But it is not necessary for us to press the rule that far in this case; because, as we view it, the terms of the grant are plain. If the rule is to have any application here it would be to prevent the resolving of doubts against the Government. An enforcement of the clear meaning of the statute is all we ask for.

(3) The principle applicable to private conveyances, that forfeitures are unfavored by law and should be avoided wherever possible, has no application. (*Rutherford* v. *Greene*, 2 Wheaton, 196; *Wilkinson* v. *Leland*, 2 Peters 627, 662; *Rice* v. *Railroad Company*, 1 Black 358; *Schulenberg* v. *Harriman*, 21 Wal. 44; *Missouri* v. *Kansas*, 97 U. S. 491, 497; *St. Paul* v. *Northern Pacific*, 139 U. S. 1.)

(4) The language of the act must be permitted to control, unless the plain meaning thereof leads to results so absurd as to force the conviction that Congress could not have intended them.

In *United States* v. *Goldenburg*, 168 U. S. 95, 102, it is said:

> The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and rules of grammar. The courts have no function of legislation and simply seek to ascertain the will of the legislator.

In *Kohlsaat* v. *Murphy*, 96 U. S. 153, 160, we read:

> Whenever the intention of the legislature can be discovered from the words employed, in view of the subject matter and the surrounding circumstances it ought to prevail, unless it lead to absurd and irrational conclusions, which should never be imputed to the legislature except when the language employed will admit of no other signification.

(5) Rules of statutory construction are employed to resolve, but never to create doubts (*Hamilton* v. *Rathbone*, 175 U. S. 414).

II.

VESTING OF THE GRANT OF JULY 25, 1866.

Under which will be discussed the question whether the grant under the act of July 25, 1866, is subject to the provisions of the act of April 10, 1869, restricting the manner in which the granted lands might be sold.

The amendatory act of April 10, 1869, contains the provision on which this action, so far as it affects the East Side grant, is based. We quote the proviso:

> *And provided further*, That the lands granted by the act aforesaid [meaning the act of 1866] shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding $2.50 per acre.

It is, therefore, of the first importance to show that the grant in question was received subject to that provision.

The act of July 25, 1866, required the company designated by the Legislature of Oregon as competent to receive the grant to file its acceptance of the act within one year from the date hereof. (Secs. 6 and 8; statement, pp. 9, 10.)

The West Side Company abandoned the East Side grant and accepted in lieu thereof the grant of May 4, 1870 (statement pp. 55, 56). Therefore, only the date on which the East Side Company filed its assent is material. This company was organized in April, 1867, and designated in October, 1868. Obviously it could not file its assent within one year from the

date of the granting act, consequently it applied to Congress for an extension of time (statement, pp. 51, 53).

On April 10, 1869, Congress amended the act of July 25, 1866, as above stated, and among its provisions is one extending the time for filing the assent required by that act to one year from the date of the amendatory act.

On June 30, 1869, the East Side Company filed its assent to the act of 1866 in these words:

> Accept all the provisions, rights, privileges, and franchises of said act of July 25, 1866, and all acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto (statement, p. 55).

Under these circumstances it would seem conclusive that the grant was received subject to the provisions of the amendatory act of 1869. Defendants contend, however, that in reaching this conclusion sufficient effect is not given to the words, "that there be and hereby is granted to said company," appearing in section two of the act of 1866. They say these words import a present vesting of the estate and that under the doctrine of relation the estate must be treated as having taken effect in the East Side Company on the date of the act of July 25, 1866. The Government denies this.

(a) The doctrine of relation does not apply.

All railroad grants import a present vesting of the estate, but in nearly every one something had to

be done after the making of the grant before the estate could actually vest. This gave rise to many disputes in the early administration of the grants, as to when the grants vested, and it became necessary for the courts to establish a rule by which the disputes could be settled. At common law a grant to one not in existence, or not qualified to take, or of lands not identified, at the time of the grant, was void for uncertainty. But this court has held that Congress, being a law making body, was not bound by the common law and could create a valid grant by methods even prohibited by it. (*Rutherford* v. *Greene*, 2 Wheaton 196; *Lessieur* v. *Price*, 12 Howard 59.) Consequently, it is settled that such grants are valid.

When do such grants become effective? That depends upon circumstances. If the grantee is capable of taking at the time of the grant, but it is necessary to do something to identify the lands, as, for instance, to locate the line of road, the grant does not vest until the identification has been made. In contemplation of law, however, it relates back to the date of the granting act. This rule has been adopted for the protection of the grantee against intervening claims of third parties.

In *Barden* v. *Northern Pacific*, 154 U. S. 288, 313, it was said:

> The title attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one.

In *Van Wyck* v. *Knevals*, 106 U. S. 360, it was said:

> When that route is thus established, the grant takes effect upon the sections by relation as to the date of the act of Congress. In that sense we say that the grant is one *in praesenti*. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act and passes the title as fully as though the sections had then been capable of identification.

In *United States* v. *Detroit T. & L. Co.*, 200 U. S. 321, 334, Mr. Justice Brewer, speaking for the court, said:

> By the doctrine of relation the patents (under the timber and stone act), when issued, became operative as of the dates of the entries. It is true that this doctrine is but a fiction of law, but it is a fiction resorted to whenever justice requires. It is that principle by which an act done at one time is considered to have been done at some antecedent time. It is a doctrine of frequent application designed to promote justice. Thus a sheriff's deed takes effect, not of its date, but at the time when the lien of the judgment attached. The ordinary railroad land grants have been grants *in praesenti*, and under them the title has been adjudged to pass not at the completion of the road, but at the date of the grant.

There are many cases like these, but there is none in which it is held that the vesting of the title goes back to a date before the grantee came into existence or before it was qualified to take.

In *Hall* v. *Russell*, 101 U. S. 503, it was said:

> There can not be a grant unless there is a grantee, and consequently there can not be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently.

Any other rule, it seems to us, would lead to an absurdity. Take the case at bar; to say that the grant to the East Side Company took effect in that company as of the date of the act of July 25, 1866, would be equivalent to saying that it took effect before the company was qualified by designation to receive it, even before the company had come into being. This proves too much.

There are other cogent reasons for saying the grant is subject to the provisions of the amendatory act of April, 1869.

(b) **Assent was necessary.**

The company was incapable of receiving or accepting the grant until it had been designated by the legislature. The provisions of the act of 1866 make this plain. Section 1 provides that "such company organized under the laws of Oregon as the legislature of said State shall hereafter designate" shall construct the Oregon portion of the road described in the act. Section 6 provides "that the said companies (which includes the Oregon company) shall file their assent to this act in the Department of the Interior within one year after the passage hereof." Section 8 provides "that in case the said

companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto, as provided in section 6 of this act, or by not complying with the same as provided in said section, this act shall be null and void" (statement, p. 10). The company regarded this assent as essential, for it applied to Congress for an extension of time within which to file it (statement, p. 51). Congress took the application under consideration and afterwards granted it in the amendatory act of 1869.

Defendants suggest that they had given their assent by commencing the construction of the road long before the passage of the amendatory act of 1869. Assent could not be given in that way. The act requires it to be filed in the Department of the Interior. An oral assent can not be filed. (*Words and Phrases*, vol. 3, p. 2764, *Bouvier's Law Dictionary*, p. 660.) This, we may remark in passing, is in accordance with the construction adopted by the company for, as we have seen, it filed a written assent.

(c) **The legal function of an assent.**

An assent implies an acceptance of a proposal. In *State* v. *B. & O. R. R. Co.*, 12 Gill & J. 399, 433, the court held, that where an act authorized the construction of a railroad and required it to assent to certain provisions of the law, the term is one peculiarly appropriate to contracts, and then observed:

> The assent of the company was essential to give to the law a binding and obligatory force; the principle being well settled that an act or

> charter of incorporation is nothing more than an offer until consummated by acceptance.

(*Canal Company* v. *B. & O.*, 4 Gill & J. 1, 130; *Fuller* v. *Kemp*, 16 N. Y. S. 158, 160; *Baker* v. *Johnson County*, 37 Iowa, 186, 189.)

The first act required by Congress from the grantee company was the filing of its assent. Until that had been done it could not be known that the company accepted the grant upon the conditions named. It was the means provided by Congress for evidencing the meeting of the minds of the grantor and grantee. The grant was an offer and, of course, could not become effective until accepted. *Rogers* v. *Railroad Company*, 45 Mich. 460, 468, is a case in point. Congress by the act of June 3, 1856, granted lands to Michigan to aid in the construction of railroads. The legislature of the State in turn granted the lands to certain railroad companies by an act which said, *inter alia*, that they "are hereby disposed of, granted to, conferred upon, and vested in" the railroad companies named. It also provided for an acceptance and said, "in such acceptance each of said companies shall severally assent and agree to the provisions and requirements of this act, which acceptance shall be filed in the office of the secretary of state of Michigan within 60 days from the passage of this act." The railroad companies did not file an acceptance, and the court was asked to determine the effect of the failure. It said:

> So far as the claim is concerned that these companies without acceptance obtained titles in fee, we think it has no legal basis.

Again,

> This acceptance was the only act whereby any of these companies were brought into contract relations with the State at all. The law did not assume to force the grant upon any company, and the contract could not bind either party until both assented to the same agreements and conditions.

(d) Acceptance of the grant in the manner provided by the granting act was essential.

It is admitted by the defendants that the East Side Company did not *file* its assent within a year after the passage of the act of 1866, but they contended that it had given its assent in some other way. Even if this be true, it would not be sufficient. The act of 1866 was not only a conveyance, but also a law. In *Schulenberg* v. *Harriman*, 21 Wall., 44, Mr. Justice Field, speaking for the court, said:

> A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires (*Missouri* v. *Kansas Pacific*, 97 U. S. 491; *United States* v. *Southern Pacific*, 146 U. S. 570).

Therefore, the manner in which the assent was to be given, having been fixed by statute, could not be disregarded without violating the law.

United States Bank v. *Dandridge*, 12 Wheat. 64, relied upon by defendants, is not opposed to this view. That case decided that acts of a corporation

are not "invalid merely from the omission to have them reduced to writing," but added,

> Unless the statute creating it makes such writing indispensable as evidence or to give them obligatory force. *If the statute imposes such a restriction, it must be obeyed* (p. 69).

Again,

> If, in the present case, the statute had prescribed that nothing but a written vote on record should be deemed an approval of the bond, or that the cashier should not be deemed for any purpose in office until such approval, the consequences contended for would have followed. His acts would have been *utterly void* and any unrecorded vote of approval nugatory (p. 87). [Italics ours.]

St. Paul, etc., Railway Co. v. *Greenhalgh*, 139 U. S., 19, is another case which defendants claim supports their contention. The question decided there arose in this wise: Congress had granted lands to the State of Minnesota to aid in the construction of railroads. One of the roads failed to complete construction within the time prescribed. Congress extended the time, but upon conditions—

> That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or other such persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad.

The act required the railroad company to file an acceptance of these conditions. There was no evidence that it had done so, but it had received all the benefits of the act, and in view of this the court held:

> It will be considered, in the absence of proof to the contrary, as having in fact accepted the conditions imposed, and relinquished all claim to the lands thus settled upon and occupied.

Because,

> It would be in the highest degree inequitable to allow the company to have all the benefits of the extension of time to complete its road, so as to avoid forfeiture of its privileges and franchises, without at the same time holding it to the conditions affecting the rights of settlers upon the lands of the company, in consideration of which the extension was made.

The decision was in effect that where the beneficiaries of a grant obtain all the benefits thereof they are estopped from denying that they had assented to the terms of the grant—had assented how? Clearly in the manner provided by the act. That case gives no countenance to the contention of defendants.

(e) Mutual Construction of Provisions Requiring Filing of an Assent.

If an instrument is of doubtful meaning the construction given it by the parties themselves, as shown by their acts and omissions, particularly at or about

the time of its execution will be deemed to be the true one, unless the contrary be clearly shown. (*Irwin* v. *United States*, 16 Howard 513; *Dakin* v. *Savage*, 172 Mass. 23.)

Considering the conduct of the parties here, how did they construe the provision with respect to the filing of the assent?

The East Side Company made application to Congress for an extension of the time within which to file its assent. When this application was pending Senator Williams of Oregon, favoring the extension of time, procured from the Secretary of the Interior his views on the subject. After setting forth the history of the subject, the Secretary said:

> I have the honor to state that as the matter now stands that the grant, so far as the portion in Oregon is concerned, has lapsed * * * and some legislation of Congress is necessary to revive the grant for the Oregon portion of the road. The proposed bill, if it becomes a law, will, in my opinion, accomplish that purpose. (Statement, p. 52.)

The bill referred to was what subsequently became the amendatory act of 1869. Congress, when it passed that act extending the time for filing the assent, must have deemed it important, for it will not do to say that it purposely did an unnecessary thing.

During the same time the West Side Company proceeded on the assumption that assent was necessary; it resisted the extension on the theory that if

it was not granted the East Side Company could acquire no rights under the grant of 1866. We have then the East Side Company, the West Side Company, the Congress of the United States, and the Secretary of the Interior all agreeing in the view that a written assent had to be filed within the time fixed in the grant. Shall the East Side Company, or its successors in title, be now heard to say that they were all mistaken—that the requirements of an act passed at its request, and largely through its procurement, was unnecessary and does not mean what it says?

(f) Is the provision with respect to the filing of an assent a condition precedent or subsequent?

It is urged by defendants that the filing of an assent was a condition subsequent. This they based upon the eighth provision of the act of 1866 to the effect that upon failure to file the assent the lands unpatented "shall revert" to the United States. The phrase "shall revert," they say, implies that the title vested in the grantee before the assent was given. This assumes too much. That the title passed out of the United States the moment the act was passed may be conceded, but this is far from admitting that at the same time it took lodgement in the company. It became in the language of this court "a float" (*Railroad* v. *Fremont County*, 9 Wall. 89) and did not and could not find a resting place until the companies, contemplated by the granting act, had qualified themselves to become its recipient.

When we consider the function of an assent, it is obvious that the giving of it was intended to pre-

cede the vesting of the estate. In *Finlay* v. *King* (3 Pet. 346, 374) it was said:

> There are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent * * * if the language of the particular clause, or of the whole will, show that the act on which the estate depends, must be performed before the estate can vest, the condition is, of course, precedent; and unless it be performed the devisee can take nothing.

Whether a condition in a deed is precedent or subsequent is always a question of the intention of the parties (*Rannels* v. *Rowe*, 145 Fed. 296; *Jones* v. *C. & O. R. R. Co.*, 14 W. Va. 514; *Carloss* v. *Oxford*, 72 Ark. 310; *Washburn on Real Property*, vol. 2, sec. 941).

No one can doubt, it seems to us, after reading the act of 1866, that it was the intention of Congress that the assent should precede the vesting of the estate.

(g) Relation of the West Side Company to the East Side Grant.

Whether the West Side Company was sufficiently "organized under the laws of Oregon" in October, 1866, to receive the designation of the Legislative Assembly of Oregon, or acquired any rights by filing its acceptance of the grant in May, 1867, is not now open for investigation. The legislative assembly, on October 20, 1868, decided that the company was not "organized or in existence" at the time of the designation, and then named the East Side Company

as the beneficiary (statement, pp. 14, 51). The West Side Company did not yield to this at once, but continued for a time to claim the grant.

The granting act required the designated company to complete the first section of 20 miles within two years from the date of the act (sec. 6), and provided that in the event it was not done, "the act shall be null and void and all the lands not conveyed by patent * * * shall revert to the United States." This time was enlarged by the act of June 25, 1868, to a year and a half from that date, but the West Side Company failed to comply with it, abandoned the grant, and applied for and received in lieu thereof the grant of May 4, 1870 (statement, pp. 13, 55).

In addition to this the Secretary of the Interior, as we show under the next caption, decided, in matters properly before him for adjudication, that the East Side Company was entitled to the grant. This decision was acquiesced in at the time by the West Side Company (statement, p. 55), and no one now seriously questions it.

(h) **The East Side Company acquires the grant.**

The granting act, as we have learned, required the designated company to file its "assent" (sec. 6) and "a map of survey of the railroad" with the Secretary of the Interior, and thereupon, it says, "the Secretary shall withdraw from sale public lands herein granted on each side of said railroad," etc. (sec. 21). Before receiving the assent or the

map, and before withdrawing the lands, the Secretary necessarily decided that the company tendering the assent and the map had been properly designated by the Legislature of Oregon. His decision has never been reversed. The West Side Company might have complained of it if that company had not failed to complete the first 20 miles of its road within the time provided by the amendatory act of June 25, 1868, and had not thereafter abandoned the East Side grant and accepted another in its stead. By doing this it acquiesced in the Secretary's decision. Neither the Government, the State, the West Side Company, nor anybody else who has a right to do so, challenges that decision, and, consequently, it is conclusive upon the point that the East Side Company, when it filed its assent on June 30, 1869 (Statement, pp. 54, 55), acquired a right to the grant, but we deny it had any valid claim thereto prior to that date.

The assent constituted an acceptance by it of the offer by the Government through the grant "and thereby the parties were brought into such contractural relations that the terms of the proposal became obligatory on both" (*Burke* v. *Southern Pacific Railroad Company et al.*, 234 U. S. 669; *Minotti* v. *Dillon*, 167 U. S. 721).

There is some claim that the East Side Company had acquired the grant before the passage of the amendatory act of 1869, by expressing its assent thereto upon the records of the company.

The first thing met with in the minutes of the company to indicate that it was making any claim to the grant, is the following resolution of the directors passed June 10, 1868:

> That the O. C. R. R. Company hereby accepts any grant of land which may have been made or may be extended to said company by Congress. And the officers of this company are hereby directed to file a duly authenticated copy of this resolution with the Secretary of the Interior, Washington, D. C. (X–5003.)

It does not appear that the resolution was ever filed, as directed, but even if it had been it would have been ineffectual, because too late. The granting act required the assent to be filed within one year after the passage of the act, and this assent was not expressed until more than two years after that time.

On November 25, 1868, the company passed another resolution expressing its assent to the granting act. This of course was also too late. Neither is there anything in the record to show that the resolution had ever been filed with the Secretary of the Interior. (X–5026–27.)

About the time the first-mentioned resolution was adopted, the company issued a pamphlet disclaiming any rights to the grant (statement, p. 49), and asserted that no right could be acquired without additional congressional and State legislation. This was followed by the legislative act of October 20, same year, and the congressional act of April 10, 1869.

(i) Oregon and California Railroad Company Estopped.

In *Newby* v. *Oregon Central Railroad Company, et al.* (Fed. Cas. 10144), the right of the East Side Company to the name "Oregon Central Railroad Company" was brought into question, it being contended that the West Side Company had appropriated that name first. Fearing, no doubt, that the contention was well founded, the company, through its promoters and stockholders, formed a new corporation on March 17, 1870, under the name of the Oregon and California Railroad Company, defendant herein, which was practically but a reorganization of the old company. The new company, in its articles of incorporation, recognized the binding force of the act of 1869. On the 29th of the same month the East Side Company made a general conveyance of all its property and franchises to the new company, and on the same day was dissolved (Statement, p. 58, *et seq.*).

April 4, following, the new corporation, through its board of directors, adopted a resolution assenting to the terms of the act of 1866 "and amendments thereto," which necessarily included the act of 1869. On April 28, 1870, it filed in the office of the Secretary of the Interior certified copies of its assent and of the general conveyances from the East Side Company, and from that time has been recognized by the Department of the Interior as the *successor* of the latter company (statement, p. 59, *et seq.*).

In connection with the foregoing, consider that on January 29, 1869, the Secretary of the Interior had decided that "the grant, so far as the road in Oregon is concerned, has lapsed * * * and some legislation by Congress is necessary to revive the grant," adding, "the proposed bill," (meaning the one which eventually became the amendatory act of 1869), "will, in my opinion, accomplish that purpose" (statement, pp. 52, 53,). From this it is clear that the Department of the Interior would not have recognized the East Side Company as entitled to the grant if the act of 1869 had not been passed, or if the company had not assented to it. By assenting, the company received the benefits of the act without contest. May it now be heard to say that the assent was unnecessary and therefore not binding? We think not. (*Bigelow on Estoppel*, pp. 354–364; *Spriggs* v. *Bank*, 10 Pet. 257, 265; *Goddard* v. *Dakin*, 51 Mass. 94; *Johnson* v. *Thompson*, 129 Mass. 398; *Parkinson* v. *Sherman*, 74 N. Y. 88.)

Is there anything in the case of *Bybee* v. *O. & C. R. R. Co.* (139 U. S. 663, 684) against this? In that case the company secured nothing from Bybee through its recognition of his alleged title. Estoppel rests upon equitable grounds. There was no equity estopping the company from denying his claim.

(j) In the act of July 25, 1866, Congress reserved the power to amend the grant, and afterwards exercised this power at the request of the East Side Company.

Section 12 of the act of July 25, 1866, reads:

> That Congress may at any time, having due regard for the rights of said California and Oregon Railroad Companies, add to, alter, amend, or repeal this act.

Pursuant to this, Congress passed the amendatory act of April 10, 1869. Did the East Side Company have any right with respect to which Congress was bound to have "due regard" at the time of the passage of that act? We have already shown it had not. But whether it had or not, the East Side Company can not now be heard to say that the amendment is not binding. It applied to Congress and represented that it had no rights under the grant and could acquire none until Congress permitted it to do so by extending the time for filing its assent. The amendment was, therefore, consented to by the company.

> With the consent of the corporation the legislature may make any change in the charter. This consent may be shown by the corporation asking for the amendment, or expressly accepting one made without request, or by acting upon or acquiescing in one enacted without request (8 *Cyc.* 964).

CERTAIN CONTENTIONS BY DEFENDANTS NOT NOTICED ABOVE.

(1) On June 25, 1868 (statement, p. 13), Congress passed an act extending the time for the completion of the first twenty miles of the road from one year to eighteen months. Defendants urge that by this act Congress waived the filing of the assent required by the act of July 25, 1866. There is nothing in its terms to warrant such a contention.

(2) It is also insisted that the provision of the amendatory act of 1869, which reads, "that nothing herein shall impair any rights heretofore acquired by any railroad company under said act," shows an intention on the part of Congress not to insist upon the other provision requiring the lands to be sold to actual settlers in limited quantities. Of course, it has no such meaning. At the time of the passage of the amendatory act there was a controversy between the West Side Company and the East Side Company (statement, p. 48). Congress did not desire to settle that controversy and, hence, incorporated the provision in question. To argue that this provision nullifies the one with respect to the sale of the lands, is pushing the contention a little bit too far.

(3) Defendants say that in the bills of complaint and stipulations of fact in certain former suits involving the grant of 1866, the Attorney General recognized the East Side Company as having become vested with the grant prior to the act of 1869.

These papers do not appear in the printed record, but they show that no such question was involved in those actions, even in the slightest degree. The stipulations were prepared by the attorneys for the defendants and principally upon the stationery of one of the attorneys for the defendants in the case at bar. In preparing them they inserted the statement, "and prior to the year 1869 the said company duly became entitled to all the benefits, privileges, and grants in the State of Oregon mentioned in or offered by the said act of Congress."

These stipulations were made many years ago, when there was nothing to direct the attention of the Attorney General to the importance of the exact time of the vesting of the grant. He did not have in mind, and could not have had in mind, the question of the validity or binding force of the provisions of the act of 1869. On the other hand, the attorneys for the railroad company have had that question very seriously in mind for many years. Besides, each of these stipulations is expressly limited to "the purposes of this suit." They have no weight in the case at bar.

(4) Another contention urged is, that the filing of an assent by either the California or the Oregon company was a sufficient compliance with the act.

The language of the act refutes this. Section 6 says, "that the said companies shall file *their* assent to this act." Section 8 provides "that in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing *their*

assent thereto, * * * this act shall be null and void." (See statement, p. 10.) "Their" assent does not mean "its" assent.

(5) Some stress is laid by the defendants upon the claim, that if the California company had, with the consent of Oregon, built the road in Oregon, it would have received the grant free from the actual settlers provision. That depends upon whether it did so in conformity with the terms of the grant of 1866. With equal force it may be said that if the West Side Company had done what was required by the grant it would have received its benefits without the restrictions of the actual settlers provision, but it did not, and there's the rub. It is because the East Side Company had not complied with those requirements that application had to be made to Congress for indulgence, which was granted by the amendatory act of 1869 upon condition that the lands be sold in conformity with the actual settlers provision thereof.

(6) Another contention is that the Oregon and California Railroad Company had acquired the rights of the West Side Company in the East Side grant by the general conveyances of the West Side Company on October 6, 1880. This is on the assumption that the West Side Company had some right in the grant. But the suggestion is completely answered by the fact that it had none, had waived all claim to it, and had applied for, received, and accepted the West Side grant in lieu of any right it might have had (statement, p. 55).

Besides, the East Side grant is not mentioned in the conveyance, nor is there anything in the instrument to indicate that it was in mind at the time the document was executed (statement, p. 69).

There is no escape from the proposition that the East Side Company had no right to the grant prior to the approval of the amendatory act of April 10, 1869, and secured all its rights therein after that act became law, and subject to it.

III.

CONSTRUCTION OF ACTUAL SETTLERS' PROVISIONS.

Under which will be discussed (a) the general policy of Congress with respect to the disposition of the public domain, and (b) the meaning and legal effect of the provision of the act of April 10, 1869, and of the act of May 4, 1870, restricting the manner in which the granted lands might be sold; the Government contending that it is a condition subsequent, the defendants contending that it is an "unenforceable, directive, regulative covenant," and the cross-complainants and interveners contending that it establishes a method by which individual citizens may acquire an enforceable right to purchase the lands.

For convenience, we again bring to the attention of the court the actual settlers' provision of the act of 1869. It reads:

> *Provided further*, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding $2.50 per acre.

It will aid greatly in the interpretation of this provision to have in mind the policy of Congress with respect to the disposition of the public domain at the time the act was passed.

First. The general policy of Congress with respect to grants of the public domain considered.

By what means are we to ascertain this policy?

(a) Congressional debates, other historical facts, and acts in pari materia may be examined.

Whenever there is doubt touching the meaning of any document the circumstances leading up to its execution may be considered as aids in solving the doubts; they act as side lights. So it is in case of legislation. Acts *in pari materia* and other historical facts bearing upon the legislation may be looked into.

In *Smith* v. *Townsend* (148 U. S. 490, 494) the court said:

> It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. (*Platt* v. *Union Pacific*).

In *Mobile and Ohio R. R. Co.* v. *Tennessee* (153 U. S. 486, 502) the court said:

> Legislative contracts especially should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made rather than at a later period when different ideas and theories may prevail.

It is equally true that the purposes of an enactment should not be confused with ideas and theories which may have prevailed at an earlier period; as, for instance, defendants in the case at bar seek to test the meaning of the act of April 10, 1869, by the purposes and policies which actuated Congress at the time of the enactment of the Pacific railroads bill on July 1, 1862 (*Texas & Pacific* v. *Interstate Commerce Commission*, 162 U. S. 197, 210; *Hamilton* v. *Rathbone*, 175 U. S. 414; *Chesapeake, etc., Tel. Co.* v. *Manning*, 186 U. S. 238, 245).

Under the category of historical facts and circumstances surrounding legislation, fall debates in Congress.

In *Jennison* v. *Kirk*, 98 U. S. 453, 459, the court referred to the remarks of a Senator, made in urging the passage of the bill, and said:

> These statements of the author of the act in advocating its adoption can not, of course, control its construction where there is doubt as to its meaning; but they * * * serve to indicate the probable intention of Congress in the passage of the act.

In *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 473, construing the tariff law, the court said:

> While the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to

> inform the court of the exigencies of the fishing interests and the reasons for fixing the duty at this amount.

In *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464, the court gave weight to the reports of the congressional committees upon the legislation under review, saying:

> We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each House, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor (p. 465).

Permitted by the foregoing authorities, we invite the court's attention to the development of the congressional policy with respect to the disposition of the public lands; also to certain evils which permeated the administration of the Pacific railroad grant and which, having been sharply brought to the recognizance of Congress in 1868 and 1869, provoked an exhaustive consideration of the whole subject of land grants. We do this for the purpose of disclosing that the amendatory act of 1869 was the deliberate outcome of that policy, as well as of the fixed determination of the National Legislature to prevent in the future, so far as possible, the occurrence of vices such as attached to the manner in which the Pacific railroad grant was handled.

(b) **Early public-land acts.**

The Government at first looked upon its public lands as means of raising revenue and managed them with a view to that end. Consequently, for many years it authorized sales of large tracts, without any reference to the number of acres which any one person might purchase, but solely for the purpose of getting the largest amount of money possible out of them. There was no general land law. Whenever the Government desired to dispose of lands within any particular area, it passed an act authorizing it to be done. The effect of this was to encourage speculation in, rather than actual settlement of, the public lands. A minimum price was fixed and the lands put up at public auction. Where the lands were not sold it was provided that they should not again be offered for sale, but should be subject to private sale at the minimum price fixed. There was nothing in these acts to encourage settlers to go upon the lands and establish homes. Notwithstanding this the lands were taken up by many, settlements were made, fields cultivated, and homes established. Those who did this naturally sought means by which to secure to themselves the lands thus taken up. The matter was brought to Congress and it was compelled to take action for the protection of such settlers. In 1830 an act was passed wherein it was provided:

> That every settler or occupant of the public lands prior to the passage of this act, who is

> now in possession and cultivating any part thereof in the year 1829, shall be, and he is hereby, authorized to enter * * * any number of acres, not more than 160, or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land (4 Stat. 420, 421).

On April 5, 1832, another statute was passed declaring that—

> All actual settlers, being housekeepers, upon the public lands, shall have the right of preemption to enter, within six months after the passage of this act, not exceeding the quantity of one-half quarter section. (4 Stat. 503.)

Experience soon developed the defects of the first public land system. It obstructed and discouraged settlement. Congress sought to correct this. But for 40 years its efforts were of limited application, and afforded only partial relief. From 1801 to 1841 no less than 30 laws were passed extending the time of payment, waiving interest, and otherwise affording temporary relief to the settlers. The system of survey was reformed so as to permit the offering of the lands in smaller tracts within the means of settlers. (*Donaldson's Public Domain*, 205.)

(c) Beginning of the preemption system.

Beginning with 1826 it became the practice to provide in all acts opening lands for sale that persons who had settled thereupon prior to a certain date named in the act should have a preference right to purchase the lands settled upon, to a limited

quantity, usually 160 acres, at the minimum price established by Congress.

The public land question was the subject of frequent debates in Congress from 1830 to 1841. The celebrated debate between Webster and Hayne, it will be recalled, related to "Foot's resolution" touching the distribution of the public lands. During that debate Mr. Webster, on January 26, 1830, observed with respect to the public lands:

> What I have said and what I do say is that they are a common fund, to be disposed of for the common benefit, to be sold at low prices for the accommodation of settlers, keeping the object of settling the lands as much in view as that of receiving money from them. (Writings and Speeches of Daniel Webster, Vol. VI, p. 21, ed. 1903, Little, Brown & Company.)

In 1839 he said:

> As to donations to actual settlers, I have often expressed the opinion, and still entertain it, that it would have been a wise policy of government from the first to make a donation of a half or whole quarter section to every actual settler, the head of a family, upon condition of habitation and cultivation. (Id., Vol. VIII, p. 263.)

As a result of this discussion the Senate committee, of which Henry Clay was chairman, recommended for passage a measure which became known as the "Distribution bill." It was enacted in 1841 and contained the first general preemption law. (5 Stat., 453.) It worked a reversal of the former pub-

lic-land policy. Under it actual settlers became a privileged class, and settlement of the public land was not only permitted, but invited.

In *Johnson* v. *Towsley* (13 Wall., 72 88) may be found an historical account of the influences leading to the adoption of this act. Sentiment in favor of the preemption law grew rapidly. In 1849 a new executive department was created for the administration of the public lands; it was called the "Home Department." This is significant. The preemption law became and remained a Congressional favorite. In 1853 and 1855 laws were enacted extending the right to unsurveyed lands in certain States, including the State of Oregon, and later this privilege was made general throughout the United States. The policy which treated the public domain as a source of revenue only, was fading fast, and in its stead was coming the new and more enlightened policy which dedicated it to homes for the people.

In 1850 donation laws were passed by which settlers were given, free of cost, from 320 to 640 acres, in certain States, including Oregon (then a Territory).

On August 4, 1854, an act was passed graduating the price for which "offered" lands which had been in the market and remained unsold for 10 years or more. This was for the benefit of actual settlers only. (10 Stat. 574.)

In 1852 the platform of the Free Soil party declared:

> That the public lands of the United States belong to the people and should not be sold to

> individuals nor granted to corporations, but should be held as a sacred trust for the benefit of the people, and should be granted in limited quantities, free of cost, to landless settlers. (*History of the Presidency, Stanwood*, vol. 1, p. 255.)

In 1860 the public demand for a homestead law had become so general that all political parties favored it. Upon his election President Lincoln urged the immediate passage of such a law. It was passed, and by him approved, May 20, 1862. It donated not exceeding 160 acres, free of cost, to those who would establish a home, reside upon and cultivate the same for a period of five years. (12 Stat. 392.)

In December, 1865, President Johnson in his annual message said:

> The homestead policy was established only after long and earnest resistance. Experience proves its wisdom. The lands in the hands of industrious settlers, whose labor creates wealth and contributes to the public resources, are worth more to the United States than if they had been reserved as a solitude for future purchasers. (*Richardson's Messages and Papers of the Presidents*, Vol. VI, p. 362.)

The foregoing shows the trend of the public mind toward reserving the public lands for actual settlers.

(d) **Grants to railroads and other internal improvements.**

From 1802 to 1828 the right of Congress to make grants in aid of internal improvements was strenu-

ously contested. The first grant was to Ohio in 1823 (3 Stat. 727), to aid in the construction of a wagon road in that State, and the last to the Texas Pacific Railroad, by act of March 3, 1871. (16 Stat. 473.) The early grants were in aid of construction of canals, river improvements, and wagon roads. It is not practical to review these grants in detail. (We give a classified list of them, ante pp. XI–XIII.)

A careful examination of the statutes just referred to will show that Congress never made grants in aid of canals, river improvements, wagon roads or railroads, except on the theory that such improvements would result in the settlement of the lands tributary thereto. The construction of the improvements was not *itself* the object of any of these grants. It was but a means to an end, namely, the settlement of the public domain. A statute giving land to the Pacific Railroad in 1862, and all railroad grants, expressly excepted mineral lands. The policy of limiting railroad grants to agricultural lands indicates that it was contemplated by Congress, even if not expressed, that the lands should be sold to actual settlers.

After the Illinois Central Railroad grant, with one exception in Alabama, all grants have been for the odd numbered sections. One object of this was to enable the Government to share in the benefits resulting from the construction of the improvement, and by doubling the price of the intervening sections to avoid pecuniary loss. But it also served another purpose; it reduced the danger of land monop-

olies, as lands held in that form could best be disposed of in small quantities to settlers. It was natural for Congress to assume that lands in segregated tracts of 640 acres would not be attractive to speculators.

A few of the earlier grants directed the immediate withdrawal of lands which would "probably" fall within the terms of the grant. Until 1862 all grants were so framed. This practice led to a positive obstruction of settlement of the public domain, because from the date of the withdrawal until construction of the railroad the lands could not be acquired by settlers either from the Government or the railroad company. As soon as the injurious effect of the practice was discovered Congress promptly corrected it by inserting in all grants, commencing in 1862, provisions directing the withdrawal of the granted lands at the time of the filing of a map of general route and, in a few cases, of definite location and expressly providing that until this was done lands should be subject to preemption and homestead entry. The sole purpose of this, as interpreted by this court, was to avoid any interruption of settlement upon the public lands (*Railroad Company* v. *Baldwin*, 103 U. S. 426; *Winona, etc.*, v. *Barney*, 113 U. S. 618, 625; *Leavenworth* v. *United States*, 92 U. S. 733, 748).

(e) Provisions for forfeiture.

The first grants permitted the immediate sale of any or all of the lands granted, and provided that in case of failure to complete construction within the

time prescribed, the grantee (the State) should pay to the Government the purchase price received from the sale of the lands. Later the grants provided for payment of the purchase price of the lands sold, and forfeiture of the unsold lands. After 1852 the grants permitted sale of the lands only as the work of construction progressed, and provided that if default was made in the construction of the road within the time prescribed the unsold lands (afterwards the unpatented lands) should *revert* to the United States. This marked a complete reversal of policy as to what should happen in case of failure to comply with the conditions of the grant. First, the value of the lands was considered a sufficient remedy. Afterwards the lands themselves were required. They were of more importance to the Government than their value, because the Government desired them for actual settlers.

(f) Provisions as to sale and use of the granted lands.

Prior to March 3, 1869, none of the grants in aid of internal improvements contained any provisions restricting the sale of the lands, either as to character of purchaser, quantity, or price, except that prior to 1850 most of the grants provided that the lands should not be sold for less than double the minimum Government price, the only abuse of the grants then anticipated by Congress being the squandering of the lands at insignificant prices.

But beginning about January 1, 1869, the uniform policy of Congress with reference to grants in aid of internal improvements, was to annex conditions to

the grants restricting the sale of the lands to *actual settlers*, in quantities not greater than one quarter section to a single purchaser, and for a price not exceeding $2.50 per acre. The manner in which this reformation was brought about we will now discuss.

Prior to the enactment of the Pacific Railroad bill in 1862, all grants in aid of internal improvements were made direct to the *States* and not to corporations. Congress naturally assumed that the States, in disposing of the lands, would have due regard for permanent industrial and commercial conditions. It was not necessary in the judgment of Congress to enjoin upon a State a duty to sell the lands in a manner that would conserve the interest of the State as well as the Nation. The States, in most instances, disposed of the lands by turning them over to some corporation charged with the duty of constructing the railroad or other internal improvement. They assumed that it was even more to the interest of the railroad companies than to the States that the lands be distributed among the producing classes in small quantities. In this they were mistaken, as the events prove.

Prior to the Pacific Railroad bill of 1862 there had been little practical experience in the administration of railroad grants. Evils which subsequently arose out of them had not been anticipated. Therefore nothing was put in that bill restricting the manner in which the lands should be sold. Besides the grant was to a corporation, created by Congress, with provisions for Federal representation upon the

board of directors. It was argued, and reasonably so, that there was no likelihood of a conflict between the interests of the corporation and those of the public. It was also thought that the interest of the railroad company was identical with that of the States, namely, that it would desire to promote settlement along its line. That Congress was mistaken in this no one will doubt who is at all familiar with the history of the construction of the Union Pacific.

Another thing worthy of consideration in this connection, in 1866 the policy of the Union Pacific Railroad Company with respect to the disposition of its lands had not developed, so that it can not be said that the act of July 25, 1866, was passed in the light of the manner in which the Union Pacific was administering its grant. Another fact worthy of consideration is that the two grants involved in the case at bar are the *only* original grants direct to *State* corporations that ever became effective.

Between March 2, 1867, and March 3, 1869, there was no legislation upon the subject of railroad land grants. The subject underwent, however, a thorough discussion and consideration in Congress during that period. This resulted, as we shall presently show, in the enactment of the restrictions in the amendatory act of 1869 involved in this suit.

(g) Evils of unrestricted grants.

The conclusion of the War of the Rebellion was immediately followed by a revival of industrial progress that was without a parallel in the previous history of the country. Nowhere was the effect of

this revival felt more than in the far West. The unlimited natural resources of the western country held forth promise to the actual settlers which attracted thousands from the crowded cities of the East and from foreign shores. Beginning early in 1867, the movement westward, and particularly along the Union Pacific and Central Pacific Railroads, literally overtaxed the capacity of all means of transportation. It was then within the power of those responsible for the conduct of the affairs of the Pacific railroads to justly fulfill every moral and legal obligation to the people of the United States.

But this condition of affairs also afforded an opportunity for manipulating the business of those railroads in the interest of a few promoters and officers to the detriment of the corporations themselves and the general public. The subsidy of bonds and lands, intended to promote the success of the enterprise and at the same time conserve the general interests of the Nation, were perverted into a means of enriching a few financial adventurers. The granted lands were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad companies. The prices obtained for the lands were small; thus the railroad companies lost and the settler was compelled to make terms with the speculator. These developments resulted in vigorous protests addressed to Congress complaining of the manner in which these lands were being manipulated. The protests were not limited to any one section nor to any one class.

They came from all parts of the country and from the substantial and representative elements of the Nation. Public sentiment upon the subject was expressed through the public press, legislative memorials and petitions signed by thousands of individual citizens, all directing the attention of Congress to the demoralizing effect of the methods practiced by the railroad companies. As an example of the earnestness with which they were urged upon the attention of Congress, we invite attention to a petition from citizens of New York City signed by many thousands.

> *To the Senate and House of Representatives of the United States:*
>
> The undersigned citizens of the United States feeling the urgent necessity for the enactment of a law to prevent the further absorption of the public lands of the United States by railroads and other corporations and to have the residue of said public domain set apart for the *exclusive use of actual settlers* in limited quantities, do respectfully petition your honorable body to take prompt action for the passage of such a law.

We urge our appeal on the grounds that tens of thousands of the industrial classes of large cities and towns now unemployed must seek an outlet and escape from the poverty and distress which surround them or be rapidly driven to pauperism and crime.

We urge our appeal on the ground of simple justice to our children and to the immigrants now seeking

our shores, fleeing from the very monopoly of lands so alarmingly threatening our Republic by the enormous absorption of the public domain by giant corporations and private monopolies.

We urge our appeal as a measure of justice to the whole American people as a rich legacy in trust by our generation for those to come after us—never to be alienated.

We urge our appeal finally as one deeply affecting the morals and well-being of our people, in that these giant corporations have become the allies of stock gamblers in turning our public domain, the heritage of all, into one vast national gambling arena.

To put a speedy end to these threatened evils and to confer a measure of equity and justice on the American people, we urgently pray the adoption of a law embodying the features herein set forth. (*Cong. Globe*, Appendix, Part 7, 41st Cong., 2d sess., 312.)

It is said that this resolution is an emanation of a political club. We do not know. But suppose it is. Does that detract from its value as a piece of evidence tending to show the state of the public mind on the subject? The following excerpts, in harmony with the sentiment of the resolution and not from a "political club," are taken from an editorial of the New York Evening Post of April 22, 1870, twelve days before the act of May 4, 1870, was passed. We quote:

> After the present Congress the country has little to fear from speculations in land grants,

> for the attention of the people has been drawn to the sacrifice of the national domain, and they will make their interests and views felt in the elections. * * * But the appropriation of public lands and of public money to aid private enterprises can not be justified. It is a violation of principle, and opens the way for endless abuses. The practice must be stopped or a bankrupt Treasury will disgrace the country and a giant land monopoly check its growth. (*Cong. Globe*, part 7, appendix, 2d sess., 41st Cong., p. 314.)

The Post was then edited by a person spoken of by Congressman Holman, of Indiana, as "one of the purest and best men in the country." (Id.)

In line with this is the following from remarks made by Congressman James A. Garfield, of Ohio, when the Texas Pacific bill was pending:

> I desire to say that while I fully share in the *general* sentiment of the country that we ought to put a *speedy* and *effective* end to the policy of granting the public lands to railway corporations, etc. (*Cong. Globe*, 3d sess., 41st Cong., p. 1470.)

(h) Congressional action in response to these protests.

The prevailing sentiment was that Congress had been deceived, and was confronted with the duty not only to correct the mistakes of the past so far as possible, but to avoid similar ones in the future.

The history of the subject leaves no possible

room for doubt as to the specific intent and purpose of Congress, which was:

1. To subordinate the benefits of land grants to the general land policies of the United States.

2. To the end that the restrictions imposed should be enforceable by the most efficient and practical remedies, and

3. That the best method was through a condition subsequent.

A careful study of the discussions upon the subject fails to disclose that Congress reposed any confidence in the railroad grantees, or was disposed in any wise to trust to the good faith of the railroad companies. Lack of faith in the grantees, because of what other railroads had done, was the dominating note in the discussions. No crumb of comfort can be found therein for persons who insist that conditions, such as the one appearing in the amendatory act of 1869, was intended to be merely "unenforceable, directive, and regulative."

(i) **Congressional debates and proceedings upon the subject.**

The chairman of the Public Lands Committee in the House, George W. Julian, on January 7, 1868, introduced a bill to prohibit the further disposition of the public lands, except under the provisions of the preemption and homestead laws, and the laws for disposing of town sites and mineral lands (*Cong. Globe*, 2d sess., 40th Cong., p. 371).

In February, 1868, Mr. Lawrence, of Ohio, introduced in the House a bill "to secure to actual settlers the right to purchase lands heretofore granted to railroad and other companies" (*Cong. Globe*, 2d sess., 40th Cong., p. 637).

The changing sentiment of Congress upon this subject was exemplified by the enactment of March 6, 1868 (15 Stat., 39). By this enactment it was provided that the Government lands, intervening the Pacific Railroad lands, should be disposed of to actual settlers only, in limited quantities, and for a limited price.

In January, 1869, the Denver Pacific bill came up for consideration in the House. This bill did not provide for a new grant, but revived an old grant, upon slightly modified terms as to location of railroad, beneficiary, etc. The Denver Pacific grant was one of the grants incidental to the Union Pacific grant, and therefore the terms of the Union Pacific grant, and the evils that had developed therefrom became the principal subject of the discussion. Mr. Washburn, of Illinois, made the principal speech upon the subject. He said:

> When we contemplate the vast power of these nonresident landholders, the overshadowing land monopoly created, the evils and oppressions always connected therewith, we must all be filled with amazement at the reckless and shameless legislation of Congress on this subject. * * * I voted for some of the earlier bills. But when I saw the use that

> was being made of these grants, the brazen greed of the speculators who obtained possession of them to use for their own interests regardless of the public interests; * * * my views in regard to the whole policy of land grants were very materially modified (*Cong. Globe*, 3d sess., 40th Cong., p. 463).

The same views were expressed by Messrs. Julian, Holman, Logan, Donnelly, Lawrence, and many others (*Cong. Globe*, 3d sess., 40th Cong, p. 463, *et seq.*).

An examination of the debates will demonstrate that the quotation which we have given from Mr. Washburn's speech expresses the general sentiment upon the subject.

Mr. Carey, of Ohio, speaking with respect to the same grant January 5, 1869, some three months before the amendatory act of April 10, 1869, was passed, but while it was in contemplation, said:

> In the first place we demand a thorough and radical change in the policy of Congress in relation to the disposition of the public domain. In the ownership of the soil lies the foundation of civilization, liberty, and progress, and our existence as a republic depends much upon a thorough distribution of the lands among the people. It is said that twelve men own one-half the land in Scotland, one hundred and fifty persons one-half of England * * *. Richard Carlisle says: "On the question of the monopoly of the land I am decided that it is the master evil in our political condition." (*Cong. Globe*, 40th Cong., 3d sess., p. 196).

On January 19, 1869, when the Denver-Pacific bill first came up for discussion, Messrs. Lawrence, Julian, and Logan each proposed an amendment. All the amendments, while differing in some particulars, proceeded on the theory that the unrestricted right in the railroad companies to dispose of the lands as they saw fit had been abused and that a change must be made which would insure the lands to actual settlers in limited quantities and for a price not exceeding $2.50 per acre.

Mr. Julian's amendment read:

> That the lands granted * * * shall be sold to actual settlers only, in quantities not greater than 160 acres to one purchaser and for a price not exceeding $2.50 per acre.

This amendment, he said, expresses the true policy; "and the whole land-grant system of our country will be repudiated unless it shall be made to conform to the conditions I have stated" (*Cong. Globe*, 3d sess., 40th Cong., p. 70, *Appendix*). The amendment was adopted.

Thus three different methods of controlling the disposition of railroad lands were proposed on one day. All were framed in the belief that the unrestricted right in the railroad companies to dispose of the land as they saw fit had been abused and that a change must be made, which would insure the land to the actual settlers in limited quantities, and for a price not exceeding $2.50 per acre.

It was in this atmosphere that the actual settlers' provision was placed in the amendatory act of April

10, 1869, consequently he who says that the provision was not intended to be mandatory, but merely directive, has a heavy burden to sustain.

(j) Proceedings in Congress, 1869 to 1871, and application of the new policy.

(1) From March 2, 1869, to March 3, 1871, every time a bill granting lands in aid of internal improvements, or reviving a former grant that had elapsed, came before the House, Mr. Julian or some other member of the Public Lands Committee moved an amendment in the form of a condition subsequent, such as was inserted in the act of April 10, 1869, involved in this suit. This amendment was offered a great many times during that period, and was accepted without opposition, save on two or three occasions, hereinafter referred to, when Congress thought best not to annex the condition; and the acts of Congress upon these occasions emphasizes the intention to make the conditions enforceable whenever they were annexed to grants.

The number of times that this amendment was offered and accepted must not be judged by the number of laws that were finally passed. The amendment was offered and became a part of many bills that were defeated. There were more than ninety measures of this kind that failed to pass during this period (Cong. Globe, 41st Cong., 2d sess., p. 2362), and as to most of these the Julian amendment was embodied in the original draft or was subsequently offered and accepted. (See 40th Cong.,

3d sess., H. B. 1998, 1901; S. B. 349, vol. 3, 570, vol. 4. 41st Cong., 1st sess., H. B. 393; S. B. 107, vol. 1. 41st Cong., 2d sess., H. B. 580, 678, 882, 1082, 1312, 1515, 1590, 1756, 1830, 1874, 1877, 2056, 2157, 2274, 2399; S. B. 396, vol. 3, 268, vol. 2, 168, vol. 2, 566, vol. 4, 55, vol. 1, 1011, vol. 7. 41st Cong., 3d sess., S. B. 483, vol. 3. 42d Cong., 1st sess., H. B. 59, 128, 137, 138, 261, 317, 371, 370.

Copies of the House bills may be found in the Library of the House and of the Senate bills in Senate Document Room. More specific reference we can not give.)

We can not find that the foregoing statement with respect to the numbers of bills embracing the actual settlers provision is denied in the briefs of the appellants.

During this period there were only three grants enacted; the West Side grant involved in the case at bar, the Texas Pacific grant subsequently forfeited, and the grant of March 3, 1869, to the State of Oregon to aid in the construction of a wagon road from Roseburg to Coos Bay (the act of April 10, 1869, is not a grant).

The first bill granting lands to come before the House after the adoption of this new policy was the Coos Bay Wagon Road grant, just mentioned (15 Stat., 349). The history of this enactment discloses the fact that in some way the terms of the bill were juggled so as to omit the restriction as to actual settlers, although actually intended by Congress, or at least intended by the House.

The bill was known as Senate bill No. 167. It passed the Senate, and came before the House on March 2, 1869, the next to the last day of the Fortieth Congress. Immediately after the bill came up for consideration Mr. Julian offered his usual amendment. It reads:

> *Provided*, That the grant of lands hereby made shall be *upon the condition* that the lands shall be sold *to actual settlers only*, in quantities not greater than one quarter section, and for a price not exceeding $2.50 per acre.

Mr. Julian stated that the bill had not been considered in committee, but if the proposed amendment were accepted he would not insist upon a reference of the bill to the Public Lands Committee.

Mr. Mallory, Representative from Oregon, who had charge of the bill, made a statement in favor of it. A motion to refer to the Public Lands Committee was made and defeated. The bill then came before the House on the question of Mr. Julian's amendment. Mr. Julian modified the amendment by adding the words "to each person" after the words "quarter section," making the clause read "in quantities not greater than one quarter section to each person." *The amendment was then agreed to without objection, and in that form the bill was passed*, and the Clerk of the House was ordered to report the action to the Senate and request its concurrence in the amendment.

Being the next to the last day of the session, the matter was immediately communicated to the Senate

without the usual precautions. It came up before the Senate within a short time on the same day. But in some manner the terms of the House amendment were changed in the meantime, and it was reported to and read in the Senate as follows:

> *Provided further,* That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section and at a price not exceeding $2.50 per acre.

The restriction as to actual settlers had been eliminated in some way from the amendment. The change was not discovered, and in the altered form the amendment was concurred in by the Senate, and the bill as thus amended was passed and approved the next day, March 3, 1869.

Whether this change occurred through inadvertence or improper influences can only be conjectured. The haste with which legislative matters are handled on the last two days of a session made either possible. But there is no doubt of the accuracy of the foregoing facts. (*Cong. Globe,* 3rd session 40th Cong., pp. 1798–1820.)

The proceedings show that the amendment proposed by Mr. Julian was not offered because of any special policy peculiar to that grant, but in fulfillment of the general policy as to all grants. This is borne out by the proceedings concerning another grant on the same day, and within a few minutes after the proceedings relating to the Coos Bay grant, when it was expressly stated that these amendments

were offered pursuant to a general policy adopted by both Houses of Congress. Senate bill No. 679 was to extend the time for the construction of a wagon road under the act of July 2, 1864 (13 Stat. 355).

The moment this bill came before the House for consideration, Mr. Julian moved the following amendment:

> *Provided*, That the grant of lands hereby renewed and continued shall be *upon the condition* that the lands shall be sold to actual settlers only, in quantities not greater than a quarter section and for prices not exceeding $2.50 per acre.

In support of his amendment, he said:

> Mr. Speaker, the amendment which has been read by the clerk is a *provision which ought to be applied to every future grant of land and to every dead grant that seeks a revival at our hands.* * * * The adoption of the amendment will not defeat the passage of the bill, for *the Senate, like the House, has repeatedly approved of the very condition prescribed in the amendment.* (*Cong. Globe*, 3d sess. 40th Cong., p. 1821.)

Again we find *the intention to create a condition subsequent expressly declared*, and apparently understood and concurred in by all.

Congressman Mallory, of Oregon, was in charge of this bill also. He stated that he did not object to the principle of the amendment, but that the work of construction had been delayed not through the fault of the company but through the interference of hostile

Indians; and that an amendment at that late stage of the session would undoubtedly defeat the bill, because the Senate would not have time to concur. (The next day was the last of the session.)

Upon Mr. Mallory's statement as to the cause of the delay, the House permitted the bill to be put upon its final passage under the previous question, which did not permit any amendment.

Here we find an instance when, for legitimate reason, Congress omitted to impose the conditions. Under the contention of the defendants in the case at bar, Congress did not intend them to be enforceable in any case. Why then did Congress in some instances annex the conditions; in other instances modify them; and in still other instances decline to annex them? Is not the discrimination with which Congress annexed these conditions proof conclusive that it understood and intended them to be enforceable, and hence the caution with which it imposed them?

A special session of the Forty-first Congress was convened shortly after March 4, 1869. During this session, three acts were passed reviving lapsed railroad grants. They were all approved on April 10, 1869, and are as follows:

> Act of April 10, 1869 (16 Stat. 47), extending the time for the Oregon Company to file assent to grant of July 25, 1866 (*being one of the acts involved in the case at bar*).
>
> Act of April 10, 1869 (16 Stat. 45), reviving grant to the State of Alabama in aid of

the construction of railroads (being the act construed to be a condition subsequent by the Alabama Supreme Court in *Warrior River Coal & Land Co.* v. *Alabama State Land Co.* (154 Ala. 135, *infra*)).

Act of April 10, 1869 (16 Stat. 46), extending time for the construction of a railroad under a grant to the States of Missouri and Arkansas.

By the time these bills came before Congress for consideration, the policy of annexing conditions restraining the sale of the granted lands had become so generally accepted that there was little discussion and no opposition. In each instance Mr. Julian moved his amendment in the form of a condition subsequent, and the amendments were agreed to as a matter of course.

The subsequent action of Congress with reference to the third act of April 10, 1869, above mentioned, is instructive. By that act the time for the construction of the railroad under the grant to the States of Missouri and Arkansas (act of Feb. 9, 1853) was extended. When the bill came before the House, Mr. Julian moved his usual amendment, assuming that the grant was in a lapsed condition, and it was adopted and the bill passed. Subsequently it was learned that this assumption was incorrect; that there existed no default at the time of the passage of the act of April 10, 1869.

Thereupon Congress, by act of March 8, 1870 (16 Stat. 76), repealed the conditions imposed by the extending act. At the time the correction was made,

Mr. Julian expressly stated that the policy which had been adopted by both branches of Congress, namely, to impose conditions of that character whenever Congress had the right to do so, would not be departed from; but that through inadvertence the conditions had been imposed in a case where Congress had no right to do so, and he was therefore willing that the mistake be corrected (*Cong. Globe*, 2d sess., 41st Cong., p. 1698).

The attitude of Congress toward railroad land grants on April 10, 1869, when the law involved in the case at bar was enacted, is aptly illustrated by the following joint resolution adopted on that day:

> That the Attorney General of the United States be, and he is hereby, authorized and directed to investigate whether or not the charter and all the franchises of the Union Pacific Railroad Company and of the Central Pacific Railroad Company have not been forfeited, and to institute all necessary and proper legal proceedings. (16 Stat. 56.)

It is seriously urged by counsel for the defendants that Congress, by the enactment of April 10, 1869, involved in this suit, had the same general intent, and the same general sentiment upon the subject of railroad grants, that it had at the time of the enactment of the act of July 1, 1862. And yet, on the same day, Congress adopted a resolution which had for its purpose the forfeiture of every franchise created by that act.

That there should be no more traps set for the American people of the pattern of July 1, 1862, was

the predominating sentiment of Congress on April 10, 1869.

(k) Discussions relating to act of May 4, 1870, West Side grant.

Early in 1870, Senator Williams, of Oregon, introduced in the Senate a bill making a separate grant to the West Side Company, for the purpose of ending the controversy in Oregon between the East Side and West Side companies over the grant under the act of July 25, 1866. So firmly intrenched had become the policy of refusing to make any new grants, or reviving any lapsed grants, except upon conditions restricting sales of the granted lands to actual settlers in limited quantities and for a limited price, that a provision containing those restrictions was inserted in the bill introduced by Senator Williams. This bill was afterwards passed and became the act of May 4, 1870 (16 Stat., 94).

The prevailing sentiment of the country at that time was precisely the same as when the amendatory act of 1869 became a law. (Post editorial, Garfield's remarks, etc., *supra*, pp. 45, 46.)

Counsel for defendants have referred to the debate in the Senate upon the act of May 4, 1870, in support of their contention as to the meaning and effect of the provision restricting sales to actual settlers. The Congressional Globe discloses the following:

The bill came up for discussion in the Senate on February 2, 1870. Senator Thurman vigorously objected to it, stating that the General Assembly of

Ohio had protested against any further land grants, and that the basis of this protest was the opposition to the unrestricted grant of July 1, 1862, known as the "Pacific Railroads bill." Senator Stewart then called Senator Thurman's attention to the provision restricting sales to actual settlers. Senator Thurman expressed a doubt that this provision would ever be obeyed or could ever be enforced by any practical method. Senators Stewart, Cassarly, and Williams differed with him, and said that in their opinion the actual settlers' provision was enforceable. During the debate Senator Vickers said:

> As I understand the bill, *the company has no right to sell the lands to anybody but an actual settler. If the lands are sold to actual settlers, there is no forfeiture. If a portion of the land is sold to actual settlers, the portion unsold will be forfeited to the Government if that condition is violated.*

(Observe, please, that Senator Vickers understood that the right of forfeiture for breach of the condition would not affect lands that had been sold within the restrictions imposed, but simply to the unsold lands.)

Again, Senator Vickers said:

> The grant is made *expressly upon condition that the lands are to be sold to actual settlers.*

It is not contended that the court should necessarily adopt the opinion of Senator Vickers. But it is at least interesting to observe that his interpre-

tation of the meaning of the provision and the remedies available to the Government in case of a breach, are strictly in accordance with the law upon the subject.

Upon the assurance that this provision would be effective, the Senate passed the bill. (*Cong. Globe*, 2d sess. Forty-first Congress, pp. 965, 1426–1430.)

When this bill came up for consideration in the House the same general debate took place. Reference was made to the fact that ten days previously a resolution was unanimously adopted declaring that land grants should cease; also to the fact that over ninety bills making grants of that kind had been introduced during the session and were then pending. Two Members of the House expressed the opinion that under the provisions of the bill the railroad company could be compelled to sell to actual settlers. Mr. Lawrence, of the Public Lands Committee, several times inquired if the bill contained a provision restricting sales of the granted lands to actual settlers, pursuant to the policy which had been adopted, and was assured that it did. Just before the bill was put upon its final passage, a member of the Public Lands Committee asked leave to add the amendment usually proposed by Mr. Julian. Those in charge of the bill stated that the provisions of section 4 were in substance the same as the proposed amendment. Upon this assurance, the bill was passed in its present form. (*Cong. Globe*, 2d sess. Forty-first Congress, pp. 2361, 3107–3110.)

(l) **Resolution of Congress of May 31, 1870.**

After the adoption of the policy not to make new grants, nor revive old ones that had lapsed, except upon condition that the granted lands should be sold to actual settlers only, there was but one real departure from that policy. That was by the resolution of May 31, 1870 (16 Stat. 378), relating to the Northern Pacific grant. This resolution, among other things, authorized the Northern Pacific Company to construct a line connecting Portland with Tacoma, and extended a grant of land in aid of the construction upon the same terms as the original grant. Pursuant to the policy hereinbefore spoken of, an amendment was offered, in the form of a condition subsequent, restricting the sale of the granted lands to actual settlers, in quantities not exceeding 160 acres, and for a price not exceeding $2.50 per acre. This precipitated one of the most protracted debates in Congress down to that time. (*Cong. Globe*, 41st Cong., 2d sess., p. 3263 et seq.)

The fight was a bitter one, finally resulting in the substitution of an amendment providing that the lands not sold or otherwise disposed of at the expiration of five years after the completion of the railroad, should be subject to preemption; being identical in terms with the provision of the Union Pacific grant construed in *Platt* v. *Union Pacific*. (99 U. S. 48.) The resolution proposing the restrictive clause was defeated by vote of 95 to 87 (*Cong. Globe*, 41st Cong., 2d sess., p. 3850).

It is unnecessary to comment upon the methods by which this result was brought about. Suffice it to say that no legislation of Congress ever created a greater scandal. Charges of corruption were freely indulged during the debate.

The following is characteristic:

> Mr. Cox. I ask the gentleman from New York to yield to me.
>
> Mr. Wheeler [in charge of the bill]. I can not yield.
>
> Mr. Cox. I protest against this crucifixion.
>
> Mr. VanWyck. So do I.
>
> Mr. Cox. Between two thieves. (*Cong. Globe*, 41st Cong., 2d sess., p. 3268).

Mr. Julian, and a few of the other members of Congress, who had been foremost in the fight for the extension of the principles of the actual settler policy to railroad grants, were absent. The bill passed both Houses by a very narrow margin.

The action of Congress upon this occasion in no way detracts from its general intent with reference to the annexing of conditions restraining the method of selling granted lands. On the contrary, the character of the debate and the action of Congress show that the sentiment of Congress was divided into two general classes, some contending for the imposing of effective restrictions upon the manner of selling the granted lands, others being opposed to it. Those who favored the imposing of effective restrictions proposed to do so by an amendment exactly the same as the provision of the act of April 10, 1869.

Those opposed offered as a subsitute a provision identical with that involved in the *Platt case*. It was understood by everyone that the one provision had a meaning and effect directly the reverse of the the other, and each was supported by its friends upon that ground. If the contention of the defendants in the case at bar that the provision in the *Platt case* is identical in general purpose with the actual settlers' provisions of the act of 1869 and 1870, is correct, then every Member of Congress was mistaken and a long and bitter fight was carried on with nothing at issue.

The passage of the Northern Pacific resolution was the death knell of the system of granting lands in aid of internal improvements. It was but a momentary lapse of the new policy; it involved but a small quantity of lands; and the practical effect of it was to hasten the abolishing of grants in aid of internal improvements upon any terms or conditions.

Mr. Beatty, speaking on June 6, 1870, upon the subject of public grants to railroads, said:

> The settler under the old policy preceded the railroad and the land monopolist. Now we send the railroad and the speculator in advance, and they cooperate in a work of robbery. The one fetches the victim and the other fleeces him, and the Government facilitates and encourages the outrage by immense subsidies and land grants. * * * The original grant to the Northern Pacific, whereby 47 million acres of public domain were transferred to a few men, and additional grants

> made during the present session to the same company, were simply a wholesale robbery of the great body of American people, for which no valid excuse can be framed. * * * There are many bills of like character on our files today awaiting the action of the House. * * * They follow in the wake of that *gigantic fraud*, the *Northern Pacific*, and if successful will be followed by still other schemes of *public plunder*, all of which, however iniquitous they may be, will have their plausible and eloquent advocates in the lobbies and corridors of this Capitol, ready to oil the wheels of legislation and forward the work of spoliation. (*Cong. Globe*, 41st Cong., 2d sess., p. 4120).

Mr. Clarke, of Kansas, discussing the same question, observed:

> I think that the enormous extent of the sum of these grants, as in this case of the Northern Pacific, makes them iniquitous in many ways of which I have not now time to speak. * * * The third and most important limitation that should be put upon the system is one which has *already received the sanction of Congress*. I refer to the sale of granted lands to *actual settlers* in *maximum lots of 160 acres* and at the same price as the sections held by the Government. (Id. p. 4123.)

He seemed to understand that at that time, June 6, 1870, the actual settlers provision had "received the sanction of Congress."

The sentiment against land grants developed so rapidly that President Grant, in his second annual

message, December 5, 1870, recommended that no further grants be made in aid of internal improvements, but that if Congress disagreed with him, in all future grants the rights of settlers and the interests of the Government should be better protected by appropriate legislation. (Messages, etc., of the Presidents, Richardson, vol. 7, p. 111.)

The recommendation of the President reflected the prevailing sentiment of Congress. The system of land grants was abolished. There was but one exception, the Texas-Pacific grant of March 3, 1871, the circumstances of which will now be explained.

(m) **Texas-Pacific grant of March 3, 1871.**

From 1862 to 1866 Congress had made three large grants establishing transcontinental lines for the benefit of the Northern States—the Union Pacific, the Northern Pacific, and the Atlantic and Pacific—with several branch lines. The Southern States received virtually no benefits from these grants. *This led to the passage of the Texas-Pacific bill* (16 Stat. 573).

Shortly after peace was established, the conservative members of Congress advocated the adoption of reasonable concessions to the South to heal the wounds caused by the unfortunate conflict. Among the proposed measures of this kind was a grant of public lands to aid in the construction of a transcontinental railroad for the benefit of the Southern States, extending from New Orleans to the Pacific coast.

When the bill came up for consideration, Mr. Julian moved his usual amendment, pursuant to the policy then prevailing. But in answer to the proposed amendment, it was stated that by way of conciliation of the South, it was desired to make the bill identical in terms with the Union Pacific grant. At the same time the general policy of making no further grants was emphasized. There is no mistaking the purpose of Congress. It was expressly declared that the hope of promoting friendly relations between the North and the South, justified a temporary departure from the prevailing policy. (Remarks of Mr. Garfield and Mr. Wheeler: *Cong. Globe*, 41st Cong., 3d sess., p. 1470, 1472.)

The action of Congress on the same day, March 3, 1871, with reference to a bill reviving another of the grants, one to the State of Alabama, emphasizes its policy. Mr. Julian again offered his amendment. There being no reason to depart from the established policy in this instance, the amendment was accepted without opposition and as a matter of course. (See act of Mar. 3, 1871, 16 Stat., 580.)

This discrimination on the part of Congress can be explained only on the theory that it understood and intended that these restrictions when imposed should be binding and enforceable, and to that extent the benefits of the grants should be subordinated to the general public land policies of the United States.

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(n) **Policy of Congress since March 3, 1871.**

After March 3, 1871, there was no change of policy. The sentiment against land grants gradually increased until it became an established national principle. This opposition to land grants was soon expressed in a number of acts to forfeit the grants where the grantees were in default; and in the enactment of the general forfeiture act of September 29,1890 (26 Stat., 496. For list of acts see Ante, XI–XIII).

All these acts were sustained by this court (*United States* v. *O. & C. R. R. Co.*, 164 U. S. 526; *Atlantic & Pacific* v. *Mingus*, 165 U. S. 413; *United States* v. *Tennessee & Coosa R. R.*, 176 U. S. 242).

The many quotations given by learned counsel for appellants in their brief (pp. 137–197) do not militate in the least against what we have said. Of course there were speeches in Congress opposing the actual-settlers clause or anything similar to it, and defending to the fullest railroad land grants as made in the old way, but they did not represent the prevailing thought of Congress upon the subject. This is shown in the resolutions and acts which we have brought to the attention of the court in the foregoing pages.

Nor is it correct to say, as counsel do, that Congress passed 3 land grants and 17 amendments since April 10, 1869, without the actual-settlers provision (Brief, p. 197). There were but two granting acts, the Texas Pacific (16 Stat. 573) and the Northern Pacific. We have already commented on

em and have shown how the actual-settlers clause
ne to be omitted. The 17 extensions were not
ants nor revivals of grants. In each case the title
s secure in the grantee, but it desired some
odifications. Here lies the distinction between
em and the grants in litigation.

There is another slight error in counsel's brief,
intentional, of course, which we desire to correct.
is said that one of the headings in a statement pre-
red by order of the Secretary of the Interior, and
which extensive reference is made, contains this:
Additional revision affecting but increasing grants."
Not" should be inserted before "increasing."
he grants were *not* increased.

For the past twenty-five years the policy of the
overnment has been to hold the railroad companies
ictly within the limitations of their grants, and
event the invasion of any rights reserved on
half of the public. It was pursuant to this general
licy, and as a logical sequence of what had taken
ace that Congress, when it became advised of the
llful and flagrant violation of the restrictions
posed by the acts of April 10, 1869, and May 4,
70, involved in the case at bar, by resolution of
pril 30, 1908, directed and authorized the institution
this suit to enforce the rights of the people of
e United States, including the right of forfeiture
breach of these conditions.

It is respectfully submitted that an intelligent
d impartial consideration of the history of the
bject leads to the following conclusion:

Congress intended to annex to the grants involved in the case at bar conditions subsequent restraining the alienation of the granted lands by the railroad company within the three limitations prescribed. But did it use apt words to express that intention? This brings us to the controlling question:

Does the actual-settlers provision constitute a covenant, a trust, an offer which anyone may accept, or a condition subsequent?

SECOND. NOT A COVENANT, AS URGED BY DEFENDANTS.

Transactions relating to the disposition of the public domain do not resemble those of a private owner engaged in selling lands with the sole motive of realizing their pecuniary value.

In *United States* v. *Trinidad Coal Company*, (137 U. S. 160, 170), the court observed that in disposing of public lands the Government does not occupy the "attitude of a mere seller of real estate for its market value."

The construction of the railroad was not the ultimate object, but the means of accomplishing the object which Congress had in mind. The railroad was looked upon as a means to promote settlement (*Platt* v. *Union Pacific Railroad Co.*, 99 U. S., 48). Congress never intended that the grant to it would obstruct or prevent settlement.

The amendatory act of April 10, 1869, was designed to correct some defect in the original act and must be construed in that light.

From the nature of the enactment and its manifest purpose it necessarily follows that Congress intended that it should be enforceable by some practicable and thorough method. To say that it did not change the legal effect of the act of 1866, would be to say that Congress in making the amendment had done a useless thing. No rule of construction will permit this if it can possibly be avoided.

It must be presumed, too, that Congress intended to adopt the method best calculated to carry out its purpose.

In *Gibson* v. *Chouteau* (13 Wall. 92) the court, speaking of the public domain, said:

> Congress has the absolute right to prescribe the terms, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfers shall be made.

Would it serve the congressional purpose to construe the actual settlers' provisions as a covenant? For breach of a covenant the action is for pecuniary damages. In *Tiffany on Real Property*, vol. 1, p .160, it is said:

> A condition is to be distinguished from a covenant, a breach of which merely renders the covenantor liable in damages.

Suppose the Government had brought a suit to recover damages for a breach of the alleged covenant; what would have been the measure of its recovery? The Government, as such, would gain not a penny by the observance of the provisions, con-

sequently could not be damaged by its nonobservance.

Ordinarily covenants affect only the parties and not the land. Conveyances in violation of a covenant are valid.

In *Warvelle on Vendors*, 2 ed. vol. 1, sec. 451, it is stated "that a restraint upon the power of alienation is nugatory unless made enforceable by provision for reverter."

In *Hale* v. *Finch*, 104 U. S. 261, the distinction between a covenant and a condition is discussed and the rule laid down that where the instrument, whether a bill of sale, deed, or grant, precludes the idea of personal responsibility it is not a covenant. The grantee railroad company promised nothing in connection with the actual settlers' provision.

That provision was not incorporated for the purpose of securing to the United States pecuniary damage, but for the purpose of realizing the fruits of a national policy; therefore, it is not a covenant, enforceable or nonenforceable.

THIRD. NOT A TRUST, AS CONTENDED BY CROSS-COMPLAINTS.

Cross-complainants urge that the settlers provision creates a trust in favor of actual settlers, and that they are entitled to avail themselves of it.

(a) The actual-settlers provision contemplates a sale.

There is nothing in the actual-settlers provision indicating that Congress had confidence in the railroad company. The reverse is true. Experience

had demonstrated that railroad companies, in matters of this kind, should be restrained, not trusted. If this be a trust, Congress deliberately committed to a party having a known adverse interest, the discharge of an important governmental function with reference to several million acres of land. If the trustee proved recreant it could lose nothing; but it might gain much. The Government would have no practical remedy.

Clearly the railroad company was empowered to sell the land. A sale is a contract, and implies discretion upon the part of the vendor and vendee. The vendor in this case had all the rights of any vendor, except that (1) it must not sell more than 160 acres to any one person; (2) the sale must be to an actual settler; and, (3) for a price not to exceed $2.50 per acre. Within these limitations the railroad company had the same discretion as any other vendor would have in making a sale. It might choose the actual settler; might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or in any amount not exceeding 160 acres.

Besides, instruments creating trusts do not use the language of bargain and sale. Every word in the provision repels the idea of a trust.

(b) **Necessary elements of an enforcible trust.**

We do not understand that cross complainants claim as beneficiaries of a charitable trust. Even if they did the actual settlers provision contains nothing

that could bring it within the recognized definitions of such a trust. If, therefore, there be a trust, it must be a private one, and subject to all the tests applicable to a trust of that character.

In Second *Pomeroy's Equity Jurisprudence*, section 1009, we find this language:

> The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject matter or property embraced within the trust, the *beneficiaries* or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general or equivocal, that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail (italics ours).

There is a distinction between charitable trusts and those that are not. This distinction must be kept in mind.

In most jurisdictions the uncertainty of the beneficiaries is a characteristic of a charitable trust.

In *Beach on Trusts and Trustees*, sec. 322, it is said:

> In a charitable trust the beneficiaries need not be definitely named, and even where there is no adequate designation of a *cestui que trust* the trust will be enforced in equity if the intention of the settlor can be ascertained beyond a reasonable doubt. (*Russell* v. *Allen*, 107 U. S., 163; *Perry on Trusts*, secs. 66 and 95.)

Where the trust is *not* a charitable one, and in some jurisdictions where it is, the beneficiaries must be definitely pointed out.

In *Levy* v. *Levy* (33 N. Y. 97, 107), the court said:

> If there be a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement is void, whether good or bad, wise or unwise.

In *Weaver* v. *Spurr* (56 West Va. 95, 105), it is said:

> There can not be a trust without a *cestui que trust;* and if it can not be ascertained who the *cestui que trust* is, it is the same thing as if there was none.

In *Brown* v. *Caldwell*, 23 West Va. 187, we read:

> It is difficult to conceive of anything more vague, indefinite, and general in its character. The societies here designated are neither local nor fixed. They, in fact, embrace the whole Christian world, and are not only indefinite but unascertainable.

This was a charitable trust, but subject to the same rules as those which apply to private trusts.

In *Heiss, Executor, etc.*, v. *Murphey et al.*, 40 Wis. 276, 292, the beneficiaries were Roman Catholic orphans. The bishop was named as trustee and authorized to sell the property and "use the proceeds for the benefit of the Roman Catholic orphans." The court held that the trust was too indefinite as to the beneficiaries for enforcement and observed:

> There are no ascertainable beneficiaries, either as a class or individuals, and therefore the trust can not be effectually carried out.

In *Wheeler* v. *Smith*, 9 How. 55, the trust provision was declared invalid, because, to use the language of the court:

> A trust is vested in the executors, but the beneficiaries of the trust are uncertain and the mode of applying the bounty is indefinite (*Perrin et al.* v. *Carey et al.*, 65 U. S. 465; *Jones* v. *Habersham*, 107 U. S. 174; *Vidal* v. *Girard's Executors*, 2 How. 127).

The effect of all these decisions is that, while in some jurisdictions the same definiteness as to beneficiaries is required in charitable trusts as in private trusts, in all jurisdictions private trusts must be so definite as to the beneficiaries that the terms used therein to describe them will enable anyone to select them without doubt.

(c) **Beneficiaries indefinite.**

Could there be anything more indefinite than the description of the alleged beneficiaries in the actual-settlers provision? If it be said that "actual settlers" constitute a class, and that the description thereof is definite, we answer that the grant is not to a class as a whole to be enjoyed by the members thereof as tenants in common. It contemplates a division of the land amongst many people. Moreover, to be actual settlers they must belong to one of two classes, (a) those who have actually settled upon the lands or (b) those who have not but are actual settlers elsewhere. If to the latter class, it is a very numerous one, for actual settlers may be found in the city, the State, or Nation. Most of the popula-

tion of the United States consists of actual settlers. So large is this class that there would not be an acre apiece in all the grants for a third of the number composing it. A selection, therefore, would have to be made of those who might be accommodated. That selection has not been made. Until it has been the actual settlers—the alleged beneficiaries—can not be known. They are, therefore, indefinite—nothing could be more so—and consequently the trust, if one was intended, is void for uncertainty with respect to the beneficiaries.

If they belong to the first class they are trespassers, because they could not become actual settlers, lawfully, without the consent of the owner, and that has not been given. Indeed, to say that it was within the intention of Congress that persons might acquire a right to the lands by becoming trespassers thereon, would be to say that Congress had given them a right conditioned on their doing wrong, which would be absurd.

(d) **Another objection to cross complainants' theory.**

Trusts are either executory or executed. In *Beach on Trusts and Trustees*, section 59, the distinction is pointed out. He says:

> Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has

> given to you and convert them into the legal estate?
>
> (See also *Nicoll* v. *Ogden* et al., 29 Ill. 323, 385; *Neves* v. *Scott*, 9 How. 196, 211.)

If this be a trust, is it executed or executory? It is the former if there be nothing left to the discretion of the railroad company; if the company must sell a certain quantity at a certain price, and upon certain terms to the *cestui que trust*. But this is not required. The only limitations placed upon the company are maximum limitations; within those it may exercise its own volition. It may sell in quantities of forty, sixty, or one hundred acres, at fifty cents, a dollar, or two dollars and fifty cents an acre; for cash, or upon such terms, and with such security, as it may choose. The trust then, if one at all, is an executory trust. Until the choice of the trustee has been made in the matters left to its choice, the cross-complainants could acquire no rights in any of the property. So that even if we say the beneficiaries are definite, they could have no enforcible rights until the trustee had fixed the terms upon which they might secure them.

(e) Decisions against cross-complainnts.

In *Nichols* v. *Southern Oregon* (135 Fed. 232) a provision in the Coos Bay Wagon Road grant of March 3, 1869, quite similar in its terms to the settlers clause in the case at bar, was construed. The provision reads:

> *Provided further*, That the grant of land hereby made shall be upon the condition that

> the lands shall be sold to any one person only in quantities not greater than one quarter section, and at a price not exceeding $2.50 per acre.

The plaintiff in that case selected 160 acres, tendered to the defendant $2.50 per acre therefor, and demanded a conveyance (this is substantially what was done by the cross-complainants and interveners in the case at bar). The defendant refused. Plaintiff brought suit upon the theory that he had a right to a conveyance. The court denied his claim for the following reasons:

> The grant was not a law for the sale of the granted lands. It did not offer them for sale. That was left to the State [the grantee], subject to restrictions as to the price at which they would be sold and the quantity that should be sold to any one person. These restrictions were mere incidents of the grant, mere regulations that the State was required to observe in selling the granted lands, at such time after they were earned as the State should conclude to sell them. The object to be accomplished in nowise depended upon them. Whatever rights existed in respect to these restrictions belonged to the United States. No interest was created in the complainant. He is not a beneficiary in the grant, and he has no standing to complain that the State has violated its conditions in the manner in which it has disposed of the granted lands. That is a matter that can only be taken advantage of by the United States.

In *Warrior River Coal & Land Company* v. *Alabama State Land Company*, 154 Ala. 135, the Supreme Court of Alabama was called upon to construe the provisions of the act of April 10, 1869, renewing the railroad grant to the State of Alabama under the act of June 3, 1856. This act contained a provision identical with the settlers' clause in our grant. Speaking of it the court said:

> The limitation quoted from the act was, at most, a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting Government, and by that only.

According to the view of this court the right to take advantage of the violation of the grant was in the Government and in nobody else. *Ergo*, not in "actual settlers."

Cross-complainants cited the following decisions, in the court below, in support of their contention: *Rice* v. *Railroad Company* (1 Black, 358); *Mills County* v. *Railroad Company* (107 U. S. 557); *United States* v. *Des Moines*, etc., Co. (142 U. S. 527); *Ashuelot Nat. Bank* v. *City of Keene* (9 L. R. A. (N. S.) 758). They can all be distinguished.

The *Rice* case was with reference to a grant to the Territory of Minnesota for certain purposes. There was no beneficiary.

The *Mills* case was one in which certain lands were granted to the State of Iowa for stated purposes. It was claimed that the State had not ob-

served the requirements of the act. The court decided that the question was between the United States and the State; that the obligation imposed did not constitute a trust which private parties could enforce.

The *Des Moines*, etc., case construed a grant to the Territory of Iowa to aid in the improvement of the Des Moines River. The court decided that no *cestui que trust* was created and that the grant was to the Territory to be used for a specific purpose.

The *Ashuelot National Bank* case disposed of a controversy with respect to the provision of a deed. The heirs of the grantor sought to have the provision declared a condition subsequent. The court refused to do this, but held that the deed created a trust in favor of the city for a certain purpose. The trust was in the nature of a charitable one.

None of the foregoing authorities give any countenance to the contention of the cross-complainants.

(f) **Not a charitable trust.**

If cross-complainants assert that the trust is a charitable one they must also fail, because the idea of such a trust is utterly inconsistent with the idea of an exclusive interest in any of the beneficiaries. In a charitable trust the persons to be benefited must be vague, uncertain, and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being. (*Perry* on *Trusts* and *Trustees*, 6 ed., sec. 710.) They can not select themselves. As possible beneficiaries of a

charitable trust they would have absolutely no standing in court to enforce the trust (*Boenhardt* v. *Loch*, 113 N. Y. S. 747; *Burbank* v. *Burbank*, 152 Mass. 254).

Apropos the tests which we have employed to determine whether the actual settlers provision raises a trust, we have not forgotten that Congress could have changed the rules with respect to this matter as far as the canons of reason would allow, but it has not done so, nor attempted to do so.

FOURTH. NOT AN OFFER WHICH ANYONE MAY ACCEPT, AS INTERVENERS CLAIM.

(a) Have the interveners acquired vested rights against the Government?

The interveners claim that the grant makes a standing offer to anyone who may qualify himself to accept it. They say that they have qualified themselves by declaring their intention to become actual settlers and tendering the price fixed in the grant. This, they assert, amounts to an acceptance of the offer, and gives them a vested right which they can enforce against both the railroad company and the Government. They say that their position is analagous to that of preemptors and homesteaders. This is on the assumption that the grant, like the preemption and homestead acts, is an offer of sale, which we deny. But suppose it is, when does the preemptor or homesteader acquire a vested right against the Government? Not until he has per-

formed all that is required of him by the law to entitle him to a patent; up to that time he has no vested right.

In *Frisbie* v. *Whitney*, 9 Wall. 187, the court quoted with approval the following:

> A mere entry upon land, with continued occupancy and improvements thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of preemption. But this is only a privilege conferred on the settler to purchase land in preference to others. * * * His settlement protects him from intrusion or purchase by others, but confers no right against the Government (10 Opinions of the Attorney General, 57).

In *Yosemite Valley* case (15 Wall. 77) we find this:

> When these prerequisites (including the payment of the purchase price) have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he can not be subsequently deprived. * * * (*Shepley* v. *Cowan*, 91 U. S. 330; *Atherton* v. *Fowler*, 96 U. S. 513; *Wirth* v. *Branson*, 98 U. S. 118.)

Under these authorities interveners have no interest which they can enforce against the Government.

(b) Have they acquired vested rights against the railroad company?

The authorities make it clear when the rights of preemption and homestead attach.

In *Hastings, etc., Railroad Co.* v. *Whitney* (132 U. S. 357) the court said:

> Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with and the certificate of entry is executed and delivered to him, the entry is made—the land is entered.

In *Northern Pacific Railroad* v. *Colburn* (164 U. S. 383, 386) the court says:

> But frequent decisions of this court have been to the effect that no preemption or homestead claim attaches to a tract until an entry in the local land office.

The court, quoting from *Lansdale* v. *Daniels* (100 U. S. 113, 116), adds:

> Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose.

In *Tarpey* v. *Madsen* (178 U. S. 215, 225) it was said:

> And the acceptance of such declaratory statement, and noting the same on the books of the local land office, is the official recognition of the preemption claim. (*Eastern Oregon Land Co.* v. *Brosnan*, 147 Fed. 807; *Maddox* v. *Burnham*, 156 U. S. 544.)

These decisions hold that homesteaders and preemptors acquire no rights until an entry has been made by the one, and a proper notation of a preemption by the other, in the land office.

The intervenors have done nothing which is the equivalent of those requirements.

It is a rule that where there is a contest between rival claimants the one first in occupancy of the land with intention of appropriating it is given priority, but this rule does not aid the intervenors.

In *Atherton* v. *Fowler, supra,* the court, after saying that the law intended to give the settler time to build a house, break up the ground, and make settlement first and payment afterwards, continued:

> During this preliminary period he had no vested right to the land; but, as we have elsewhere decided, he did thus acquire the right of preference in the purchase—that is to say, if he made the necessary settlement and improvement, and the necessary declaration in writing, no other person could buy the land until the period elapsed which the law gave him to pay the purchase money.

In *Tarpey* v. *Madsen, supra,* this was said:

> So that any controversy between two occupants of a tract open to preemption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office but by the fact of prior occupancy.

So far, then, as his rival is concerned the claimant first in possession has what is equivalent to a vested right, but he has no such right as against the

Government. This principle aids neither the interveners nor cross-complainants.

(c) Decision relied on by interveners.

In *Jumbo Cattle Co.* v. *Bacon* (17 S. W. 136) a grant made by the State of Texas was construed. It provided for the sale of land at fifty cents per acre to any responsible person who would make application therefor and survey it. The plaintiff showed that he had done all these things except paying the price, which he tendered, but it was refused. There was there a definite offer on definite terms. Plaintiff accepted the offer and complied with the terms so far as he could. The court said:

> When there is an offer made by the act of the legislature, which is accepted by an individual, there is a contract which it is not within the power of the State to impair. * * * The expenses of the surveys, in connection with the price to be paid to perfect the title, are sufficient consideration to support the contract.

A casual inspection of the acts in the case at bar and the act there construed will show there is no similarity between their respective terms. In the Texas grant there was a specific offer to sell such quantity as the applicant might select at fifty cents per acre. The plaintiff accepted the offer in the precise terms in which it was made, and thereby a contract came into existence between him and the State of Texas.

Now, look again at the terms of the actual settlers provisions. If they be treated as offers to sell,

how much land was offered to each settler? What was the price? How was it to be paid for, in cash or on time? The grantee might have one view about these matters, the settlers another. Until they agreed there was no meeting of the minds, and hence no contract.

(d) **Not a contract for benefit of third parties.**

Are the intervenors entitled to invoke the principle that where a contract is made with one party for the benefit of a third, the latter may avail himself of it and enforce it by suit if necessary? No, because in such cases the persons for whose benefit the contract is made is defined. Here there is no such definition. Who can say that he has a right to any particular part of the land? Concededly, he has no right to more than 160 acres, but by what rule of construction can it be said that he has a right to that number of acres, rather than fifty or forty? We have fully discussed the uncertainty of the alleged beneficiaries. (Ante. p. 16.)

Neither the cross-complainants nor the interveners have any rights in the premises.

FIFTH. "THE ACTUAL SETTLERS" PROVISION OF THE AMENDATORY ACT OF 1869 CONSTITUTES A CONDITION SUBSEQUENT.

(a) **General characteristics of conditional estates.**

Where an estate is granted and its continuance made to depend upon the doing of something by the grantee, it is an estate upon condition subsequent. No particular form of words is necessary to create

such an estate; if the intention appears from the language used, it will be enforced. But there are certain words which, if used, necessarily evidence the existence of such an estate. They may be divided into two classes—(a) where the grant is followed by the words "provided that," "so as," "or under this condition"; in such cases words of reentry are not necessary; and (b) where the grant is followed by words "*si contingat*" and the like, but these latter words must be followed by words authorizing the grantor to reenter.

In Sheppard's Touchstone (p. 121) we read:

> Conditions annexed to estates are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know, therefore, that for the most part conditions have conditional words in their frontispiece and do begin therewith; and that amongst these words there are three words that are most proper, which *in and of their own nature and efficacy, without any addition of other words of reentry in the conclusion of the condition*, do make the estate conditional, as *proviso, ita quod*, and *sub conditione*. And therefore if A grants lands to B to have and to hold, to him and his heirs, *provided that*, or *so as*, or *under this condition*, that B do pay to A ten pounds at Easter next, this is a good condition, and the estate is conditional without any more words. But there are other words, as *si, si contingat*, and the like, that will make an estate conditional also, but then they must

have other words joined with them and added to them in the close of the condition, as that then the grantor shall reenter, or that then the estate shall be void, or the like.

The same authority states the rule in another way (p. 122):

> Where the word "provided" is inserted amongst the covenants of the deed, it doth make the estate conditional when there are these things in the case:
>
> 1. When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself.
>
> 2. When it is compulsory to the feoffee, donee, etc.
>
> 3. When it comes on the part, and by the words of the feoffor, donor, lessor, etc.
>
> 4. When it is applied to the estate, and not to some other matter.

The second and third qualifications are clear and need no word of explanation. Touching the first it is said:

> But if the clause have dependence on another clause of the deed, or be the words of the feoffee, etc., to compel the feoffor to do something, then it is not a condition but a covenant only; as if there be in the deed a covenant that the lessee shall scour the ditches, and then these words follow "provided that the lessor shall carry away the earth."

As to the fourth qualification it is said:

> So if this clause be applied to some other thing, and not to the thing granted, then it is

> no condition, as if a lease of land be made rendering rent at B. Provided that if such a thing happen, it shall be paid at C; this doth not make the estate conditional.

The proviso in the act of 1869 "stands originally by and of itself" and has "no dependence upon any other sentence"; "it is compulsory to the" grantee; "it comes on the part and by the words of the" grantor; "it is applied to the estate and not to some other matter." Therefore, it answers every test of the rules laid down in the Touchstone. A careful examination of these rules show that they find uniform support in all the early English decisions and may be treated as accurate expressions of the ancient common law upon the subject (*Littleton's Tenures*, secs. 328–331; *Coke upon Littleton*, secs. 328–331, 203 a. b., 204 a.; *Cruise's Dig.*, vol. 4, 352, 353, Tit. 32, ch. 25, secs. 1–6; 3 *Comyn's Dig.*, 74, 76, *Condition*, A 2, A 4; *Bacon's Abr.*, vol. 2, *Title, Condition* A).

The modern decisions are in harmony with the ancient authorities.

In *Tiedeman on Real Property*, 3 ed., sec. 201, we read:

> No particular words or forms of expression are really necessary for the creation of such an estate. Any words, particularly in wills, which show the intention to annex a condition to the estate granted will be sufficient. Such phrases, however, as "on condition," "provided," "if it shall so happen," etc., are found in constant use, and, if resorted to, will ordinarily remove

any doubt as to the grant being an estate upon condition.

In *Warvelle on Vendors*, 2 ed., vol. 1, sec. 445, it is said:

> The use of technical words which in themselves import conditions will ordinarily be held to create the same, for technical words are presumed to be used in their legal sense unless there is a plain intent to the contrary.

The technical words to which he refers are those mentioned above.

(See also *Washburn on Real Property*, vol. 2, secs. 938, 956; *Tiffany on Real Property*, vol. 1, sec. 162; *Adams* v. *Valentine*, 33 Fed. 1; *Mahoning County* v. *Young*, 59 Fed. 96; *Adams* v. *Ore Knob Copper Co.*, 7 Fed. 634, 640.)

(b) **Decisions seemingly in opposition.**

There are a number of cases which apparently are in conflict with the foregoing rules, but a careful analysis will disclose that they are not. They may be divided into the following classes:

(1) Those in which it was urged that the estate was upon a condition subsequent, but in which no words such as "provided," or "on condition," were used. *Wright* v. *Morgan*, 191 U. S. 55, illustrates this class.

(2) Cases in which the words "provided that," or "upon condition" were used, but in connection with other words showing the grantor did not use them in their usual sense.

This class deserves a little closer examination than the first, and may be divided thus:

(a) Cases in which the grantor, being a trustee, was without authority to impose conditions; or the grantee was without authority to assume the burdens of conditions. *Sohier* v. *Trinity Church*, 109 Mass. 1, is typical of this class. There lands were held by a trustee and the limitations of the trust expressly or by necessary implication prohibited the imposition of conditions.

(b) Cases involving the interpretation of wills, the rule as to which differs from that as to private grants. *Stanley* v. *Colt*, 5 Wall. 119, is characteristic of this class.

Besides, the court held that from a review of all the language of the will bearing on the subject, it was evident the testator did not intend to create a condition subsequent.

(c) Cases involving grants to municipal corporations or charitable institutions in which provisions, conditional in form, restricted the use of lands granted to some specific purpose, such as a burial ground or the like.

The case of *Portland* v. *Terwillinger*, 16 Oreg., 465, comes within this class. The land was conveyed to the city of Portland as a resting place for the dead. If the condition had been enforced the land would have reverted to the grantor, the defendant in the case. Speaknig to this point the court said:

> The defendant would again become reinvested with the estate, including the tombs and

> their contents, and might exercise such control and dominion over them as any other private property is subject to. I feel safe in saying that such was not the intention of the parties to these writings at the time they were executed, and change of circumstances since they were made can not affect their construction.

Green v. *O'Connor*, 18 R. I. 56, is another case of this kind. In that case property was granted to the town of Providence upon condition that it be used for the purpose of a highway. There was a statute of Rhode Island prohibiting a town from obligating itself to maintain or repair a highway; it was presumed, of course, that the grantor knew this and, hence, that it was not his intention to impose upon the town a condition which the law prohibited it from fulfilling. Unless the decision can be said to rest on this ground it is an exception to the rule with respect to grants to municipalities on condition that the land be used perpetually for the purpose of a street. In *May* v. *Boston*, 158 Mass. 21, and *Rose* v. *Hawley*, 118 N. Y. 502, a like grant was held to be upon a condition subsequent.

(d) Cases involving grants containing provisions conditional in form, but which inure to the benefit of some person other than the grantor or his heirs.

The general rule is that grants upon condition for the benefit of some persons other than the grantor or his heirs are not treated as conditional estates. The case of *Countryman* v. *Deck*, 13 Abbott's Cases, N. Y.,

110, belongs to this class. The condition in that case reads:

> Provided always that the party of the second part shall fence and keep fenced the premises above described.

It was held that this proviso constituted a covenant running with the land, because the manifest intention of the parties was that it should benefit the grantee and his grantees and not the grantor or his heirs. The latter had no direct and exclusive interest in the preservation of the fence; and since they had not, the court reached the conclusion that it was not the intention of the parties that the grantee should lose his estate if he failed to build or keep up the fence. The Government has a direct and exclusive interest in the enforcement of the actual-settlers provision. It represents the public, and the condition was made for the benefit of the public. No one else could enforce it, and, hence, the inevitable conclusion is that it was intended as a condition subsequent.

(e) Cases involving grants containing provisions conditional in form, but which, if construed to be conditions, would nullify other provisions of the grant. *Episcopal City Mission* v. *Appleton*, 117 Mass. 326, exemplifies this class.

Is there any room for the application of such a rule in the case at bar? Section 2 of the act of 1866 provides that—

> The lands herein granted shall be applied to the building of said road within the States respectively wherein they are situated.

Defendants insist that this provision can not be given effect if the condition subsequent theory prevails; hence, that here is an inconsistency.

This is grounded upon the assumption that defendant's interpretation of the act is correct, but we have shown that it is not (*infra*, 116). The condition subsequent can be observed and the grant enjoyed, not, perhaps, to the extent for which the defendants contend, but, nevertheless, so as to be of very material aid to the grantee.

(f) Cases in which conditions have been held to be void on grounds of public policy, etc.

Conditions in total restraint of the power of alienation are held void and unenforcible, although conditions restraining the power of alienation for a limited period, or as to a particular class of persons are held valid. (*Cowell* v. *Springs Co.*, 100 U. S. 55, 57.)

In *Taylor* v. *Brown*, 147 U. S. 640, 646, the court said:

> The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain and reasonable time may be valid, and the grantee forfeits his estate by violating it.

Even a total restraint of power of alienation is valid in case of public grants, although invalid in case of private grants. (*Sheppard's Touchstone*, 130.)

It will not do to say that an act of Congress, making a gift to a grantee upon condition that it do certain things, is against public policy.

Every case in which the use of the words "provided," or "upon condition," were held not to import conclusively a condition subsequent, falls within some one of the foregoing classes and has no application to the case at bar.

(c) Cases in which the general rule has been applied and enforced.

Wherever the grant or the deed, as the case may be, introduce the condition by the words "provided" or "upon condition," the estate has been held to be one upon condition, unless other language in the deed made it *clear* that the parties did not so intend.

In *Adams* v. *Valentine*, 33 Fed. 1, the court construed a deed, containing a condition opening with the word "provided." It was asked to say that the deed fell within an exception. In answering this Judge Wallace said:

> Nothing could be plainer or more peremptory than the words in the latter deed, "provided and this deed is upon condition that." There is no room for construction, and there is nothing in the context of either of these deeds, which warrants any other than the ordinary meaning of the language employed.

Referring to the decisions which had been submitted to him in support of the opposite contention, he said:

> The instrument considered by the court in each of these cases contained language from which it was reasonable to infer that the clause under consideration was not intended to operate as a condition.

Ergo, where the instrument does not contain such language the general rule must apply. And that is what we are contending for here.

In *Clapp* v. *Wilder*, 176 Mass. 332, 335, where a similar question was under review, the court said:

> The common law as to the creation of conditional estates has always been considered a part of our common law. *If we are to have such estates it is important that there should be the least possible uncertainty as to the form of the language to be used in creating them;* and when we find in a deed an intensified form of the phrase which from the earliest times has been regarded as "the most express and proper" phrase by which to create such an estate, it is to be assumed, in the absence of anything appearing in the deed to the contrary, that the phrase is used for its proper legal purpose, namely, to create such an estate, and that such an estate is thereby created. No doubt there is a disposition among courts to look for something in the deed which shall modify the severity of the language; and *sometimes considerable astuteness has been exercised in this direction* (*Post* v. *Weil*, 115 N. Y. 361); and no doubt the language is sometimes used when, from the whole deed, it sufficiently appears that it could not have been intended in its full technical sense, and in such cases a restriction and not a technical condition is the result.

Concluding the discussion upon this point the court observed:

> The case at bar does not come within any exception to the general rule as to the legal

> meaning of the phrase "upon express condition." As stated by Parker, C. J., in *Gray* v. *Blanchard* (8 Pick. 283, 287), the words, "this conveyance is upon condition" can mean nothing more nor less than their natural import. * * * It would be quite as well to say that the words mean nothing, and so ought to be rejected altogether (p. 337).

In *Blanchard* v. *Detroit, etc., R. Co.*, 31 Mich. 43, 48, 50, a conveyance was made "in consideration of $500.00 and the covenant to build a depot hereinafter mentioned." The so-called covenant reads:

> But this conveyance is upon the express condition that the said railroad company shall build, erect, and maintain a depot or station house on the land herein described, etc.

It will be noticed that the provision is referred to as a covenant, but the court, looking to the intention of the parties, held that it was a condition subsequent, saying:

> Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties can not be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a

> condition, they yet meant that it should be exactly as a covenant (p. 51).

In *Hammond* v. *Railroad Co.*, 15 S. C. 10, 32, the deed under examination had these words, "provided always, on condition." Speaking of their effect the court remarked:

> * * * When, then, Hammond has used the very terms which the books lay down as the special terms to be used to create such an estate, and when this was his interest, and nothing was found in the deed to negative the idea that it was also his purpose, why resort to implication? Why not take him at what he says? It seems to the court that it would be in violation of all rules of construction to hold otherwise than this deed created an estate upon condition.

In *Pepin County* v. *Prindle*, 61 Wis. 301, 308, land was conveyed to the County of Pepin "upon the express condition and term that the said County of Pepin erect thereon within five years a courthouse for the use of said county, and shall keep and maintain the same thereon for the space of ten years, upon the express condition," etc. It was urged that the mere maintenance of the building was a sufficient compliance with the condition. The court answered:

> Such a construction would do violence not only to the sense conveyed, but also to the language employed. It would be more narrow and technical than is implied in the word "strict" or "literal;" it would be extremely finical.

In *Langley* v. *Chapin*, 134 Mass. 82, the deed under consideration provided:

> This conveyance is made by us upon condition that the said Corbitant Mills, or its successors, will erect or cause to be erected upon said premises a cotton factory of not less than 20,000 spindles within two years from the date hereof.

Judge Holmes (now Mr. Justice Holmes), speaking for the court, said of this provision:

> There is no doubt that it attaches a condition subsequent to the estate conveyed. The tenant argues that it amounts only to a personal covenant with the grantors. But there is nothing in the context which warrants any other than the natural interpretation of the words used, and we must therefore assume that they mean what they seem to.

From the foregoing cases it is clear that the words "provided" or "upon condition" import a condition subsequent, unless there is strong reason arising from other words in the document for believing that the parties did not so intend.

(d) Cases in which the words "provided" or "condition" do not appear.

Even in cases where those words are not used, if it is clear from the context that it was the intention of the parties to create a condition subsequent, the court will so decide.

Wilson v. *Wilson*, 86 Ind. 472, 474, illustrates this class of cases. In the conveyance construed the

word "condition" did not appear. Speaking of this the court said:

> The word "condition" is not necessary to the creation of a condition. Any words that convey the proper meaning will be sufficient; and when, as in this case, the conveyance was made upon specified terms, and for no other consideration, the terms stated must be regarded as expressive of conditions subsequent, a breach of which might forfeit the estate.

(e) **Reluctance of courts to enforce condition.**

It is true that courts are reluctant to construe *private* grants to be conditional where the formal words are not used. In such cases the intention of the parties must be very clear or else the court will refuse to hold the estate to be one upon condition.

(f) **But it is otherwise with respect to public grants.**

In *Northern Pacific* v. *Townsend*, 190 U. S. 267, the language of the granting act was "that the right of way through the public lands be, and the same is hereby, granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed." Neither the word "provided" nor "condition" was employed. In the case of a private grant it is probable that the court would have held that this provision did not create an estate upon condition, but in the case of a public grant it is otherwise. We read from the opinion:

> But, although there was a present grant, it was yet subject to conditions expressly stated

> in the act, and also (to quote the language of the *Baldwin* case, 103 U. S. 426) "to those necessarily implied, such as that the road shall be * * * used for the purposes designed." * * * In effect the grant (of the right of way) was of a *limited fee*, made on an *implied condition* of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted (p. 271).

In *United States* v. *Michigan*, 190 U. S. 379, 398, the words were "for the purposes aforesaid and no other," and the court held that they implied "a grant upon condition for a special purpose."

In *Horner* v. *Chicago, etc., Ry. Co.*, 38 Wis. 165, 175, it is written:

> This deed conveyed two parcels of land. After the description of the first parcel, and referring to it, are the following words: "The aforesaid piece or parcel of land hereby conveyed to the party of the second part only for depot and other railroad purposes." After the description of the other parcel, which in terms is granted for a railway, the deed contains this clause: "Both of said pieces or parcels being granted solely for said road purposes." The words "only" and "solely" are words of restriction or exclusion. As used in this deed, their effect clearly is to prohibit the grantee from using the lands for any other than the specified purposes.

Speaking further of the words of restriction used the court said:

> But their insertion was a useless act unless the clauses are held to be conditions. That the grantor intended to reserve to herself some

> remedy in case the grantee should make default, is too plain for argument or doubt.

So we say of the actual settlers provisions in the case at bar.

The decisions in all the foregoing cases, where formal words were not used, turn on the intent of the grantor. Did he intend the provision for his protection? If so, then it is a condition subsequent. The Government determined to protect itself against a breach by the railroad company. Unless the actual-settlers provision is treated as a condition subsequent the Government is without effective protection.

(g) Cases construing provisions similar to the actual-settlers provision.

The number of cases in which provisions similar to those in the act of 1869 were construed are not many.

In *Nichols* v. *Southern Oregon Co.*, 135 Fed. 232, the proviso in the grant read: "*Provided further*, That the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section and at a price not exceeding $2.50 per acre." (15 Stat. 340.) The suit was by a private individual to compel defendant to deed to him a portion of the land upon the terms and at the price specified in the grant. The court held that he had no rights under the grant. In the course of the discussion these words occur:

> It is not necessary to consider whether this act was a waiver by Congress of the conditions subsequent in the grant.

Was this a *dictum*? The decision of the case required that the court should decide who was entitled to complain of the violations of the act. In doing so it found that complaint could be made only by the Government, because the grant was upon a condition subsequent. True, the court spoke of the restrictions placed in the grant as "mere incidents, mere regulations," but these are the same things which it afterwards denominated as conditions subsequent.

In *Warrior River Coal and Land Co.* v. *Alabama State Land Co.*, 154 Ala. 135, the court interpreted the provisions of the act of April 10, 1869, renewing the grant to the State of Alabama under the act of June 3, 1856. This of course is not the act involved in the present suit, although bearing the same date. Its provision, however, with respect to the sale of the land, is the same. It reads:

> *Provided*, That the land mentioned by the act hereby revived, except mineral lands, shall be sold to actual settlers only, in quantities not greater than one quarter section to any one person and at a price not exceeding $2.50 per acre.

The court, speaking of the limitation quoted, said that it—

> was at most a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting government, and by that only.

It may be this was *obiter*, but whether or not, it discloses the views of the court upon the subject, and for that reason is worthy of consideration.

(h) **Cases construing provisions of public grants analogous to the case at bar.**

There are a number of decisions construing provisions of public grants affirmatively requiring the settlement of the lands by or the disposition of them to settlers. The provisions are in the form of a condition subsequent, and the courts sustain the natural and ordinary meaning of the words employed; in other words, applied the general rule invoked by the Government in the case at bar. To illustrate:

In *Chapman* v. *Pingree*, 67 Me. 198, a provision in a grant (in the ordinary language of a condition subsequent) requiring that the grantee should settle twenty-five families on the granted lands within a specified time, was held to be a valid condition.

In *United States* v. *Repentigny*, 5 Wall. 211, a provision in one of the old French grants requiring the settlement and improvement of the lands granted and the occupation thereof by the tenants of the grantee, was sustained and enforced as a condition subsequent; and the lands were held to have been forfeited to the United States, as the successor of the King of France, because of a breach of such condition.

In *United States* v. *Wiggins*, 14 Pet. 334, a provision in one of the old Spanish grants in the

form of a condition requiring settlement and improvement of the lands, was held to be a condition subsequent and enforced as such; and it was decided that the United States, as the successor of the King of Spain, the original grantor, was entitled to forfeit the estate.

In *United States* v. *Arredondo*, 6 Pet. 689, a provision in another old Spanish grant in the form of a condition requiring the settlement of two hundred Spanish families upon the granted lands, was held to be a condition subsequent. In this case failure to perform the condition was excused, because performance was rendered practically impossible by the act of the grantor in ceding the territory where the lands were situate before the expiration of the time prescribed for their settlement.

Conditions requiring settlement were common in the old French and Spanish grants. And it has never been contended or held that there was any ground for converting those conditions into mere personal covenants.

(i) **Provisions construing private grants analogous to the case at bar.**

There are many cases in which provisions in private grants, similar to the actual settlers provision, were held to be conditions subsequent. Those grants contain provisions requiring or prohibiting the use of the lands in a certain manner or for a certain purpose. The authorities are practically unanimous that where these restrictions are expressed in the form of

a condition, as, for instance, by the the use of conditional words such as "provided" or "on condition," they will be enforced as conditions (*Cowell* v. *Springs Co.*, 100 U. S. 55; *Adams* v. *Valentine*, 33 Fed. 1; *Gray* v. *Blanchard*, 8 Pick. 284, 287; *Blanchard* v. *Detroit, etc.*, 31 Mich. 43, 48; *Langley* v. *Chapin*, 134 Mass. 82; *Marston* v. *Marston*, 47 Me. 495; *May* v. *Boston*, 158 Mass. 21; *Tiedeman on Real Property* (3d ed.), sec. 205).

(j) **Rule disfavoring conditional estates not applicable to public grants.**

In the case of private grants courts will try to avoid decreeing forfeiture wherever possible. This comes (1) largely from a motive to protect the weak against the strong, to guard the ignorant and unsuspecting against the unconscionable devices of those more learned and cunning. And (2) because of a desire to avoid the insecurity and uncertainty resulting from the existence of defeasible estates. But the enactments of Congress can not be discounted upon either of these grounds. The judiciary has no duty to review the policy or wisdom of congressional acts where they are within the constitutional power of Congress. The condition created by the actual settlers provision was designed to conserve the public welfare. It does not create permanent conditional estates. Its object is to prevent an undesirable distribution of the lands. It will not do to say, in construing grants by Congress, that the common law required this or that and that Congress did not ob-

serve the requirement. The legislative branch of the Government may modify or even ignore the common law. When Congress by the use of appropriate words impresses a condition upon a public grant, the condition becomes a law. How ridiculous it would be to say, after Congress has created a conditional estate, that such an estate is not favored by the law. What Congress enacts, within its constitutional power, the law necessarily favors.

In *Farnsworth* v. *Minnesota* 92 U. S. 49, 68, it was expressly decided that the doctrine disfavoring conditions and forfeitures, as a general rule is applicable to private contracts, but *not* to public grants. It held that equity would enforce forfeiture in favor of the Government upon grounds of public policy, and quoted with approval these words of Lord Macclesfield:

> You can never say that the law has determined hardly, but you may that the party has made a hard bargain.

The most careful research has failed to discover a single decision in which a provision in a public grant, such as we have here, was held not to be a condition subsequent (additional authorities as to words necessary to constitute a condition subsequent without words of re-entry or forfeiture, are given ante p. .

(k) Certain cases distinguished.

Do the cases of *Morgan* v. *Rogers*, 79 Fed. 577, and *Davis* v. *Gray*, 16 Wall. 203, so hold? No. In

Morgan v. *Rogers* the grant recited that the lands were "to be held and used as a burial ground for said city and vicinity." The court said that these words constituted a mere statement of the reasons which induced Congress to make a grant of that exceptional character. It will be noted, however, that the grant did not contain the formal words found in the actual settlers provision of the amendatory act of 1869. In *Davis* v. *Gray* the grant involved was one from the State of Texas to aid in the construction of a railroad. The court held that the performance of the condition was rendered impossible by the State of Texas joining in the rebellion, and then said:

> Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the State herself. By plunging into war, and prosecuting it, she confessedly rendered it impossible for the company to fulfill during its continuance.

Manifestly these cases do not militate in the least against the Government's position. They are entirely consistent with it. We repeat, no case can be found in which the rule disfavoring conditional estates was held to be applicable to public grants.

(l) Omission of the Word "Revert" Immaterial.

The learned counsel for appellant (defendants below) urge that because the act of 1866 provides expressly for a reverter of the land in case of a failure to file assent or to complete the road in the time limited and the act of 1869 does not so provide in case of disobedience of the actual settlers' clause, Congress

must have meant that a forfeiture should not result in the latter case. This inference is unwarranted. Possibly it would be admissible, although we do not admit it, if the act of 1866 provided expressly for forfeiture in the event of a breach of one condition and not for breach of another of the same category. But it is entirely unsound when, as here, the conditions do not appear in the same act, but in different acts separated, as to date of passage, by almost three years. Those who framed the earlier act might have deemed it necessary to provide expressly for forfeiture, while those who drew the latter might have had a different mind upon the subject.

Moreover, there is no express provision for forfeiture in the grant of May 4, 1870, nor does it contain the word "condition," "forfeiture," "revert," or "provided," in connection with the actual settlers' clause, yet Congress in the act of January 31, 1885 (23 Stat., 296), forfeited a large part of that grant for failure of the grantee to complete the road in time, and the act was sustained by this court (*United States* v. *Oregon and California Railroad Company*, 164 U. S. 526; *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284). Consequently, forfeiture may follow without any express provision in the act to that effect.

SIXTH. ACTUAL SETTLERS' PROVISION OF THE WEST SIDE GRANT IS IN LEGAL EFFECT THE SAME.

There is some difference in words between the actual settlers' provision of the act of 1869, and that of

1870, but the effect is the same. The provision of the latter act reads:

> That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road shall be sold by the company only to actual settlers, in quantities not exceeding 160 acres or a quarter section to any one settler, and at prices not exceeding $2.50 per acre. (Sec. 4. Statement, p. 21.)

The words "provided" or "on condition" do not appear, but this makes no legal difference according to the authorities just reviewed. The intention of each is identical. They are so closely related that it seems impossible to conceive an intention to impose a condition subsequent in the one case and not in the other.

IV.

BREACHES OF CONDITIONS IN ACTUAL SETTLERS' PROVISIONS.

Under which will be Discussed the Character and Extent of the Transactions Charged to be in Violation and Breach of the Conditions Restricting the Manner of Selling the Granted Lands, and Certain Excuses of the Defendants.

First. Unlawful Sales and Time Thereof.

In selling the granted lands the railroad company has always ignored the restrictions imposed by Congress. In saying this we do not mean that all sales were in violation of the instructions, but this

was not due to any regard for the law, but to other circumstances. (Statement, pp. 87, 88.) The lands have been disposed of solely with the object of deriving the greatest possible financial benefit therefrom. Many sales have been made to speculators in quantities from 1,000 to 20,000 acres to a single purchaser, and for prices ranging from $5 to $40 per acre, and one sale of 45,000 acres was made to one person at $7 per acre. (Statement, p. 87.)

Of the granted lands, nearly 5,306 sales have been made, aggregating approximately 820,000 acres. Of this amount, about 524,000 acres were sold to 376 purchasers in quantities exceeding one quarter section to one purchaser. Substantially all of the 524,000 acres were sold to speculators. Of the 524,000 acres approximately 370,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to one purchaser. (Statement, p. 88.)

For many years the limited demand for the lands furnished comparatively few opportunities to violate the terms of the grant, and thus it transpired that until about the year 1894 nearly all of the lands disposed of were sold in substantial compliance therewith. Yet during that period there were a few sales in quantities of 400 to 1,000 acres to a single purchaser. (Statement, p. 87.)

However, nearly all of the more serious violations have taken place since the year 1894, and after an active demand for the lands by speculators, in large quantities, had been developed by the Southern Pacific Company. (Statement, p. 87.)

SECOND. TRUST DEEDS AND MORTGAGES.

The trust deed of June 2, 1881, purporting to create some preferential interest in the lands in favor of the owners of the so-called preferred capital stock of the Oregon and California Railroad Company, in terms confers upon the trustees the power to sell and dispose of the lands *in solido*. It therefore constitutes a breach of the conditions. The same is true of the Union Trust Company's mortgage of July 1, 1887. (Statement, p. 86.)

THIRD. LANDS CONVEYED IN EFFECT TO SOUTHERN PACIFIC COMPANY.

The proof shows that through the manipulation of corporate securities and the maintenance of the Oregon and California Railroad Company as a dummy corporation to serve the defendant Southern Pacific Company, the entire land grant has been appropriated to the use and benefit of the latter company. The Southern Pacific Company has assumed and exercised all of the rights of ownership of the lands. Nominally, the title remains in the defendant Oregon and California Company, but this does not affect the actual nature of the situation. The practical effect of what has taken place is the same as if all the lands now remaining unsold had been conveyed to the Southern Pacific Company. If a dummy corporation is maintained to enable another corporation to exercise and enjoy certain franchises and other rights of property, the courts will inquire into the transaction and treat it the same

as if the dominating corporation were the legal owner of the property held in the name of the dummy corporation. (*J. J. McCaskill Co.* v. *United States*, 216 U. S. 504; *Linn & Lane Timber Co. et al.* v. *United States* (decided March 8, 1915); *Vilas* v. *Page*, 106 N. Y. 439; *Bennett* v. *Minott*, 28 Oreg. 339; *San Francisco* v. *Bee*, 48 Cal. 398; *Barksdale* v. *Finney*, 14 Grat. (Va.) 338; *Metcalf* v. *Arnold*, 110 Ala. 108; *Van Campen* v. *Ingram*, 12 Atl. Rep. (N. J.) 537; *Terhune* v. *Skinner*, 45 N. J. Eq. 344.)

Consequently the situation is the same in legal effect as if the unsold lands, aggregating approximately 2,360,492 acres, had been sold to the Southern Pacific Company. In any event, the withdrawal of the lands from sale and the refusal to entertain applications therefor by persons willing to become actual settlers, constitute a further breach of the restrictions. (Statement, p. 89.)

Further discussion of this question for the purpose of showing that defendants breached the conditions of the grant is unnecessary. They frankly admit it. We take the following from the record:

> Mr. FENTON. Defendants admit that they would not have paid any attention to the proviso of April 10, 1869, or to section 4 of the act of May 4, 1870, with respect to the limitation upon the grant. (Statement p. 88.)

In addition, the answers admit substantially all the acts charged by the complainant as breaches.

FOURTH. THE EFFECT OF THESE BREACHES.

The immediate effect of the refusal to obey the restrictive provisions was to create a virtual land monopoly affecting the territory within 35 or 40 miles of the Oregon and California Railroad line, and particularly from Eugene to the southern boundary line of the State. For upwards of 45 years, almost every alternate section of land in southwestern Oregon has been held in idleness by one company for its selfish interests, and without any regard for the commercial and industrial growth of the territory. This is the specific evil, in a grossly aggravated form, that Congress intended to prohibit by the actual settlers provisions. It is unnecessary to elaborate upon the matter. This court, when considering the comparatively feeble provision of the Union Pacific grant, said:

> Anyone who has lived in a community where large bodies of land are withheld from use or occupation, or from sale except at exorbitant prices, will recognize the value of this provision. (*Railway Company* v. *Prescott*, 16 Wal. 603.)

FIFTH. EXCUSES MADE BY DEFENDANTS FOR DISREGARDING RESTRICTIONS OF ACTUAL SETTLERS' PROVISIONS, STATED AND ANSWERED.

(a) Actual settlers' provision inconsistent with the chief purpose of the grant.

The defendants, especially the Union Trust Company, urge that the chief motive of the act of 1866 was the building of a railroad; that the act should be con-

strued with reference to this, and that if the enforcement of the actual settlers' provision would interfere with the accomplishment of that purpose, the provision must be disregarded. Pursuing this line of argument, they say that to mortgage the lands with the right of the mortgagee to sell in case of default in the payment of the debt secured, was permissible. Unless this could have been done, they urge, money could not have been secured to prosecute the work, and the project would have inevitably failed. A construction which would have lead to such a result must, they claim, be rejected. Their position is untenable.

There is nothing in the title or the terms of the original act, or in the circumstances out of which it arose, to warrant this. The project had its origin in the desire of the people of the Pacific coast to develop the resources of that rich area and to induce people to come into it and settle upont he lands. (Statement, p. 44.) The building of the road was to be a means to this end. The Government was willing to aid the enterprise. It had no pressing need, peculiar to itself, for a railroad. Troops, the mail, and property of the Government could be conveniently conveyed by sea between the different points on the coast. It was surely not the intention of Congress to build or aid in the building of a railroad for the mere benefit of the corporation which was to own and operate it.

This view finds persuasive support in a message sent to the Legislature of Oregon on October 6, 1868,

by Governor Woods, who was one of the original promoters of the East Side Company, and the person who subscribed for 70,000 of the 72,500 shares of the capital stock of that company for its "use and disposal" (statement p. 48), in which he said:

> This grant, though quite liberal is wholly inadequate and will not, of itself, afford sufficient security to insure investment. Capital for the completion of this great work must come from abroad, and good policy requires that we should hold out inducements for investment (Govt. Ex., 101; R. X–5146, 5150).

There is no analogy between the motives which prompted the passage of the Pacific Railroad grant and those which led to the enactment of this grant, although defendants earnestly urge that there is. The purpose which Congress had in view when it passed the Pacific Railroad grant is stated by this court in *United States* v. *Union Pacific*, 91 U. S. 79, and *Platt* v. *Union Pacific*, 99 U. S. 48. In the first case Mr. Justice Davis said:

> Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and can not be properly construed without reference to the circumstances which existed when it was passed. The War of the Rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions.

In the latter case Mr. Justice Brewer observed:

> Suffice it to say, the purpose of Congress, above all others, was to obtain the construction of the railroad by the corporations it created to undertake the work. Only for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise.

Besides, the Pacific grant empowered the grantee to sell "or otherwise dispose of the lands." It was held in the last named case that this authorized the company to mortgage the grant. We have no such provision in the act, here involved.

The title of the act of 1866 says that it is to "aid" in the construction, etc. This does not mean that it is to be the sole source of all the funds necessary to build the road. The grantee could have used the lands as an aid without violating the actual settlers provision. There is nothing in the latter which prohibits the giving of a mortgage on the grantee's interest in the land so as to entitle the mortgagee to a first lien upon the funds derived from their sale in harmony with the restrictive provision. True, such security would not be as broad or as valuable, perhaps, as that which would result from a mortgage with a right of sale in case of a default, but it would aid in the work of construction, and that is all the act was intended to do.

The following, taken from remarks made by Congressman Wood while the bill which became the act

of May 4, 1870, was under consideration, is quite pertinent at this juncture:

> When in Europe last year I found at Frankfort, in Germany, and in Paris, and in London that a very large number of American railroad corporations were in the market there to borrow money, and the lands appropriated by Congress were really the only security that they had to offer, thus showing conclusively that by the bounty of Congress the lands form pretty much the only capital that these companies possess, and upon those lands they borrow in the European money market the money with which to construct their roads. Therefore the lands were not devoted to the purpose of actual settlement or occupation by any class of individuals, but were rather used by financiers and speculators upon which to raise money for speculative purposes entirely (*Cong. Globe*, part 7, and Appendix, 2d sess., 41st Cong., p. 313).

Defendants proceed upon the erroneous theory that the grant was to supply, in one way or another, all the money necessary to build the road. And on this assumption the grant has been administered. Every dollar which has gone into the building and equipping of the railroad, except, possibly, $800,000, was raised upon the security of the land. This $800,000 was allowed in 1876 to Holladay and his associates, who were the original promoters of the enterprise, by a bondholders' committee on account of what they had done for the road, but whether the money went

into the construction or not the record does not disclose.

The use made of some of the funds of the East Side Company was considered in *Holladay* v. *Elliott*, 8 Oreg. 85, *supra*, from which we take this finding:

> That one million dollars of this preferred stock was given back to the stockholders of the company, according to a private understanding with them, that they were to have it to be *used* by them in *procuring* the necessary legislation in Oregon to promote the interests of the company (p. 90). [Italics ours.]

Let us assume however, but without conceding, that the chief purpose of the act of 1866 was just as defendants say; Congress had the right to change that purpose and to substitute another. If, therefore, the amendatory act of 1869 is inconsistent with any part of the act of 1866, the former must prevail, because it is the last expression of the legislative will upon the subject.

> When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the later act * * * operates to the extent of the repugnancy as a repeal of the first. (*United States* v. *Tynen*, 11 Wall. 88, 92.)

(b) Actual settlers' provision applicable only to cultivable lands.

(b) The defendants contend that the phrase "actual settlers" means settlers who *cultivate* the land, and that if the land is not susceptible of cultiva-

tion, the actual settlers' provision does not apply. This is too narrow a view. To be a settler does not necessarily imply cultivation of the land. There are old settlers' associations in almost every city in the West composed of persons who never tilled a foot of the soil on which they had settled, yet they are actual settlers. No one would think of denying it. This is a matter of common knowledge and the court will take notice of it. Persons might settle upon these lands and use them for any purpose to which they were susceptible whether it be pasturing, growing an orchard, or the cultivation of the soil for the purpose of raising grain. The test is actual settlement upon the land without reference to any other use that may be made of it. Congress desired to populate the country. That accomplished, it was willing to let the inhabitants select the uses to which they would put the lands.

Moreover, when Congress desired to condition the enjoyment of land upon the cultivation thereof, it said so expressly. In the preemption act of 1830 (4 Stat., 420) it conferred the bounty upon those who were in possession and *cultivated* a part of the land. In the act of 1841 (5 Stat., 543) the gift was made to those who inhabited and *improved* the land. In the act of 1850 (9 Stat. L., 496) it gave the land upon condition that the occupant continued to reside thereon and *cultivate* it. In the homestead act of 1862 it required actual settlement *and cultivation* (12 Stat. L., 302). "The essential conditions of a preemption are actual entry upon, residence in a

dwelling, and improvement and *cultivation* of a tract of land" (Donaldson's Public Domain, 214). Thus we see that the terms "possession," "settlement," and "residence" were never understood by Congress to include cultivation. When it required cultivation it used the word "*cultivation*." It did not use it in the act either of 1869 or 1870 which we are considering and, therefore, we are justified in concluding that it did not intend to require cultivation.

This court has recently decided that a grant is to be construed according to the plain meaning of the words used. (*M., K. & T. R. Company* v. *United States*, 235 U. S., 37.) So we contend here.

It is suggested that actual settlers within the meaning of the act contemplates those actually on the land when the granting act was passed, and also those who went upon it between that date and the passage of the amendatory act of April 10, 1869. This, of course, is incorrect.

Section 2 of the original act makes specific provision for those on the land at the time it was passed. We read:

> And when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of, other lands designated, as aforesaid, shall be selected by said companies in lieu thereof under the direction of the Secretary of the Interior in alternate sections designated by odd numbers as aforesaid, nearest to and not more than 10 miles beyond the limits of said

> first named alternate sections. (Statement, p. 6.)

This shows that at the time the act was passed, it was not intended to include in the grant any lands on which there were actual settlers, consequently the phrase "actual settlers" does not refer to them.

There is no evidence that there were any settlers who went upon the land between the date of the original act and the passage of the amendatory act. But if there were such, and Congress intended to protect them, why should it apply to them a different rule from that which it had applied to those who were on the land in 1866? And if it intended that, it is fair to assume it would have said so in clear and unmistakable terms.

When we consider what was said in Congress at the time the amendatory act was under debate, there can be no question but that Congress meant just what it said in the amendment as passed.

Mr. Sargeant, of California, answering an objection made by Mr. Holman, of Indiana, said:

> The gentleman's blind rage does not discriminate between this system and that which was unrestricted. * * * He says the lands along the Union Pacific now sell for $10 per acre. * * * Under this bill the lands can never realize more than $2.50 per acre to the company, even if the road makes them worth $100 per acre (2d sess. 41st Cong., *Cong. Globe*, p. 3105).

In the Senate, when the bill was being considered, Senator Williams of Oregon said, in effect, that

notwithstanding the grant to the railroad company, every foot of the lands granted must be sold by the company to actual settlers, and for a price not exceeding $2.50 per acre (2d sess. 41st Cong., *Cong. Globe*, p. 1428).

According, then, to the views of the gentlemen who favored and voted for the amendatory act, both in the Senate and the House, the restrictive proviso was to apply to *all* the lands, not merely to those occupied by settlers.

How would a person become an actual settler so as to be competent to become a purchaser? The grantee would have no difficulty in clothing any person with the necessary characteristics. There are many ways in which this could be done. One would be by providing that the intending purchaser might, upon certain conditions, go upon the land to become an actual settler before he acquired any other rights under the contract of sale.

(c) **Impossibility of performance.**

Much testimony was put into the record by the defendants for the purpose of showing that the land was not susceptible of cultivation, and therefore that the actual-settlers provisions are inapplicable. The Government objected to all such testimony on the ground that it was immaterial, irrelevant, and incompetent, and still insists upon the objection. (Statement, p .95.)

When the grantees accepted the grants they knew the condition of the lands. The same hills were

there that appear in their photographic exhibits. Substantially the same character of timber covered the surface. They knew then as well as they know now the uses to which the lands could be put. If the lands were not susceptible of actual settlement, or the grantees had any doubt about it, they should have protected themselves either by not accepting the grants or by asking to have them amended; not having done so they are bound by their contract. In *Ingle* v. *Jones*, 2 Wall. 763, the defendant in error had made a contract to construct a building and "make it fit for use and occupation." He built it, according to plans and specifications, but owing to a latent defect in the soil upon which the foundation rested the building cracked and part of it threatened to fall. This made it necessary to take the building down and rebuild the structure, which was done at a large expense. The contractor, defendant in error, contended that he had fulfilled his contract and was not responsible for defects arising from a cause of which he was ignorant and which he had no agency in producing and therefore was entitled to recover the balance due upon the contract. The court in denying his claim said:

> This covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use

and occupation." It could not be occupied with safety to the lives of the inmates. It is a well-settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. (Citing authorities.)

(d) **In any event the terms with respect to the quantity and price are possible of performance.**

Assume for the purpose of the argument that these lands are incapable of cultivation, and that this would excuse the defendants from selling to actual settlers, it would by no means follow that the defendants would also be excused from observing the other restrictions, namely, those with respect to the quantity that might be sold to one person at a sum not to exceed $2.50 per acre. These latter conditions are not impossible of performance, yet the defendants have ignored them.

Is there any warrant in the legislation of Congress for assuming that if these lands be incapable of cultivation the grantees may sell them in such quantities and at such prices as they please without any reference to the other restrictions? We have shown (Ante., pp. 30, 68, *et seq.*) what the policy of the Government was with respect to the disposition of the public domain at the time the acts of 1869 and 1870 were passed. No support can be found in that policy for the contention that if these lands be timberlands

Congress did not intend to put any restraint upon the grantees with respect to their disposition.

In addition to what we have already said upon this question, we invite attention to the act governing the sale of timber and stone lands in California, Oregon, Nevada, and Washington Territory, approved June 3, 1878. It provides:

> That surveyed public lands of the United States within the States of California, Oregon, and Nevada * * * may be sold to citizens of the United States * * * in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands.

It further provides:

> That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate * * * setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone, * * * that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself.

This shows not only the policy but the practice of the Government with respect to timber and stone lands.

Another act that is very pertinent. On March 3, 1869, a little more than a month before the amendatory act of 1869 was enacted, Congress passed what is known as the "Coos Bay Military Wagonroad Grant" to aid in the construction of a wagon road from Roseburg to Coos Bay in Oregon. When this bill was under discussion Senator Williams of Oregon said:

> I have a map here, and can exhibit the condition of the country and the situation of the points referred to if the Senator desires to look at it; but I will state to the Senator that Roseburg is the county seat of Douglas County, and the chief town of the Umpqua valley. It is surrounded on all sides by mountains. This bill proposes to assist in the construction of a road from Roseburg to the navigable waters of Coos Bay. * * * There are some small valleys in these mountains in which the land may be worth something, and it is possible that there may be some timber on the mountains that may be used by the State in the construction of this road with advantage (2d sess. 40th Cong., *Cong. Globe*, pp. 249–250).

Notwithstanding this description, Congress embodied in the act the following provision:

> *Provided further*, That the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter sec-

> tion and at prices not exceeding two dollars and fifty cents per acre. (15 Stat. 340.)

There is nothing there about actual settlers, yet the quantity that might be sold to one person and the price per acre are limited.

So, if we say these lands are chiefly timber lands, that would not justify the conclusion that Congress did not intend to apply to them the limitations with respect to the quantity and the price.

Moreover, Congress, when it came in 1869 to amend the act of 1866, knew the lands covered by that act were timbered, in part at least, for section 10 of the act speaks of timber on them, yet Congress did not in the amendatory act exempt timber lands from the actual settlers provision.

(e) **But the lands are susceptible of actual settlement.**

While insisting that the character of the lands is immaterial, we contend that the evidence shows overwhelmingly that they are susceptible of settlement. The defendants called 33 witnesses upon the subject. A large number of them were persons who had been sent upon the lands by the railroad company for the purpose of gathering testimony favorable to their employer. This was done after the agitation for the recovery of the lands had commenced. To say the least, those who were thus sent were deeply interested, and their testimony should be considered in the light of that fact. They said that from 4 to 60 per cent of the land when cleared would be fit for agricultural purposes and the balance for grazing.

(Statement, Table A, p. 223.) This does not comport with the contention that none of these lands, or practically none of them, is susceptible to actual settlement or cultivation.

On the other hand, the Government produced *70* witnesses—men who were familiar with the land through residence in the neighborhood, and who were entirely disinterested excepting in so far as they might have desired to see the law enforced and the rights of the Government vindicated. Forty-five of them said that all of the land was fit for settlement. The 25 remaining put the percentage a little lower. (Statement, Table B, p. 223.) If the court should undertake to weigh the testimony of these men against that of the defendants' witnesses, it seems to us that the contention of the defendants, that these lands are not susceptible to settlement, must inevitably fail.

Indeed, it may be said of much of this land, as it has been said of other land, "if you tickle it with a hoe, it laughs with harvest."

Moreover, the defendants' witnesses testified that there were from 4,000,000 to 25,000,000 feet of timber on each quarter section and that it was worth from $1 to $2.50 per thousand feet to lumber companies which would remove it without expense to the owners of the land. This means that a quarter section of land purchased for $400, assuming that the maximum price of $2.50 per acre was paid, would bring from $4,000 to $62,500 (Statement, Table B, p. 223); such a sum would go a long way toward paying for the removing

of the stumps and the clearing of the land. Under these circumstances who can doubt that the lands would have been rapidly settled if the railroad company had complied with the terms of its contract with the Government?

(A reduced summary of the testimony of all the witnesses upon this subject is given in two tables marked "A" and "B"; the one contains the testimony of the defendants' witnesses, the other that of the witnesses called by the Government. (Statement, p. 223.)

But there is other persuasive testimony that these lands are fit for agricultural purposes. The defendants contend that they are chiefly timber lands. Very well; lands which will grow timber will grow fruit trees, grain, and other agricultural products. This must be manifest. Surely such lands can not be classed as arid. The admission, therefore, that they are chiefly timber lands proves conclusively that when cleared they will be fit for agricultural purposes.

In addition, we have the uncontradicted testimony of Mr. McAllaster, land commissioner of the defendant company, that 10,000 people, between the years 1907 and 1912, had applied to the company to purchase sections of this land for the purpose of cultivating the same and building homes thereon. He said:

> About 10,000 applications to purchase quarter sections of timber lands belonging to the company at $2.50 per acre have been made to

> the company and refused since the commencement of the first Lafferty suit about that time, up to July 30, 1912. (Statement, p. 89.)

True, he added that in his judgment the applicants were not in good faith.

What did he have to do with that? We know it was at one time the fashion for large corporations when called to account by any one, whether a Government officer or a private citizen, for violations of the law, to charge bad faith against their accusers. But this charge, in modern days, has lost its potency. In addition, if Mr. McAllaster really doubted the good faith of the 10,000 applicants he could have put it to the test in a very simple way, namely, by accepting the money tendered by them, or by offering to accept it. If upon doing the latter the offer was withdrawn, he would have more convincing proof of bad faith than he has now.

Besides, we have a stipulation that 4,000 other persons had applied for permission to actually settle upon this land and pay for it at the maximum price of $2.50 per acre, and that they were refused. (Statement, p. 89). In view of these facts how futile it is to argue that the lands are not susceptible of actual settlement. Such a contention must fall upon ears that are deaf while the 10,000 applicants who seek access to the lands knock for admission upon doors that are barred against them by the defendants. If the Railroad Company had put these lands upon the market for sale according to the terms of the grants,

it would have been demonstrated within a short time that there were thousands of people willing to take them and establish there abodes thereon. If that had been done, what is now a wilderness would be a land of homes filled with happy and prosperous citizens.

V.

REMEDIES—JURISDICTION.

Under which will be discussed the remedies available to the Government, and the question of jurisdiction raised by the defendants.

Is forfeiture the proper remedy and has equity jurisdiction to decree it? Defendants contended:

> First. That forfeiture could not be resorted to without a declaration of forfeiture by Congress, and a judicial proceeding thereafter analogous to the proceeding known at common law as "inquest of office."
>
> Second. That equity should refuse to entertain this suit because the principal object thereof is to enforce a forfeiture.
>
> Third. That the suit should not be entertained as one to quiet title, because such a suit can be maintained only when the plaintiff has both legal title and possession.

We shall consider these propositions in the order named.

FIRST. THIS SUIT MAY BE MAINTAINED WITHOUT INQUEST OF OFFICE; THE ACT OF CONGRESS AUTHORIZING THE ATTORNEY-GENERAL TO BRING IT IS SUFFICIENT.

(a) **Underlying principles of conditional estates.**

The theory of conditional estates is, that the grantor parts with the title reserving the right to recall the same upon the happening of the contingency named. Therefore, a condition subsequent is not self-executing. It rests with the grantor to say whether the condition shall become operative or not. And so, a violation of a condition does not terminate the estate of the grantee, unless the grantor so elects. Conditions are designed for the benefit of the grantor, not for the benefit of the grantee.

Conditional estates being of feudal origin, the early rules defining the rights and remedies incident to such estates were influenced by the general doctrines of feudal tenures. Originally a freehold estate could be created only by *feoffment* with *livery of seisin*. Therefore it was held that it could be terminated only by some act of equal notoriety and solemnity. Thus it became the rule that the grantor could exercise the right of election to forfeit a freehold estate for breach of a condition only by an actual entry upon the land, such entry being considered the equivalent of the livery of seisin by which the estate had been created. (*Tiffany on Real Property*, vol. 1, sec. 74; *Davis* v. *Gray*, 16 Wall. 203, 230; *Cornelius* v. *Ivins*, 26 N. J. L. 376, 386.)

(b) **Modern rule upon the subject.**

In time grants became recognized as a proper method of creating and conveying freehold estates. Livery of seisin not being required in the case of grants, the reason for the original rule requiring actual entry in case of a breach of a condition disappeared and with it the rule itself.

In *Schlesinger* v. *Railway Company*, 152 U. S. 444, the court said:

> In the case of a private grant, an entry by the grantor, *or any act equivalent thereto, showing a purpose to take advantage of the breach of condition subsequent, and to reclaim the estate forfeited by such breach, is all that is required* (p. 453).

In *Union Pacific* v. *Cook*, 98 Fed. 281, 284, Judge Thayer, speaking for the Circuit Court of Appeals, said:

> It is true, no doubt, that the grantor of an estate upon a condition subsequent is no longer bound to make a formal entry for breach of the condition, but may sue to recover the possession if the condition is not fulfilled within the time limited. According to the modern view, the *commencement of a suit in ejectment by the grantor takes the place of a formal entry and demand of possession* (*Cowell* v. *Springs Co.*, 100 U. S. 55, 58; *Ruch* v. *Rock Island*, 97 U. S. 693, 697; *Austin* v. *Cambridgeport Parish*, 21 Pick. 215, 224; *Cornelius* v. *Ivins*, 26 N. J. Law 376, 386; *Jackson* v. *Crysler*, 1 Johns. Cas. 125; *Tied. Real Prop.*, sec. 277; *Hopk. Real Prop.*, p. 174).

(c) **Rules defining the manner in which the right of forfeiture for breach of a condition subsequent might be exercised by the King of Great Britain.**

In England it became the general doctrine that the right to forfeit an estate for breach of a condition annexed thereto could be exercised by the King only by a special proceeding known as "inquest of office." If the inquest resulted in favor of the Crown, the finding of the jury was known as "office found," and the legal effect thereof was the same as a reentry by an individual. This rule was not absolute. Under certain circumstances, an inquest of office was not necessary, as we shall see in a moment.

(d) **Inquest of office—where necessary.**

It would serve no useful purpose to investigate the origin and trace the devlopment of the proceeding known as "inquest of office." Let it be sufficient to say that in the course of time it became established that where the right of the King to the possession of lands appeared as a matter of *record*, no inquest of office was necessary, and the King's possession was presumed from the mere existence of the record showing the right (*Viner's Abridgement, title "Office or Inquisition,"* [G 2] 6, vol. 16, p. 88; *Bacon's Abridgement, title "Prerogatives,"* vol. 8, p. 100; *Chitty's Prerogatives of the Crown*, p. 249).

Therefore, in a case such as the one at bar, inquest of office would not have been necessary under the old common law. The grant to the railroad company was by a public statute and appeared of record.

The conveyances by the defendant, Oregon & California Co., in violations of the conditions of the grant, appear of record in the State of Oregon. Consequently, even if the doctrine of inquest of office be in force here, there was no occasion for its application. But, as we shall see, inquest of office is a proceeding not applicable to the Government of the United States.

(e) **Inquest of office—how initiated.**

There were two officers of the Crown, viz, the sheriff and the coroner, who, by virtue of their positions, had general authority to institute inquests of office on behalf of the Crown. Either of these might at any time summon a jury and submit to it either general or specific questions concerning the property rights of the King.

But they were not the only functionaries possessing this power. A court of *chancery* had authority to appoint special inquisitors when it was thought necessary, but their duties were the same as those of the jury selected by the sheriff or coroner. They conducted a mere investigation and returned their findings to the court of *chancery*.

(f) **General nature of the proceeding.**

Inquests of office were not trials in any sense of the word. There were no pleadings. The proceedings were based not upon an allegation but upon an inquiry. It was not necessary in order to conduct an inquest of office to acquire jurisdiction either as to parties or subject matter. The verdicts returned

did not possess any of the elements of a judgment or decree. An inquest of office was in every sense analogous to the modern coroner's inquest. In fact, coroners' inquests were inquests of office at the common law. A verdict favorable to the Crown did not assume to adjudicate the rights of the Crown.

In *Phillips* v. *Moore*, 100 U. S. 208, 212, the court thus described the legal effect of an "office found":

> It removed the fact, upon the existence of which the law devests the estate and transfers it to the Government, from the region of uncertainty and makes it a matter of record.

(See also *Chitty's Prerogatives of the Crown*, p. 59; *Blackstone's Commentaries*, Book III, p. 259; *Pollock and Maitland's History of English Law*, vol. 1, p. 119–122; *Gilbert's History of the Exchequer*, p. 109, 132, *et seq.*; *Hamilton* v. *Brown*, 161 U. S. 256, 263.)

(g) The manner in which right of forfeiture for breach of conditions may be exercised by the United States.

The law requires from the Government only such act as will show intention to avail itself of the condition. This can only be done by or under the authority of Congress. Sometimes Congress manifests the intent by passing an act declaring a forfeiture; in other instances, as here, it authorizes a suit to be brought to have the forfeiture declared and the condition enforced. The method of procedure has been passed upon often by this court, and in no case was it held that inquest of office, or anything similar to it, was necessary before commencing the action.

In *United States* v. *Repentigny*, 5 Wal. 211, it was said:

> A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly, under authority of the Government, without these preliminary proceedings.

In *Schulenberg* v. *Harriman*, 21 Wal. 44, we read:

> If the grant be a public one, it must be asserted by judicial proceedings *authorized by law*, the equivalent of an inquest of office at common law, finding the fact of forfeiture and *adjudging the restoration of the estate* on that ground, *or there must be some legislative assertion of the ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.*

In *Farnsworth* v. *Minnesota*, 92 U. S. 49, it was said:

> A forfeiture by the State of an interest in lands and connected franchises granted for the construction of a public work may be declared for noncompliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination—that is, by judicial proceedings—is attended with many conveniences and advan-

> tages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends, and thus avoids uncertainty in titles and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned and is made by a law which expressly provides for the forfeiture when that object is not accomplished. *Where lands and franchises are thus held, any public assertion by legislative act of the ownership of the State, after default of the grantee, such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object, will be equally effectual and operative.* (The court cites *United States* v. *Repentigny* and *Schulenberg* v. *Harriman.*)

In *Bybee* v. *Oregon and California Railroad Co.*, 139 U. S., 663, the grant involved in the case at bar was considered. The court said:

> And in all cases in which the question has been passed upon by this court the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the Government itself to take advantage of it and forfeit the grant *by judicial proceedings or by an act of Congress, resuming title to the lands.*

Iron Mountain R. R. Co. v. *Memphis*, 96 Fed., 113, decided in 1899, was a suit in equity to enjoin

the city of Memphis and its legislative council from enforcing a forfeiture.

We take the following from the opinion of Judge Taft:

> Where the sovereign makes a grant upon condition subsequent, the breach of the condition does not, of itself, devest title and right of possession, but the power is in the sovereign, as grantor, *to manifest his will that the condition shall be enforced*, and this manifestation of his will is by *legislative action*. In this case the condition expressly requires that the council shall exercise an option before forfeiture should ensue. In exercising such an option the council is acting in a legislative capacity. Its declaration is a law.

In *Columbia Valley R. Co.* v. *Portland, etc.*, 162 Fed. 603, decided in 1908, it appears that by act of March 3, 1875 (18 Stat., 482), Congress granted the right of way through the public lands to railroad companies upon certain terms and conditions, one of which was that the railroad should be constructed within five years from the time of the appropriation of the right of way by the filing of a map of survey in the office of the Secretary of the Interior. An act of June 26, 1906 (34 Stat., 482), declared forfeited to the United States all grants of right of way and station grounds under the former act in cases where the railroad company had failed to construct its railroad within the time required. The question presented was whether this was a proper exercise of the right of

forfeiture. The opinion is by Judge Gilbert, who said (page 606):

> The question arises whether this act operated *ipso facto* to forfeit the right of the appellant to any section of its located road not completed within five years from the date of the location. The appellant denies that it has that effect, and contends that, *in addition to the act, there must be a judicial ascertainment of forfeiture by a procedure in the nature of an inquest of office*, citing *Fairfax* v. *Hunter* (7 Cranch, 603, 3 L. ed. 453), *Smith* v. *Maryland* (6 Cranch, 286, 6 L. ed. 225), and *United States* v. *Repentigny* (5 Wall. 211); and argues that while an act of Congress declaring forfeiture unconditionally may be sufficient where no facts are to be ascertained, the forfeiture here, under the act of June 26, 1906, which is to be enforced only where the road has not been constructed within the five years following the location, or where the construction of the railroad was not progressing in good faith at the date of the approval of the act, leaves two important questions to be decided before the forfeiture is to take effect. But these questions so suggested are questions of fact of the nature of those which are to be determined in any case where the inquiry is whether particular rights under a grant have been forfeited under the provisions of a forfeiture act. *The act itself takes the place of the adjudication of forfeiture and of the inquest of office.* It is the "legislative assertion of ownership of the property for breach of condition." *It is itself the entry of the grantor for condition broken.* [Italics ours.]

Judge Gilbert then discussed the leading authorities upon this subject, including all of those hereinbefore referred to. The opinion is very instructive and supports the contention of the Government in the case at bar.

(See also *Cooke* v. *United States*, 91 U. S. 396; *United States* v. *De Visser*, 10 Fed. 642, 647; *United States* v. *Campbell*, 10 Fed. 816, 821; *Cotton* v. *United States*, 11 How. 228, 231; *Smith* v. *Maryland*, 6 Cranch 286; *McMicken* v. *United States*, 97 U. S. 204, 217; *Van Wyck* v. *Knevals*, 106 U. S. 360, 368; *St. Louis, etc., R. Co.* v. *McGee*, 115 U. S. 469, 473; *United States* v. *California, etc., Land Co.*, 148 U. S. 31; *Schlesinger* v. *Railway Company*, 152 U. S. 444, 453; *United States* v. *O. & C. R. R. Co.*, 164 U. S. 526; *Atlantic & Pacific* v. *Mingus*, 165 U. S. 413, 431, 434; *New York Indians* v. *United States*, 170 U. S. 1, 24; *United States* v. *Tennessee, etc., R. Co.*, 176 U. S. 242, 256; *United States* v. *Northern Pacific*, 177 U. S. 435, 441.)

(h) **Trial by jury not required.**

The contention by defendants that the Government can assert a right of forfeiture only through the finding of a jury made before the institution of suit is based upon the assumption that the proceeding "inquest of office" is applicable to the United States. They say that inquest of office involved a jury trial, and that the Constitution of the United States preserves for them the right to such a trial in a case of this character. The trouble with this argument is that the proceeding, inquest of

office, as we have shown, does not apply to the United States, and even if it did it was but a special proceeding and not within the purview of the constitutional provision preserving due process of law. Besides, during the last 120 years the United States has brought many actions to forfeit grants for breaches of conditions and not in a single instance was inquest of office resorted to or considered necessary.

In *Hurtado* v. *California*, 110 U. S. 535, it is said:

> Due process of law carries with it the right of trial by jury when trial by jury has been the usual course of administration in the particular class of cases through courts of justice to which the one in question belongs. That term carries with it the right of trial by jury in all cases in which trial by jury was a part of the usual course of administration through courts of justice at the time the Constitution was adopted. (*Light* v. *Canadian County Bank*, 2 Okla. 551.)

(i) **Congress authorized forfeiture.**

Congress did not declare a forfeiture in the case at bar prior to the institution of the action, but it empowered and directed the Attorney General to bring an action for the determination of "the claim and right of the United States to such" relief. It says in the joint resolution that he is—

> authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any

> and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to the acts in question granting lands, etc., "and in and by any and all such suits, actions, or proceedings, * * * in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions, and proceedings, including the claim on behalf of the United States that the lands granted by each of said acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being *intended* to *fully authorize* the Attorney General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending to entertain, consider, and adjudicate the claim and right of the United States to *such forfeiture* or forfeitures, and *if found* to *enforce* the same."

The bringing of the pending suit, in pursuance of that authorization, is the equivalent of a declaration by Congress itself of a forfeiture.

In *Ruch* v. *Rock Island* (97 U. S. 693, 697) it was said:

> Bringing suit for the premises by the proper party is sufficient to authorize a recovery,

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without actual entry or a previous demand of possession.

In *Union Pacific* v. *Cook*, 98 Fed. 281, 284, Judge Thayer, speaking for the Circuit Court of Appeals, said:

> The commencement of a suit in ejectment by the grantor takes the place of a formal entry and demand of possession.

The foregoing authorities amply sustain the proposition that the institution of legal proceedings authorized by Congress is a sufficient election to claim a forfeiture.

Besides, Congress, by the act of August 20, 1912, declared "that all claims of forfeiture heretofore or hereafter asserted by the Attorney General" under the joint resolution above set out "are hereby ratified and confirmed, and are hereby declared to be of the same force and effect as declarations of forfeiture by the Congress of the United States" (37 Stat. 320).

SECOND. THE FACT THAT THE PRACTICAL RELIEF PRAYED FOR IS FORFEITURE, NOT A GROUND FOR EQUITY TO REFUSE TO EXERCISE ITS JURISDICTION.

(a) Exceptions to the general rule.

The general rule that equity will refuse to enforce forfeitures is not absolute. It will enforce them where the plaintiff is without an adequate remedy at law.

In *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801, Judge Van Devanter speaking for the court, discussed this question as follows:

> Both because forfeitures are *usually* harsh and oppressive, and because they can *ordinarily*

be enforced at law, courts of equity *generally* refuse to aid in their enforcement. (Citing many Federal decisions.) This has been at times declared to be an absolute and inflexible rule, as in *Marshall* v. *Vicksburg*, 15 Wall. 146, where it is said: "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." And at other times it has been stated with some qualification, as in *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U. S. 25, where it is said: "Equity always leans against them, and only decrees in their favor when there is full, clear, and strict proof of a legal right thereto." *The better view is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underlie it; and that in cases, otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief.* As said by Story (*Eq. Jur.* sec. 439): "The beautiful character of pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." In *Brown* v. *Vandergrift* (80 Pa. 142, 148), a case involving the forfeiture of an oil lease, it was held by the Supreme Court of Pennsylvania: "In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do jus-

> tice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity and protects the land owner against the indifference and laches of the lessee and prevents a great mischief" (*Glocke* v. *Glocke*, 113 Wis. 303).

Memphis, etc., R. R. Co v. *Neighbors*, 51 Miss. 412, is not an exception to this rule. In that case the defendants were in actual possession and consequently the plaintiff had an adequate remedy at law.

In *Vicksburg, etc., R. R. Co.* v. *Ragsdale*, 54 Miss. 200, 208, it was held that if the plaintiff be without adequate remedy at law, equity will entertain a suit to quiet a title, even though it depend on a forfeiture.

In *Lafayette County* v. *Hall*, 70 Miss. 678, it was held that the general rule against the enforcement of forfeitures in equity is not applicable when the right of forfeiture is based upon a statute.

(b) The general rule is not applicable to forfeitures asserted by the Government.

The general reason underlying the doctrine that equity will not aid in the enforcement of forfeiture is that forfeitures are usually harsh and oppressive. From the nature of things, the rule can not be applicable to acts of the Government in the discharge of governmental functions for the conservation of the general public welfare. The Government never inserts conditions in its grants for the purpose of pecuniary gain or for the purpose of obtaining an unconscionable advantage over those dealing with it.

(c) **The rule in England.**

One of the chief functions of the chancery and the exchequer was to ascertain and enforce all property rights of the King, including those accruing by forfeiture and escheats. This we have already shown in our discussion under the head of inquest of office. Equity lent its writs for the express purpose of doing that without which a forfeiture in favor of the King was impossible (Ante., p. 136 *et seq.*).

(*d*) **The rule in the United States.**

In *Farnsworth* v. *Minnesota*, 92 U. S. 49, we read:

> It is said that provisions for forfeiture are regarded with disfavor and construed with strictness and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration; but there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation can not be made for the default of the party, nor where the forfeiture is imposed by positive law. "Where any penalty or forfeiture," says Mr. Justice Story, "is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred; for it would be in contravention of the direct expression of the legislative will" (*Story's Eq. Jur.*, sec. 1326). The same doctrine is asserted in the case of *Peachy* v. *The*

Duke of Somerset, reported in the 1st Strange, and in that of *Keating* v. *Sparrow*, reported in 1st Ball & Beatty. In the first case Lord Macclesfield said that "cases of agreement and conditions of the party and of the laws are certainly to be distinguished. You can never say that the law has determined hardly; but you may that the party has made a hard bargain." In the second case, Lord Manners, referring to this language and taking the principle from it, said that "it is manifest that in cases of mere contract between parties this court will relieve when compensation can be given; but against the provisions of a statute no relief can be given."

The court further held that where a forfeiture is sought to be enforced to enable the Government to discharge some important function, not only does the general rule against the enforcement of forfeitures not apply, but in such case a court of equity will lend its jurisdiction upon grounds of public policy.

The conditions in the grant under examination were inserted to conserve an important public policy, namely, to prevent land monopolies and to promote a distribution of the public lands in a manner consistent with the permanent industrial welfare of the Nation.

(c) The general doctrine that equity will not entertain a suit to enforce a forfeiture is not applicable when the right of forfeiture is based upon a statute as distinguished from a private contract.

If the United States is entitled to a forfeiture in the suit at bar, it is not by virtue of a transaction

analogous to a contract between private parties, but in virtue of a positive law enacted by Congress.

In *Lafayette County* v. *Hall*, 70 Miss. 678, the court said:

> Equally untenable is the position assumed by counsel for appellees that equity will refuse its aid in the enforcement of penalties. The unsoundness of this view lies in the failure to mark the distinction between statutory penalties and penalties created by contract between private persons. The latter courts of equity refuse to enforce, but the former, the expression of the will of the law-making power, the *courts of equity will not undertake to disregard and nullify by refusing their aid in proper cases.*

(To the same effect see: *Farnsworth* v. *Minnesota*, *supra*; *Pomeroy's Equity Jurisprudence*, vol. 1, sec. 458; *Story's Equity Jurisprudence*, sec. 1326; *Clark* v. *Barnard*, 108 U. S. 436; *Powell* v. *Redfield*, 4 Blachf. 45; Fed. Case No. 11359; *Chapman* v. *Oregon*, 5 Oreg. 432, 436.)

THIRD. THIS SUIT IS MAINTAINABLE UPON SEVERAL OTHER GROUNDS.

The United States is entitled to enforce its rights of property and other contract rights by all of the methods that are available to private individuals.

In *Cotton* v. *United States*, 11 How. 228, the court said:

> Although as a sovereign the United States may not be sued, yet as a corporation or body politic, they may bring suits to enforce their contracts and protect their property in the

> State courts or in their own tribunals administering the same laws.

(a) As a suit to quiet title under the general doctrines of equity jurisprudence.

To quiet a title, or remove a cloud therefrom, has always been one of the leading heads of equity jurisprudence. There is but one general limitation upon the right to maintain a suit to quiet title, and that is the general limitation applicable to all suits in equity, namely, plaintiff must be without an adequate remedy at law. This rule is sometimes carelessly stated to the effect that a suit to quiet title can only be maintained where the plaintiff has both legal title and possession. This is not correct. If he holds either under circumstances which would prevent him from having an adequate remedy at law, equity will give relief (32 *Cyc.*, p. 1337).

(b) Possession by plaintiff not necessary when lands are vacant and unimproved.

There are in this suit only 24,671.02 acres leased to tenants. (Statement, p. 91.) If their possession be treated as the possession of the company, very well; all the rest is vacant and unimproved, and ejectment as to it would not lie. As to the acres not in possession there is not only an inadequacy, but a total lack of remedy at law.

In *Christy* v. *Springs*, 11 Okla. 710, the court said:

> However, independent of the statute, an action to quiet title may be maintained by the holder of the legal title where he is not in pos-

session, if the premises are vacant and unoccupied.

In *Douglas* v. *Nuzum*, 16 Kans. 515, Judge Brewer, speaking for the court, declared that under the general principles of equity jurisprudence, independent of a statute, a suit to quiet title may be maintained even though the plaintiff is not in possession, if the premises are vacant and unoccupied.

In *Davenport* v. *Stephens*, 95 Wis. 456, the court said:

> Some question was raised whether the plaintiff has shown such possession as should entitle her to maintain this action. It is entirely immaterial whether she was in the actual possession or not. No other person was in the actual possession (*Grand Rapids, etc.*, v. *Sparrow*, 36 *Fed. 210; Southern Pacific* v. *Goodrich*, 57 Fed. 879; *Taylor* v. *Clark*, 89 Fed. 7; *Holland* v. *Challen*, 110 U. S. 15; *O'Brien* v. *Crietz*, 10 Kans. 202; *Utley* v. *Fee*, 33 Kans. 683; *Hoffman* v. *Woods*, 40 Kans. 382).

(c) Also as a suit to determine adverse claims to real property under the provisions of section 516 of the Annotated Code of the State of Oregon, which reads:

> Any person claiming an interest or estate in real estate, not in the actual possession of another, may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates.

In *Wehrman* v. *Conklin*, 155 U. S. 314, the court, speaking of statutes of this class, said:

> This method of adjusting titles by bill in equity proved so convenient that in many of the States statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases.

In *More* v. *Steinbach*, 127 U. S. 70, the bill of complaint contained no allegation of possession by the plaintiff. Objection was urged upon this ground. In speaking to the point the court said:

> As to the want of any allegation in the complaint of possession by the plaintiffs, or any evidence of that fact in the proofs, it is sufficient to say that by section 738 of the Code of Civil Procedure of California, a plaintiff asserting title to lands, though out of possession, may maintain an action to determine an adverse claim, estate, or interest in the premises. *People* v. *Center* 66 Cal. 551. A statute of Nebraska, authorizing a similar suit by a plaintiff out of possession, was before this court for consideration in *Holland* v. *Challen*, 110 U. S. 15, and the jurisdiction of a court of equity to

> grant the relief prayed in such case was sustained (citing several decisions of this court).

The following authorities hold unqualifiedly that statutes like that of Oregon may be taken advantage of by suits in equity instituted in Federal courts. (*Holland* v. *Challen*, 110 U. S. 15; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405; *Gormley* v. *Clark*, 134 U. S. 338; *Whitehead* v. *Shattuck*, 138 U. S. 146; *Wehrman* v. *Conklin*, 155 U. S. 314, 323; *Bardon* v. *Improvement Co.*, 157 U. S. 327.).

(d) **What is actual possession?**

In *O'Hara* v. *Parker*, 27 Oreg. 156, the court, after defining constructive possession, said:

> This is possession in law which follows in the wake of title, and is distinguished from actual possession — *pedis possessio* — which means a foothold upon land accompanied with the real and effectual enjoyment of the estate, with the reception of its fruits, its rents, issues, and profits, and is usually evidenced by occupation, by a substantial enclosure, by cultivation, or by appropriate use according to the particular locality and quality of the property.

(To the same general effect see *Hoffman* v. *Woods*, 40 Kans. 382.)

Will it be contended that the defendants are in actual possession of the 2,300,000 acres, less the 24,671.02 leased, of wild, unimproved lands involved in the case at bar, within the definition of actual possession given by the Supreme Court of Oregon?

(e) Question of possession is immaterial when the common-law remedies are inadequate.

The common-law remedy of ejectment is not always adequate. Therefore, even in cases where the defendants are in possession, equity will entertain a suit to quiet title, if in the circumstances the common-law remedies are insufficient.

In *O'Hara* v. *Parker*, 27 Oreg. 156, 170, it was expressly held that a party out of possession may maintain a suit to quiet title to vacant lands, under the general principles of equity jurisprudence, when for any reason the remedies at law are inadequate. This case contains also a valuable discussion of the distinction between actual and constructive possession in cases of this character. (*Bunce et al.* v. *Gallagher et al.*, 5 Blatchf. 481; *Sayers et al.* v. *Burkhardt et al.*, 85 Fed. 246.)

The suit at bar comes within the foregoing principles. Even if the defendants were in the actual possession of the lands, an action in ejectment would be inadequate to grant the relief claimed. This must be clear. A court of law would be unable to prevent defendants from mortgaging or conveying the land pending the suit. It could not adjudicate the rights of the Union Trust Company and Stephen T. Gage, or the rights of the cross-complainants or interveners. When equity is properly invoked on any ground, jurisdiction will be retained to adjudicate and enforce all the rights of the parties to the suit. (*Ober* v. *Gallagher*, 93 U. S. 199; *Gormley* v. *Clark*, 134 U. S.

338; *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313; *Hopkins* v. *Grimshaw*, 165 U. S. 342.)

This is not a suit simply to quiet title, with an alternate prayer for enforcement of the provisions of the grants relating to the sales of the granted lands. Equity jurisprudence is invoked upon other grounds.

(f) Also as a suit for injunction to prevent waste.

It is charged in the bill of complaint that the railroad company has heretofore cut large quantities of timber growing upon the lands and has otherwise committed waste thereupon, and that it will continue to commit waste in the particulars mentioned, as well as in other respects, unless restrained. The evidence supports this allegation, and the court so found. (Statement, p. 222.) This presents a ground for equitable cognizance.

Thus it has been held that the removal of ore from public lands will be restrained by injunction. (*United States* v. *Gear*, 3 How., 120, 133; *United States* v. *Parrott*, Fed. Case, 15998.)

And it has been held that the United States may invoke the jurisdiction of equity to restrain the cutting of timber upon the public lands of the United States (*Cotton* v. *United States*, 11 How. 228, 232; *United States* v. *Livestock Co.*, 76 Fed. 694; *United States* v. *Guglard*, 79 Fed. 21, 23).

(g) Also as a suit to avoid a multiplicity of actions.

In addition to the remedies of the United States as against the railroad company, it is necessary to

secure an adjudication of the rights of the United States as against the defendant Stephen T. Gage as surviving trustee of the trust deed of June 2, 1881; also as against the Union Trust Company as trustee under the mortgage of July 1, 1887; also as against each of the sixty-six parties who had instituted suits against the defendants, which were pending at the time the suit at bar was instituted, and in each of which an equitable title to certain of the lands involved in the suit at bar was asserted in the trial court before the bringing of this action (*Hale* v. *Allinson*, 188 U. S. 56; *Preteca et al.* v. *Maxwell Land Grant Co.*, 50 Fed. 674; *Boyd et al.* v. *Schneider et al.*, 131 Fed. 223).

The doctrine that equity will lend its jurisdiction to render speedy and complete justice, and avoid the vexations and irreparable injuries resulting from a multiplicity of actions and suits, is peculiarly applicable to the circumstances of this case.

Even if the suit at bar was not originally cognizable in equity, the consolidation of it with the suits of the cross-complainants brought it within the jurisdiction of equity.

An objection to the jurisdiction of a court of equity may be waived by the defendants. If waived, the court will proceed to adjudicate the rights of the parties.

In *O'Hara* v. *Parker*, 27 Oreg., 156, 173, it was expressly held that objection to the jurisdiction of equity to entertain a suit to quiet title was waived by the defendant failing to interpose a plea challeng-

ing the right of the plaintiff to proceed in equity and interposing an answer in which he asked for affirmative relief (*State* v. *Blize*, 37 Oreg. 404, 409).

It is submitted that when the defendants moved to consolidate the suits of the cross-complainants with the suit of the Government, they necessarily conceded that the suit of the Government was cognizable in equity, and they can not now urge objections against the jurisdiction of equity to adjudicate the cause (R., II, p. 643).

VI.

WAIVER—EFFECT OF PATENTS—STATUTE OF LIMITATIONS—LACHES.

Under which will be discussed the arguments advanced by the defendants in support of the following propositions: That all rights under the actual settlers provisions have been waived; that the provisions have been construed by executive officers adverse to the construction now advocated by the Government; that the suit is barred by certain acts of Congress; that the binding force of the restrictive provisions was terminated by the issuance of patents and that the suit is barred by laches.

First. Certain Principles of Law Applied to the Facts.

Waiver necessarily implies knowledge of the right and an intention to relinquish it.

(a) There is a distinction between waiver on the one hand and laches on the other. Waiver may be applicable to the Government, but laches never. Waiver rests upon knowledge of the right and an in-

tention to waive it. Laches rests upon neglect in the enforcement of the right.

In *Pence* v. *Langdon*, 99 U. S. 578, 581, the court said:

> Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One can not waive or acquiesce in a wrong while ignorant that it has been committed.

In *Bennecke* v. *Insurance Company*, 105 U. S. 355, 359, the court said:

> A waiver of a stipulation in an agreement *must, to be effectual, not only be made intentionally, but with knowledge of the circumstances.* This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but *where it is sought to deduce a waiver from the conduct of the party.*

There is no proof in the case at bar that the breaches of the actual settlers provisions were ever brought to the attention of any governmental body or officer having power to waive them. An officer in the Department of the Interior known as Auditor of Railroad Accounts, and afterwards as Railroad Commissioner, received certain reports from the Oregon & California Railroad Company which showed that the company was selling the land at more than $2.50 per acre, but not in excess of 160 acres to one person. (Statement, p. 92.) These reports were trans-

mitted to the President and by him laid before the Congress, where they were referred to the proper committee and afterwards published as executive documents. This reference was, of course, merely perfunctory. There is nothing to show that Congress ever considered them or ever had any actual knowledge of what they contained. Even if it had such knowledge, there is nothing to show an intention on its part to relinquish the right which the Government had to have the settlers' provisions obeyed. There was but one way by which that intention, if it existed, could have been manifested; that was by a joint resolution or an act, and, of course, there was neither. Knowledge on the part of any other body or any officer of the Government would have been ineffectual because, as we shall show in a moment, Congress alone had the power to waive the provision. (*Infra.*, p. 165.)

(b) **Constructive notice ineffectual.**

Waiver, as we have seen, implies actual knowledge; it will never be presumed from constructive knowledge alone.

Besides a party is never held to have constructive knowledge of instruments recorded subsequent to his own title.

In *A. & E. Enc. of Law*, vol. 24, page 146, it is said:

> The operation of the record as notice is prospective and not retrospective. It is only a subsequent conveyance which defeats a prior unrecorded conveyance, and therefore only

> persons who acquired their rights subsequently to the registration can be said to be charged with notice of a recorded conveyance.

In *Rannels* v. *Rowe*, 145 Fed. 296, it was held that a party is not bound by constructive knowledge of instruments recorded subsequent to his title.

(c) Mere silent acquiescence in breaches of a condition never constitutes waiver of either the breaches or the condition.

In *Washburn on Real Property*, vol. 2, sec. 962, the rule is stated thus:

> A mere silent acquiescence in, or parol assent to, an act which has constituted a breach of an express condition in a deed would not amount to a waiver.

In *Gray* v. *Blanchard*, 8 Pick. 284, the court said:

> A mere indulgence is never to be constructed into a waiver of a breach of condition; and so are the authorities.

In *Trustees of Union College* v. *New York*, 173 N. Y. 38, we find this language:

> The effect of an express condition in a deed can not be destroyed by silent acquiescence. * * * The title to the property was vested in the grantee and the plaintiff was entitled to assume that its grantee would comply with the condition of the grant.

In *Howe* v. *Lowell*, 171 Mass. 575, it was said:

> It is to be noticed that the terms of the deed were equally well known to both parties, and whether the city was violating the condition

of the deed was a matter of which the city could judge as well as Howe. Howe did nothing actively to induce the city to erect the pumping station. He simply stood by and saw it done without making objection.

(d) **The mere waiver of breaches of a condition will not constitute a waiver of the condition itself.**

If a party injured by one breach of a contract sees fit to waive the breach, he does not thereby license the other party to make additional breaches. In *Tiedeman on Real Property*, 3 ed., sec. 208, the rule is thus stated:

> If a party who is entitled to the right of entry waives the performance by *an actual release of the condition*, or by an *express license*, the condition is gone and he can not take advantage of any subsequent breach. *But a mere acquiescence, without actual license, would only constitute a waiver of the present breach, and the right of entry for subsequent breaches would survive.*

In *Tiffany on Real Property*, vol. 1, page 179, the rule is stated thus:

> *The waiver operates only on previous breaches, and does not affect the right to take advantage of a subsequent breach; and, accordingly, mere silence or acquiescence in a breach of a condition will not imply a license for a subsequent breach.*

In *Ireland* v. *Nichols*, 46 N. Y. 413, 417, the court held that a condition in a lease prohibiting subletting is a condition of continuing obligation, and

a waiver of one breach does not waive subsequent breaches; nor does it waive the condition itself.

In *Crocker* v. *Old South Society*, 106 Mass. 489, 498, it was held that a waiver of a breach of a condition does not waive the binding force of the condition itself, nor the right to take advantage of subsequent breaches.

The practical application of the rule now being discussed is aptly illustrated by the decision in *Alexander* v. *Hodges*, 41 Mich. 691. In that case there had been flagrant violations of the conditions of a lease by the tenant, and the lessor had exercised unusual indulgence. The tenant afterwards attempted to claim that the acquiescence of the lessor constituted a waiver of the condition itself. The court said (p. 694):

> If the conditions were continuous, there is no reason to hold them waived by a receipt of rent for any time. The desire of the landlord to avoid coming to extremities if the lessee would mend his ways can not be regarded as a waiver, but was laudable and calculated to further the interests of both. *When there is a continuous obligation, there is nothing to prevent the exercise of forbearance until it ceases to be desirable.*

The rule discussed in the foregoing authorities is applicable in cases where the grantor has full knowledge of the breaches and full knowledge of the right of re-entry, but fails to exercise it. If in such cases there is no presumption of an intention to waive the condition and thus authorize subse-

quent breaches, there can be none in a case such as the one at bar, where there is no knowledge of the breach.

(e) No one but Congress can waive a breach of a condition, or the condition itself, in the case of a congressional grant.

This grant, as we have seen, is a law—an act of Congress; no one can change an act of Congress but Congress itself. It is not in the power of any executive officer of the Government to amend, modify, or waive a statutory provision. This should go without saying.

In *Hawkins* v. *United States*, 96 U. S. 689, 691, it is said.

> Principals * * * are, in many cases, bound by the acts and declarations of their agents, even when the act or declaration was done or made without any authority, if it appear that the act was done or the declaration was made by the agent in the course of his regular employment; but the Government or public authority is not bound in such a case unless it manifestly appears that the agent was acting within the cope of his authority, or that he had been held out as having authority to do the act or make the declaration for or on behalf of the public authorities.

It does not "manifestly" appear in this case that any executive officer of the Government had authority to waive the condition we are considering.

In *New York Indians* v. *United States*, 170 U. S. 1, it was expressly held that the executive officers of the

Government had no authority to take advantage of a breach of a condition annexed to a grant made by Congress. To the same effect, see *United States* v. *Northern Pacific*, 177 U. S. 435.

If they had no authority to take advantage of a breach by the defendants, how can it be said that failure to do so worked a waiver—that a failure to do that which they had no power to do waived a valuable right?

Besides, on October 26, 1880, the Attorney General advised the executive departments of the Government that they could not take advantage of a breach of a condition subsequent in one of the Atlantic and Pacific railroad grants, unless specifically authorized to do so by Congress. His opinion was based largely upon the decision of the Supreme Court in *Schulenberg* v. *Harriman*, 21 Wall. 44.

Having examined the question with great care, he concluded thus:

> I am, therefore, of opinion that the grant to the railroad has not been forfeited by its failure to complete its road within the time named in the act, no action by reason of its failure to perform the conditions having been taken by authority of Congress. (16 *Attorney General's Opinions*, 572, 576.)

The executive officers acted on this advice. If therefore they had knowledge of the breaches by the defendants and failed to act with respect to them, it was because they did not believe they had authority

to act and not because they intended to waive the breaches.

(f) Laches not imputable to the United States.

Counsel for defendants in several of their arguments invoke the doctrine of laches while disclaiming any intention to do so, nevertheless, when their contentions are analyzed they amount to as much. That this doctrine may not be urged against the Government is too familiar to require discussion. (*United States* v. *Dalles Military Road Co.*, 140 U. S. 599, 632; *United States* v. *Beebe*, 180 U. S. 343, 354; *United States* v. *Michigan*, 190 U. S. 379, 405.)

Attention is directed particularly to the decision of this court in *United States* v. *Dalles Military Road Company*, 140 U. S. 599, 632, where it was held that a resolution of Congress, directing the institution of judicial proceedings, is conclusive that there has been no laches on the part of the Government. The court said (p. 632):

> An assertion that the claim of the United States is a stale claim is an assertion that Congress deliberately directed suit to be brought upon a stale claim. If laches be a good defense, it must be declared that Congress directed suits which would be defeated by showing prior delays by Congress. Besides, the defenses of stale claim and laches can not be set up against the Government.

The foregoing doctrine is applicable to the case at bar.

SECOND. OTHER GROUNDS UPON WHICH DEFENDANTS PREDICATE WAIVER.

(a) Acquiescence in the conveyance by the East Side Company to the Oregon & California Railroad Company.

It is clear that the conveyances from the East Side Company to the Oregon & California Railroad Company was intended simply to make the latter company the successor of the former. The transaction was so considered and treated by all parties, including the Government. No patents were ever issued to the East Side Company, but, on the contrary, all have been applied for by, and issued to, the Oregon & California Railroad Company *as the successor of the East Side Company.* (Statement, pp. 81, 82.) It will be remembered that the grant runs to the grantee, and its "successors and assigns" (sec. 2, statement, p. 5). The chain of title runs direct from the Government to the Oregon & California Railroad Company. Moreover, the East Side Company had filed a map of location as to the first sixty miles only of the railroad at the time it was succeeded by the Oregon & California Railroad Company. All of the other maps were filed by the latter company. That the transaction was not intended as a *sale of lands*, but as a *succession to the general franchise rights* of the older company, is too plain to require argument.

(b) Construction of the act by executive officers.

It is contended by the defendants that the Commissioner of the General Land Office, the Auditor

of Railroad Accounts, afterwards called Railroad Commissioner, and other officials of the Government, many years ago put a construction upon the grants to the effect that the actual settlers provisions were inapplicable. This is predicated largely upon the claim that the Auditor of Railroad Accounts was required by the act of June 19, 1878, creating his office, to see that the laws with respect to land-grant railroads west of the Missouri River were enforced; that he knew the grantee railroad company had repeatedly violated the terms of the actual settlers provision and that he took no steps to enforce the law against it. This, they affect to believe, amounted to a construction by him of the law and as such is binding upon the Government under the rule that—

> When the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution, where that construction has for many years controlled the conduct of the public business (*United States* v. *Healey*, 160 U. S., 141).

A ready answer to this contention is that the auditor of railroad accounts was charged with the duty of enforcing the law, not with power to waive its enforcement. Furthermore, the fact that an officer charged with the duty of enforcing a law fails to perform that duty can not be plead as a defense by the law violator when he is called to account for his dereliction. Besides, neither the auditor of railroad accounts, nor any other executive

officer of the Government, had the power to enforce the actual settlers provision. That, as we have seen, could be done only by Congress declaring a forfeiture, or specifically authorizing some officer to do so. Congress had not done this prior to 1908 and, hence, the auditor of railroad accounts and all other executive officers were without power in the premises.

Moreover, the decisions cited by defendants in no wise warrant the position which they take. They are cases which deal with situations where an executive officer was authorized by Congress to administer a law which is open to more than one construction. In such cases the construction adopted by the officers is given much weight by the courts. In *Webster* v. *Luther*, 163 U. S., 331, 342, we read:

> The practical construction given to an act of Congress, fairly susceptible of different construction, by one of the executive departments of the Government, is always entitled to the highest respect and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted, * * * but this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of the statute.

The question here, as presented by the defendants, is not whether one meaning or another shall be given to the actual settlers provision, but whether it shall be given any meaning at all—whether it shall not be rejected as so much surplusage.

But there is another consideration in this connection which is most significant. The construction which defendants say was placed upon this act by the executive officers of the Government is at best a strained deduction from *failure* to act. How particularly unsubstantial must such a deduction be in the presence of the fact that the Secretary of the Interior had affirmatively construed the actual settlers provision, at the request of Mr. Holladay, president of the grantee railroad company, and held that it was enforcible and meant precisely what it said. This was done, it will be remembered, in 1871. (Statement, p. 62, *et seq.*) That construction has never been changed. It is precisely the same as the construction for which the Government now contends.

A remarkable argument is made upon this point to the effect that because Mr. Holladay at that time laid before the Attorney General and the Secretary of the Interior certain views with respect to the construction of the act, and some mortgages drawn in accordance with those views, the Government acquiesced therein; when the fact is, as we have just stated, that the Secretary of the Interior repudiated those views and decided that the act meant just what it said. If the railroad company continued to act upon a different theory it did so, not only without the concurrence of the Government, but in direct opposition to what it knew was the opinion of the Secretary of the Interior.

In addition, the executive officers in 1880 were advised by the Attorney General that they had no

power to declare a forfeiture in the case of violated railroad grants, without the specific authority of Congress (*supra*, 166). Whatever the auditor of railroad accounts or other executive officer failed to do with respect to the enforcement of the actual-settlers provision must be construed in the light of these opinions, and when so considered the deduction tortured from the failure must vanish into thin air.

(c) **The general forfeiture act of September 29, 1890.**

The first section of this act provides that there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to, and coterminous with, the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted.

The sole purpose of this act was to declare a forfeiture for breach of conditions requiring construction of the railroad.

The act was general, applying to all grants, and *can not be held to have been intended to apply to conditions peculiar to some of the grants and not common to all*. Moreover, it can not be presumed that Congress had in mind breaches of conditions other than those relating to the construction of the railroad.

Even if the presumption contended for by defendants should be indulged, at the most it could be claimed as a waiver of breaches which occurred prior

to September 29, 1890. It would not be a waiver of breaches occurring thereafter, and, as the bill of complaint sets forth, nearly all of the substantial breaches in the case at bar occurred after that time.

(d) **The act of January 31, 1885.**

It is also contended by defendants that the forfeiture act of January 31, 1885, relating to the West Side grant, by implication waived the binding force of the condition restricting the manner of selling the granted lands.

This is so unreasonable that discussion is unnecessary.

It is submitted that there is nothing in the case at bar justifying the conclusion that the actual settlers provision was waived.

(e) **The Central Pacific Company never owned either of the grants involved in this suit.**

In Mr. McCall's brief (p. 2 et seq.) on behalf of the Oregon & California Railroad Company, the startling proposition is made that by the consolidation of the Central Pacific Railroad Company with the California & Oregon Railroad Company in August, 1870, the former secured the East Side grant, and the stipulation in this case is cited in support of the statement. This is the first time such a claim has been made, and it has no basis in the record. The item of the stipulation referred to says:

> The statements in this item and the last preceding item four, concerning the ownership and conveyance of lands granted by said acts

> of Congress, are made subject to the terms and provisions of said acts of Congress, respectively, and all rights of the use thereunder, *the title to said lands not being in issue in the suit at bar.* (R. IV, p. 1568.)

The Oregon part of the grant is by the grant itself treated as substantially distinct from the California part. It is made to a separate company, one to be "organized under the laws of Oregon" and designated by the legislative assembly. The grant has always been claimed, used, and enjoyed by the Oregon & California Company, or its predecessors in title, and never by the Central Pacific. The defendants, Mr. McCall's clients, assert in their answer that the grant belongs to the Oregon & California Company. (R. II, pp. 912, 932.) When, then, did the Central Pacific Company convey it to that company? Of course it never did, because it never had it to convey.

THIRD. DO THE ACTS OF MARCH 3, 1891, OF MARCH 2, 1896, OR SECTION 1047, R. S., BAR THE SUIT?

The act of March 3, 1891, provides:

> That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

The act of March 2, 1896, declares:

> That suits by the United States to vacate and annul any patent to lands heretofore

> erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section 8 of chapter 561 of the acts of the second session of the 51st Congress, and amendments thereto, is extended accordingly as to the patents herein referred to.

These provisions, by their terms, relate to suits brought to annul patents. This is not a suit of that kind. While the patent may be annulled as the result of it, it is not predicated upon the idea that the patent was improperly issued, but upon the ground that a condition of the grant has been breached. The title was conveyed by the grant, not by the patent. The latter is but evidence of the title. Manifestly the above-mentioned acts were not intended to apply in any case until a cause of action *had arisen*. In truth, the statute of limitations necessarily implies the existence of a cause of action, which is to be barred after the lapse of a certain time. Lands under railroad grants are not subject to disposition until patents have been issued. (*St. Paul, etc.*, v. *Northern Pacific*, 139 U. S. 1; *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241.) It follows that a breach of the condition subsequent could not take place until after the patent had been issued. This in itself shows the inapplicability of the statutes in question.

Suppose in this case no breach had taken place until seven or eight years after the patents had

emerged, would it be reasonable to say that the cause of action was barred by those statutes—barred before it arose? To give such an effect to the statutes would be to treat them not as statutes of limitations but as *laws* amending the granting acts so as to eliminate the provision imposing the conditions subsequent.

In 25 *Cyc.*, 990 we read:

> It is a familiar principle that a statute of limitation should not be applied to cases not clearly within its provisions. Even cases within the reason, but not within the words, of a statute are not barred, but may be considered as omitted cases which the legislature did not deem proper to limit.

(See also *Kirkman* v. *Hamilton*, 31 U. S. 20, 23; *Missouri, etc.*, v. *Rice*, 84 Fed. 131.)

If Congress had intended to eliminate the actual settlers' provision from the grant, it would have done so openly and not under the guise of a statute of limitations.

Obviously this is not a suit to annul the patents. If it were it would be useless, because the title to these lands would still remain in the defendants. To make this suit effective it must go beyond the patents and deal with the grant, which is the source of defendants' title. It is a suit to annul the grant, not the patent, except as an incident. Therefore these statutes do not apply.

In addition the defendants have failed to show that they were "bona fide purchasers." This is required by the statute, and the burden of showing it is on the

defendants (*Washington & Georgetown Railroad* v. *Hickey*, 166 U. S. 521; *United States* v. *Brannan*, 217 Fed. 849).

SECTION 1047, R. S.

It is asserted that the action is barred by the aforementioned statute. This statute deals with crimes. The forfeiture of which it speaks is a punishment visited upon the delinquent, while the forfeiture in the case at bar is the result of a violation of contract. Besides, the forfeiture in this case had not "occurred" before the institution of the suit, if it did prior to the rendition of judgment, certainly not previous to the passage of the authorizing joint resolution of April 30, 1908 (*United States* v. *Northern Pacific Railway Company*, 177 U. S. 435). For these reasons the statute has no application.

FOURTH. DID THE ISSUANCE OF PATENTS BAR THE SUIT?

(a) **What does a patent import?**

All acts of Congress conferring authority upon the Interior Department to issue patents for the public lands prescribe that the patents shall be issued only upon compliance by the claimant with certain requirements. Consequently, before the Interior Department issues a patent for any of the public lands it is the duty of the department to ascertain whether the provisions of the law have been complied with so as to entitle the party to a patent. Congress having conferred this authority upon the department, the issuance of a patent by it in the absence of fraud or

mistake is ordinarily conclusive as to the existence of the facts justifying the issuance of the patent. And, in this sense, patents are said to be conclusive. But this is the extent of the rule and the reason for the rule.

Patents issued by the Interior Department never convey any greater estate than that authorized by the law under which they are issued. They are always to be construed as subordinate to all laws relating to the subject in force at the time. The quality of the estate conveyed by the United States can not be ascertained by reference to the terms of the patent alone; but it must be determined by reference to the laws of Congress upon the subject. To illustrate: Patents issued under the homestead law convey a title which can not be subjected to the payment of debts contracted prior to the date of the patent. This qualification of the estate is not set forth in the patent itself, and yet the effect of the patent is qualified by this provision of the law.

The decision in *Hough* v. *Porter*, 51 Oreg. 388, is instructive upon the question. The authorities are there collected and discussed, and the court holds that in order to determine the nature or quality of the estate conveyed by a Government patent, reference must be had to all acts of Congress in force at the time; and that patentees take title with notice of all of the qualifications annexed to the title by virtue of existing laws.

So, it has been held that patents issued under the homestead or preemption laws are subject to the

general laws of the United States granting right of way to railroads through the public lands, although no reference is made in the patent itself to this qualification. (See *Railroad Company* v. *Baldwin*, 103, U. S. 426).

But where Congress makes a grant direct, as in the case of railroad grants, and provides for the issuance of patents after the identity of the lands has been ascertained, and as rapidly as the lands are earned, the patent serves an entirely different function. It does not *create the estate or title;* much less does it *define the terms and conditions of the estate or title.* In such a case, the patent performs two distinct functions, viz:

1. It identifies the land which was not identified by the grant, and it certifies that the lands have been earned by performance of the conditions of the grant precedent to the issuance of the patent.

2. It fixes the time when the lands are subject to disposition by the grantee, the lands not being subject to disposition prior to the issuance of patent.

The grants in the case at bar illustrate the function and effect of patents under railroad grants. The granting acts *created* the title or estate, and *constituted the grant.* The terms and conditions of the grant—the nature and quality of the estate or title granted—are determined by the granting acts. If the identity of the lands had been known at the time the granting acts were enacted and Congress had intended to permit the railroad company to immediately dispose of all the lands, there would have been no necessity for the issuance of patents.

(b) Authority of the Interior Department as to the issuance of patents under railroad grants.

In the issuance of patents under railroad grants, the authority and duty of the Interior Department were limited and specific. The Interior Department had but three questions to determine, viz., (1) whether the railroad was constructed as prescribed by the granting act; (2) whether the lands claimed were of the general character described in the granting act, i. e., that they were odd-numbered sections within the limits of the grant; (3) whether the lands claimed were excluded by any of the exceptions of the grant, i. e., that they had not been theretofore disposed of by the United States, and were not subject to homestead or preemption claim, and were not mineral in character.

This being the extent of the duty of the Interior Department in the premises, it necessarily follows that patents issued pursuant to that duty had no greater effect than that of establishing the existence of the facts which made it the duty of the Interior Department to issue them.

In support of the foregoing statement of the general functions and effect of patents issued under railroad grants, see the following authorities: *Wisconsin R. R. Co.* v. *Price Co.*, 133 U. S. 496, 510; *St. Paul, etc.* v. *Northern Pacific*, 139 U. S. 1, 6; *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241, 251.

As bearing out the general proposition that where lands are granted by act of Congress the patents issued thereunder do not add anything to the quality

or nature of the estate of the grantee, see the following authorities: *Ryan* v. *Carter*, 93 U. S. 78, 82; *Morrow* v. *Whitney*, 95 U. S. 551, 555; *Whitney* v. *Morrow*, 112 U. S. 693, 695; *Wright* v. *Roseberry*, 121 U. S. 488, 499.

(c) No decision that actual settlers provision had not been breached.

It is contended on behalf of the defendants that the issuance of patents by the Interior Department was an adjudication, binding upon the United States, that there had been no breach of any of the conditions annexed to the grant. There is no foundation for this contention, either in principle or authority. The Interior Department had no right to inquire into the question. Nearly all of the land-grant railroads failed to construct railroads within the time prescribed by Congress. Applications were made for patents after the railroad company was in default. The question arose whether the Interior Department was in duty bound to issue patents under such circumstances. It was held by the Attorney General (16 *Attorney General's Opinions*, 397, 401, *supra*) that the executive officers of the Government had no authority to refuse to issue patents because of a breach of the conditions annexed to the grant; that the authority to take advantage of such a breach rested solely with Congress; and that, until Congress authorized action the executive officers of the Government must continue to issue patents. And this was expressly held by this court in *United States* v. *Northern Pacific Ry. Co.*, 177 U. S. 435, 441.

In other words, even if the Interior Department had known that the railroad company in the case at bar had violated the conditions of the grant restricting the manner of selling the lands, it would still have been the official duty of the Secretary of the Interior to issue patents, if the railroad company was otherwise entitled to them. This being true, it is absurd to contend that the issuance of patents was an adjudication that there had been no breaches of the conditions.

Besides, as a matter of fact, the Interior Department did not inquire into the question at all. The witness S. S. Marr said that he was a law examiner in the railroad division of the General Land Office from May 1, 1877, down to the present time; that the work of determining whether the land was free from claims belonged to his division, and that the division in recommending a list of lands for patent never considered or determined whether conditions subsequent annexed to grants had been violated. (Statement, p. 92.)

J. F. Casey testified to the same effect. The evidence of neither is contradicted (*id.*, p. 92).

(d) **One of the functions of patents under railroad grants is to fix the time when lands are subject to disposition.**

Until patents were issued, none of the lands were subject to sale by the railroad company upon any terms or in any manner. This was expressly held in *St. Paul, etc.*, v. *Northern Pacific*, 139 U. S. 1; and *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241.

Upon the patents emerging, the lands in question were subject to disposition by the railroad company and not before. It is submitted that the delivery of the patents for the granted lands affected in no manner the binding force of the conditions embraced in the actual settlers provision.

VII.

RIGHTS OF THE UNION TRUST COMPANY AND STEPHEN T. GAGE.

The terms of the grants were matters of public record. The repeated sales of the lands in violation of those terms were also matters of public record. When the deeds of trust represented by Stephen T. Gage and the Union Trust Company were issued the grantees therein were charged with knowledge of the terms of the grant and the violations thereof, consequently their titles came to them afflicted with the same infirmities as those possessed by the title of their grantor, the Oregon and California Railroad Company. And their rights must now stand or fall in accordance with the outcome of the suit with respect to that title. (*Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 437.)

Moreover, it will be remembered that Mr. Gage holds his deed as security for the preferred stock of the Oregon and California Railroad Company. This stock, as well as all the common stock of that company is owned by the Southern Pacific Company. For upwards of twenty years the latter company has been the master of the Oregon and California Rail-

road Company; has directed all its acts, whether good or bad; has, in truth, been and is the Oregon and California Company. Therefore, it would be unreasonable to hold that the Oregon and California Railroad Company had forfeited all its title to those lands, but that the Southern Pacific Company could enforce, through the trustee, Mr. Gage, its claim against them. To do so would be to sacrifice substance to form, to follow the letter which kills, and reject the spirit which quickens.

Of course there is no question about the ability of the Southern Pacific Company to make good its guaranty of the bonds held by the Union Trust Company. The witness, Richard Koehler, formerly general manager of the Oregon and California Railroad Company, testified that the Southern Pacific Company is solvent, and financially able to pay all outstanding bonds of the former company. (Statement, p. 91.)

Besides, the evidence shows without contradiction that the property, outside of the granted lands, covered by the Union Trust Company's mortgage, is worth upwards of $30,000,000. (Statement, p. 91.) The balance due on the mortgage is less than $17,745,000.00, so that if under some possible view the Trust Company's mortgages should be held valid, the company would be compelled under the rule of marshaling assets to exhaust the property which is not claimed by the Government before having recourse to that which is (*Matthews* v. *Memphis, etc., Railroad Company*, 108 U. S. 756, 757).

VIII.

ALLEGED EQUITIES OF DEFENDANT.

It is urged that the action of the Government in prosecuting this suit is inequitable. This is bottomed upon the delay which has elapsed. But delay is not a defense which can be raised against the Government in any court. It has been repeatedly decided that the Government is not subject to the charge of laches. Outside of this there is nothing on which the claim of unethical conduct can be grounded. The Government has performed promptly, fairly, and fully every stipulation of its contract. On the other hand, the defendant grantee has failed to discharge the contractual obligations assumed by it. For more than 45 years it has used the lands as a security upon which to raise substantially every dollar which has gone into the construction and equipment of the railroad. There is some evidence which, at first glance, would indicate that the defendant company had put between eight hundred thousand and a million of dollars into the enterprise outside of the money which it had borrowed. But from a closer examination it seems that this was later taken care of with funds secured from a bond issue. All loans were finally merged in the two deeds of trust, one to the Union Trust Company and one to the predecessors of Stephen T. Gage.

Besides using the lands as a credit basis, defendants have derived from them sufficient money to pay taxes, as well as every conceivable expenses chargeable to them during the last 45 years. After all this has been

done, there is left a credit balance of $2,495,094.03. (Statement, p. 84.)

Upon such a showing, we submit, the Government asks for nothing unfair when it prays that the lands may be forfeited.

CONCLUSION.

The terms of the actual settlers' provisions of the acts of 1869 and 1870 are as plain as language can make them. There can not be, and never could have have been, any just reason for misunderstanding their meaning. More than forty years ago the Oregon and California Railroad Company sought and obtained from the Secretary of the Interior an interpretation of those provisions which is in complete harmony with what the Government now claims. From that interpretation the Government has never deviated. Notwithstanding this, the defendant company has flagrantly violated the congressional acts, and now seems to think the Government harsh in calling upon it to suffer the consequences of its misconduct.

There is not a single equity in the company's favor; for every dollar in taxes paid, it has received more than $3 out of the lands; for every dollar in value given to the Government in the form of free transportation, it has received about $6 from the proceeds of the lands (statement, pp. 83, 84); for upwards of a quarter of a century the company has, for its own selfish purposes, and in contempt of the laws of the country, withheld these lands from home seekers,

and thwarted the industrial development of a large section of a great State, and at this moment demands the right to continue in its vicious work of obstruction. Unless it be reprehensible for the Government to enforce the laws—and there are some who seem to think it is—there is no room for the claim that its action in demanding a forfeiture of the lands in question is inequitable and should be condemned. The decree of the lower court is right and we respectfully ask that it be affirmed.

JOHN W. DAVIS,
Solicitor General.
ERNEST KNAEBEL,
Assistant Attorney General.
CONSTANTINE J. SMYTH,
Special Assistant to the Attorney General.

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In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Complainant,

v.

OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, Stephen T. Gage, (individually and as trustee), Union Trust Company (individually and as trustee), John L. Snyder, Julius F. Prahl, Albert E. Thompson, James Barr, Fred Witte, W. A. Anderson, W. H. Anderson, O. M. Anderson, F. E. Williams, Paul Birkenfeld, J. H. Lewis, Francis S. Wiser, W. E. Anderson, Albert Arms, Joseph A. Maxwell, Isaac McKay, J. R. Peterson, D. MacLafferty, Edgar MacLafferty, V. V. McAboy, George C. MacLafferty, George Edgar MacLafferty, E. L. MacLafferty, B. N. MacLafferty, Enos M. Fluhrer, F. W. Floeter, S. Shryock, Sidney Ben Smith, Orrin J. Lawrence, Robert G. Balderree, Oscar E. Smith, Egbert C. Lake, C. W. Sloat, Jesse F. Holbrook, A. E. Haudenschield, S. H. Montgomery, W. A. Noland, John H. Haggett, Charles W. Mead, William Otterstrom, Angus MacDonald, John T. Moan, Joseph D. Hadley, Henry C. Ott, Fred L. Freebing, William Cain, R. T. Aldrich, James C. O'Neill, Alexander Fauske, Francis Wiest, Cordelia Michael, John B. Wiest, Cyrus Wiest, John Wiest, Thomas Manley Hill, Otto Nelson, Jasper L. Hewitt, B. L. Porter, Frank Wells, C. P. Wells, I. H. Ingram, L. G. Reeves, W. W. Wells, F. M. Rhoades, Marvin Martin, and Roy W. Minkler,
Defendants.

In Equity
No. 3340

Now comes George M. Brown, Attorney General of the State of Oregon, and by direction of the Legislature of said State asks leave to appear in the above entitled cause, and to file a brief on behalf of the State of Oregon as *amicus curiae* for the reasons which will more fully appear in such brief.

Statement

The above entitled suit was commenced by the United States pursuant to an action of Congress taken at the request of the State of Oregon, through its Legislature, and its Senators and Representatives in Congress. The request of the Legislature for such action is shown in the following memorial which was adopted by the Legislative Assembly of the State of Oregon, February 14, 1907, and is found at page 516 of the General Laws, Resolutions and Memorials enacted by said Legislative Assembly:

SENATE JOINT MEMORIAL NO. 3

To His Excellency, the President, and Honorable Senate and House of Representatives of the United States of America:

Your memorialist, the Legislative Assembly of the State of Oregon, most respectfully represents:

That vast tracts of public lands within Oregon are claimed and held by the Oregon and California Railroad Company, as grantee in succession, under the acts of Congress of the United States of July 25, 1866, and April 10, 1869;

That said tracts are withdrawn from sale, whereby the development and material prosperity of the State is retarded;

That said railroad company, so claiming said lands, has not complied with the terms of said act of April 10, 1869, as to the terms of sale and the quantities of land to be sold;

That said conditions are claimed to inure only to the United States as grantor to the predecessor in alleged interest of said Oregon and California Railroad Company, and have not been complied with; therefore,

Your memorialist most respectfully asks that the Congress of the United States be and hereby is requested to enact such laws and take such steps by resolution, or otherwise, as may be necessary to compel said railroad company to comply with the conditions of said grant, and to enact and declare some sufficient penalty for non-compliance therewith by way of forfeiture of the grant, or otherwise, as in the wisdom of Congress may seem best.

That the Senators and Representatives in Congress from the State of Oregon and all other land grant states be and they hereby are requested to use their utmost endeavor to procure the needed legislation in the above matter.

That this memorial be forwarded to the President and to Oregon Senators and Representatives in Congress.

Filed in the office of the Secretary of State, February 14, 1907.

The Legislative Assembly of the State of Oregon at its regular session held in January and February, 1915, adopted the following memorial, as shown at page 611 of the General Laws, Resolutions and Memorials, enacted and adopted by said Assembly:

SENATE JOINT RESOLUTION No. 24

Whereas, the Legislative Assembly of the State of Oregon, at its regular session in 1907, adopted Senate Joint Memorial No. 3, urging the United States Congress to enact such laws and take such steps by resolution or otherwise, as might be necessary to compel the Oregon and California Railroad Company to comply with the conditions of the acts of Congress of July 25, 1866, and April 10, 1869, granting to the predecessor in interest of said railroad company, vast tracts of public lands within the State of Oregon, and requiring such lands to be sold to actual settlers at a price not to exceed $2.50 per acre, and to enact and declare some sufficient penalty for non-compliance therewith by way of forfeiture of the grant, or otherwise, as in the wisdom of Congress might seem best, and urging the Senators and Representatives in Congress from the State of Oregon, and all other land grant states, to use their utmost endeavor to procure the needed legislation in such matter, which memorial was forwarded to the President, and to the Oregon representatives in Congress, and

Whereas, Pursuant to the prayer of said memorial, and the efforts of the Oregon Senators and Representatives in Congress, action in compliance therewith was taken by the United States Congress, under which authority suits were commenced in the District Court of the United States for the District of Oregon, and are being prosecuted by the United States, and are now pending in the United States Supreme Court, in which it is sought to forfeit said grant, and if the decision of the District Court is affirmed such will be the result of said suits and the land will revert to the United States Government, and thereby be withdrawn from

taxation by the State of Oregon, and its several counties and municipalities, and

Whereas, Such granted lands constitute vast areas and a large percentage of the total area of several counties in which they are located, as shown by the following table, taken from the report of the engineer to the committee created by Chapter 374, General Laws of 1913:

COUNTIES	Forfeited O. & C. Land Grant (acres)	Total State Tax Levied for All Purposes	Amount Assessed to O. & C. Land Grant not paid because of forfeiture
Benton	53,627	$ 53,082.92	$ 20,078.76
Clackamas	89,162	154,275.76	30,661.52
Columbia	17,679	66,964.87	15,042.62
Coos	106,563	90,080.62	50,922.62
Curry	7,845	15,656.24	2,313.67
Douglas	616,843	139,602.47	96,901.76
Jackson	441,791	140,348.00	71,219.20
Josephine	167,481	43,819.96	35,874.60
Klamath	43,015	64,290.94	10,359.50
Lane	299,606	169,290.59	80,527.00
Lincoln	15,906	30,841.83	2,158.22
Linn	61,966	131,780.60	13,871.38
Marion	30,256	183,784.80	8,273.46
Multnomah	9,047	1,582,520.90	2,328.26
Polk	37,018	74,670.12	13,557.59
Tillamook	29,741	71,117.37	3,444.95
Washington	17,932	112,125.97	4,876.54
Yamhill	28,683	89,510.01	4,461.22
Totals	2,074,161	$*3,213,763.97	$ 466,872.87

* This total supplied.

And Whereas, It is of vital importance to the development of the entire State of Oregon, and several counties in which such granted lands are located, that such lands should not be withdrawn from taxation, but that they should be disposed of for settlement and development under the terms of such a decree as the court may deem just and equitable, now therefore,

Be It Resolved by the Senate of the State of Oregon, the House of Representatives Jointly Con-

curring, That the Attorney General be, and he is hereby authorized and directed to intervene on behalf of the State of Oregon, in such manner as may be permitted and authorized by the rules of the court, or any court in which such suit or suits may hereafter be pending, for the purpose of securing and protecting the best interests of the State of Oregon and its citizens, and to take any and all steps and proceedings which may be necessary or permissible to safeguard such interest.

Filed in the office of the Secretary of State, February 23, 1915.

The following figures are taken from the publications of the various United States Departments, and while there is some little conflict on account of their not being simultaneously compiled by the different departments, they are believed to be practically correct and accurate:

The total area of the State of Oregon is	61,188,480 acres
The total area within the State of Oregon included in forest, Indian and other United States reservations is	18,121,930 acres
The total area included in the Oregon and California Land Grant now involved in the present suit is	2,074,161 acres
which if forfeited to the United States and undisposed of, would make a total of	20,196,091 acres

reserved and withheld from settlement and taxation within the State, and which would constitute about one-third of the entire area of the State of Oregon.

The lands belonging to said grant lie in eighteen counties of the State, which contain a total area of	22,166,400 acres
Area of forest, Indian and other reservations in said counties	8,871,754 acres
Add the area of the Oregon and California Grant if forfeited and undisposed of, 2,074,161, making a total of lands reserved from settlement and taxation in said eighteen counties of	10,945,915 acres

It will be seen this total is nearly one-half of the total area of said counties, and the Oregon and California Grant comprises nearly one-tenth of said counties.

From the foregoing figures, it is very apparent that the State of Oregon is vitally interested in the suit now at issue, not only in respect to having the lands in question subjected to settlement and improvement, as contemplated by the provisions of the grant, in order that these vast areas of the State may be improved, but also that the lands may not be withdrawn from taxation, thus depriving the State, and especially the eighteen counties in which they are situated, of a large proportion of their resources from direct taxes.

It will be noticed from the table shown in Senate Joint Memorial No. 24 above set forth, that the total taxes assessed against the lands included in the grant for the year 1914, amounted to $466,872.87, and the total of taxes levied for State purposes and apportioned to said counties for said year was $3,213,763.97, so that the taxes against the lands included in the grant, amount to more than one-seventh of the entire State taxes derived from the counties in which they are located.

The State of Oregon does not wish to be understood as in any way suggesting that the suit should not be maintained against the defendants for the purposes for which it is commenced, and would urge the importance to the State of having the action already taken and the decision of the lower court upheld at least to the extent that the defendants should not be able to further withhold said lands from development and settlement and thus retard the growth of the commonwealth. In view of the fact already given however, the State of Oregon wishes at this time to urge upon the court the importance of such disposition being made of the subject matter of this suit as will not deprive the State of its revenue and especially those counties affected by reason of the granted lands forming so large a part thereof, and to urge that the lands be disposed of according to the terms of the original grant, or in some such manner as that they may pass into the hands of actual settlers for the purpose of homes, and that the State may retain its lien upon them for the taxes already levied and to be levied in the ensuing years.

We believe the court has ample jurisdiction over the disposition of the property involved in this suit to make and enforce a decree by which the lands should be sold to actual settlers at not to exceed $2.50 per acre, and in quantities limited by the terms of the original grant, and that persons applying to purchase the same be required to make proof of such settlement, and such further facts as the court may deem best to require before the Register and Receiver of the local United States Land Offices, subject to inspection and report by the United States Field Agents, disregarding all pre-

tended and bogus applications and simulated filings heretofore made or attempted to be made. Also that, in the discretion of the court, the purchase price of such lands, or some part thereof, should inure to the use and benefit of the United States instead of the defendant railroad companies. Such a solution of the problem in the event the decision of the lower court is sustained is the one desired by the Legislative Assembly of the State of Oregon directing this appearance to be made, and we would most earnestly urge upon the consideration of the court a solution in accordance with the suggestions above given on account of the vital importance to the growth and development of the commonwealth of Oregon.

Respectfully submitted,

GEO. M. BROWN,

Attorney General of the State of Oregon.

panies only to actual settlers in quantities not exceeding 160 acres to each and at a price not exceeding two dollars and fifty cents per acre, are not conditions subsequent, the violation of which result in forfeiture of the grants, but are covenants which are enforceable. This suit, under such circumstances, becomes one to enforce the covenants and not to annul the patents.

The fact that the actions of the railroad companies in connection with the lands granted were known to the government officials and that no action was taken by the Government in regard thereto does not amount to an estoppel against the Government so that it cannot now enforce the covenants.

Acts of Congress granting lands are laws as well as grants and are operative until repealed; the fact that the conditions imposed in the grant were not applicable to the character of the lands furnishes no excuse for antagonistic action, even though it might justify non-action pending further legislation.

The delay in the assertion of a right is not conclusive against its existence, although there may be argument in it.

Under the acts involved there was a complete grant to the railroad company with power to sell limited only as prescribed, and cross complainants and intervenors who have set up alleged rights in the lands by reason of settlement thereon cannot sustain their claims thereto. Nor can there be an absolute right to purchase and settle on lands where there is no compulsion to sell.

The words "actual settlers" indicate no particular individuals; and the uncertainty of the expression prevents any individual from being a *cestui que trust* to enforce the condition of the statute.

In construing land grant statutes the courts cannot, even at the instance of the Government, give a greater sanction to them than Congress intended; nor can the courts give to any parties rights which the statutes did not confer upon them.

As the conditions contained in the grant are enforceable, the railroad company is enjoined from further violating them, but as conditions have changed since the grant was made, the company is further enjoined from making any disposition of the land or cutting or removing the timber thereon until Congress shall have a reasonable opportunity to provide for their disposition by legislation, and in case after six months Congress shall not have acted, the company may apply to the District Court for a modification of the decree.

THIS writ brings up for review a decision of the United States District Court for the District of Oregon decreeing

the forfeiture of the unsold portion of certain lands granted by Congress to certain railroad companies and quieting the title of the United States thereto.

In consequence of a memorial presented to it, Congress, on April 30, 1908, adopted a joint resolution which authorized and directed the Attorney General of the United States to institute and prosecute any and all suits in equity, actions at law, or other proceedings, to enforce any rights or remedies of the United States arising and growing out of either of the following acts of Congress, to-wit: "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," approved July 25, 1866, c. 242, 14 Stat. 239, as amended by the acts approved June 25, 1868, c. 80, 15 Stat. 80, and April 10, 1869, c. 27, 16 Stat. 47, and "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," approved May 4, 1870, c. 69, 16 Stat. 94.

The Attorney General was empowered to assert all rights and remedies existing in favor of the United States, including the claim on behalf of the United States that the lands granted by such acts, or any part of the lands, have been or are forfeited to the United States by reason of any breaches or violations of the terms or conditions of either of such acts which may be alleged or established in such suits, actions or proceedings.

The resolution declared that it was not intended to determine the right of the United States to any such forfeiture or forfeitures, but to fully authorize the Attorney General to assert on behalf of the United States, and the court or courts before which such suits, actions or proceedings might be instituted or pending to entertain, consider and adjudicate, the claim and right of the United States to such forfeiture or forfeitures, and, if found, to enforce the same. Res. 18, 35 Stat. 571.

Being so authorized, the United States brought this suit as complainant against the Oregon & California Railroad Company, the Southern Pacific Company, Stephen T. Gage (individually and as trustee), the Union Trust Compnay (individually and as trustee), John L. Snyder, and certain others as defendants, to declare forfeited to the United States lands of the Oregon & California Railroad Company aggregating 2,300,000 acres which inured to the predecessors in interest of the company under the acts of Congress referred to in the resolution.

The bill set forth the acts of Congress and alleged that it was expressed that neither the amendatory act of April 10, 1869, nor the act of 1866 should be construed to entitle more than one company to the grant of land, and that following such provision which was in the act of 1869 there was this proviso: "And provided further, That the lands granted by the act aforesaid [act of 1866] shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

That the act of May 4, 1870, also contained the provision (§ 4) that the lands granted thereby, excepting only such as were necessary for depots and other needful uses in operating the road, should "be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

The bill also detailed the organization of companies and the steps taken by them to avail themselves of the grants and accomplish the purpose for which they were made; the steps and proceedings in the construction of the roads contemplated; the issue of patents for the lands granted; the amount of land sold and unsold, and wherein

and by what acts there had been breaches of the provisions of the acts above set forth, which were alleged to have been conditions subsequent, and that by such breaches the grants had become forfeited. The bill likewise detailed the various steps and the proceedings whereby the Oregon & California Railroad Company became the owner of the grants, the connection of the defendants, Southern Pacific Company, Gage and the Union Trust Company therewith, and the rights they asserted therein.

It was alleged that each of the other defendants (other than the railroad company, the Southern Pacific Company, Gage and the Union Trust Company) asserted an interest in the lands, created, as they alleged, by actual settlement in good faith upon certain of the unsold lands, not exceeding one quarter section, with intention of making a permanent home thereof, and had applied to the railroad company to purchase the same; that the said defendants had instituted suits against the railroad company, Gage and the Union Trust Company to compel a sale and conveyance of the lands to them; that unless enjoined they would prosecute their suits to final judgments, and that they were hence made parties to this suit in order that they might be so enjoined, and, if the court so order, be permitted to set forth their respective claims for adjudication.

The bill prayed a forfeiture of the unsold lands and that the title of the Government thereto be quieted, or, if such relief be denied, that the lands be adjudged subject to purchase by actual settlers in quantities not exceeding 160 acres to any one purchaser and at a price not exceeding $2.50 per acre; that a receiver be appointed to sell the lands and account for the proceeds "as the court shall direct."

If such relief be denied, that a mandatory injunction issue requiring the railroad company to offer for sale and to sell the lands as required by the grants. And the

bill also prayed that all of the defendants be enjoined from asserting any right, title or interest in and to the lands or committing waste thereon and for an accounting of all moneys received from the sale of lands or timber.

The persons who asserted interests acquired by actual settlement were made parties to this suit and the causes consolidated, and Snyder and others filed cross complaints herein setting up their alleged rights. And there were about 6,000 other persons who by the court were permitted as interveners to present their claims for consideration and adjudication. They are represented in the record by the petition and papers of B. W. Nunnally and others.

The cross complainants alleged that they were actual settlers upon the lands granted by the act of May 4, 1870, long prior to the institution of any suit or the assertion of any claim of forfeiture by the Government; and the petitions in intervention averred that the petitioners were applicants to purchase lands granted by that act or the act of July 25, 1866; and both cross complaints and petitions respectively alleged in substance that the lands were granted in trust to the respective grantee companies for actual settlers or those who should become such, and alleged respectively tender of the purchase price, demand for conveyances and the refusal of the railroad company to accept the tender or make the conveyances. And both cross complainants and interveners asserted a prior right to the extent of the land demanded by them, respectively; denied that the grants had become forfeited, and resisted the relief prayed by the Government. They adopted in all other particulars the allegations of the bill and relied upon them as the basis of their respective claims; prayed that the railroad company be decreed to hold in trust the legal title to the land respectively claimed by them, that their several rights be established and enforced, and that the railroad com-

pany be directed to convey to each of them the tract of land applied for by each, and for general relief.

Demurrers were sustained to the cross complaints and to the petitions in intervention. Demurrers to the bill were overruled. 186 Fed. Rep. 861. Joint and several answers were then filed by the railroad company, the Southern Pacific Company and Gage. The Union Trust Company answered separately. These companies when referred to collectively will be called defendants.

The answers admitted most of the allegations of the bill and denied others; alleged facts in resistance to the construction of the Government of the acts of Congress and to the relief prayed, justified the alleged breaches of the conditions or covenants of the grants, and set up laches, waiver of the breaches, and statutes of limitation.

A great deal of testimony was taken, but the case was practically submitted and a decree entered upon a stipulation of facts made by the Government and defendants. It of itself is quite voluminous, but we deem only certain of its facts material.

By the act of July 25, 1866, *supra* (c. 242, 14 Stat. 239), Congress authorized and empowered the California & Oregon Railroad Company, which had been organized under a statute of the State of California, and such company, organized under the laws of Oregon, as the legislature of that State should designate, to construct and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad in California, as follows: The California & Oregon Company to construct that part of the railroad and telegraph line within the State of California, beginning at a point to be selected by the company on the Central Pacific Railroad in Sacramento Valley, and running thence northerly through the Sacramento and Shasta valleys to the northern boundary of the State. The Oregon company to construct the part in Oregon from Portland south

through certain designated valleys to the southern boundary of Oregon to connect with the part constructed by the first-named company. Whichever company first completed its respective part of the road from the designated terminus to the boundary line between the States was authorized to continue construction until the parts should meet and connect, and the whole line of railroad and telegraph should be completed.

Section 2 of the act granted to the companies, their successors and assigns, "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line."

In case of deficiency in the original sections granted other lands might be selected in lieu thereof. Upon the filing of the survey of the railroad the lands granted were to be withdrawn from public sale so far as located within the limits designated. And it was provided that the lands granted should be applied to the building of the said road within the States, respectively, wherein they were situated; and that the lands reserved by the Government should not be sold except at double the minimum price of public lands, with provisions for sale to actual settlers under the preëmption and the homestead laws.

Section 3 granted to the companies the right of way through the public lands "for the construction of said railroad and telegraph line" 100 feet in width on each side of the road, including grounds for stations, etc., and the right to take from the public lands materials for the construction of the road.

Section 4 provided that when 20 or more consecutive

miles of any portion of the railroad and telegraph line should be ready for the service contemplated, commissioners should be appointed by the President to examine the same, and if it should appear that 20 miles had been completed and equipped in all respects as required by the act, and the commissioners should so report under oath to the President of the United States, patents should issue to the companies or either of them, as the case might be, to the extent of the completed section, and successively as 20 or more miles should be constructed, until the entire railroad and telegraph line authorized by the act should be constructed, and patents to the lands granted should be issued.

Section 5 expressed that the grants were made upon the condition that the companies should keep the railroad and telegraph in repair and use and transport the mails and dispatches for the Government when required to do so by any Department thereof; that the Government should have the preference in the use of the railroad and telegraph at reasonable rates not exceeding those paid by private parties, and that the road should remain a public highway for the use of the Government, free of toll or other charges upon the transportation of the property or troops of the United States, and at the cost and charge of the corporation or companies.

Section 6 required assent to the act to be filed in the Department of the Interior within one year after the passage of the act, and that the first section of 20 miles should be completed within two years and 20 miles in each year thereafter, and the whole on or before July 1, 1875; and the road to be of the same gauge as the Central Pacific Railroad of California and be connected therewith.

Section 7 required the roads to be operated and used as one connected and continuous line and afford to the Government and the public equal advantages and facilities as to rates, time and transportation.

Section 8 provided that for failure to file assent to the act or to complete the road as required the act should be null and void, "and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of such failure, shall revert to the United States." And it was provided if the road and telegraph should not be kept in repair and fit for use the United States might put the same in repair and use and might devote the income of the road and telegraph line to repay all expenditure caused by the default of the companies or either of them, or might fix pecuniary responsibility not exceeding the value of the lands granted.

Section 9 provided that wherever the word "company" or "companies" was used in the act it should be construed to embrace the words "their associates, successors and assigns" the same as if the words had been inserted or thereto annexed.

Sections 10 and 11 are not material to be quoted. And § 12 provided that Congress might, at any time, having due regard for the right of the companies, "add to, alter, amend or repeal" the act.

To avail of the grant, the Oregon Central Railroad Company was incorporated October 6, 1866. It projected its road from Portland to Forest Grove, thence southerly on the westerly side of the Willamette River and became known as the "West Side Company" and its railroad line as the "West Side Line."

The legislature of Oregon, by joint resolution adopted October 10, 1866, designated the Oregon Central as the road to receive the land grant. (There were certain steps in the organization of the Company not important.)

The assent of the company to the act of 1866 was filed in the office of the Secretary of the Interior and subsequently (August 20, 1868) a map of survey of its projected line.

April 22, 1867, certain persons, contending that the

West Side Company had not been lawfully incorporated or organized, and designing to secure the grants and other benefits under the act of 1866, caused proceedings to be taken, intending to organize under the general laws of Oregon the Oregon Central Railroad Company of Salem, and so named in its articles of incorporation. It projected its line of railroad on the easterly side of the Willamette River and became known as the "East Side Company" and its railroad line as the "East Side Line."

In furtherance of its design it procured from the legislature of Oregon on October 20, 1868, the adoption of a joint resolution which declared that the West Side Company was not properly incorporated and was incapable of receiving the grant, and designated the Oregon Central Railroad Company organized at Salem on April 22, 1867, "as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said act of Congress." Oregon Session Laws, 1868.

Controversy arose between the companies as to which was entitled to the benefits of the act of 1866, which controversy continued until about January, 1870.

The controversy was carried to Congress and on April 10, 1869, Congress passed an act which amended § 6 of the act of 1866 so as to allow any railroad company theretofore designated by the legislature of Oregon to file its assent to the act of 1866 within one year from the date of the amending act and providing that nothing therein contained should impair any rights theretofore acquired by any railroad company; but declaring that neither the act of 1866 nor the amending act should be construed to entitle more than one company to a grant of land. "*And provided further, That the lands granted by the act aforesaid [act of 1866] shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.*"

On June 8, 1869, the East Side Company adopted a resolution which recited the act of July, 1866, its designation by the legislature of Oregon as the company to receive the grant, the passage of the act of April 10, 1869, and concluded as follows: "This company, the Oregon Central Railroad of Salem, Oregon, . . . do hereby accept all the provisions, rights, privileges, and franchises of said act of July 25, 1866, . . . and of all acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto."

A certified copy of the resolution was filed in the office of the Secretary of the Interior June 30, 1869, and in the following October a map of survey of location of the first 60 miles of the projected line. On December 24, following, the company completed the first 20 miles within the prescribed time, and the same was examined and approved by commissioners appointed therefor pursuant to the provisions of § 4 of the act of 1866.

March 16, 1870, the Oregon & California Railroad Company was incorporated, and, on March 29, 1870, the East Side Company assigned to it all of its property, including the land grant, with present and future rights under the act of July, 1866, and acts amendatory thereof and supplemental thereto, and by virtue of any act or resolution of the legislature of Oregon, and by the action of its stockholders the East Side Company was dissolved and its stock canceled.

Resolutions were adopted by the Oregon & California Railroad Company accepting the transfer and also a resolution accepting the act of 1866 and amendments thereto, and "all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified," and authorizing its assent to be filed with the Secretary of the Interior and a copy of the deed of assignment from the Oregon Central Railroad Company. This

was done, and since the date of the transfer (March 29, 1870) the Oregon & California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company and of all its rights under the acts of Congress.

The West Side Company abandoned all claims under the act of 1866 and solicited and obtained from Congress, by the act of May 4, 1870, a grant of other lands. The act recited (§ 1) that for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill River, near McMinnville, in the State of Oregon, there is granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands, and the right to take materials from the public lands and necessary lands for depots, etc., not exceeding 40 acres at any one place; and also 20 alternate sections per mile of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers, not disposed of or reserved or held by valid preëmption or homestead rights at the time of the passage of the act.

There was the usual provision for selecting other lands in case of deficiency; the survey of the lands along the line of the railroad; the segregation of lands upon the survey and location of 20 or more miles of road; and for the disposition of the lands reserved by the Government within the limits of the grant only to actual settlers at double the minimum price for such lands.

The issuance of patents was provided (§ 3) upon the completion and equipment of 20 mile sections of the railroad.

By § 4 it was enacted "That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations,